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UNITED STATES REPORTS

VOLUME 518

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1995

OPINIONS OF JUNE 13 (CONCLUDED) THROUGH JULY 1, 1996

ORDERS OF JUNE 17 THROUGH OCTOBER 3, 1996

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

505 U. S. 830, line 6: "March 22" should be "March 25".
516 U. S. 373, line 3: "515 U. S. 1187" should be "515 U. S. 1141".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

RETIRED

LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
DREW S. DAYS III, Solicitor General.[1]
WALTER DELLINGER, Acting Solicitor General.[2]
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.
SHELLEY L. DOWLING, Librarian.

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[1] Solicitor General Days resigned effective June 30, 1996.
[2] Mr. Dellinger became Acting Solicitor General on July 1, 1996.

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.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1994 edition.

Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered.

	Page
Aaron *v.* Public Utilities Comm'n of Cal.	1006
Abayan *v.* Office of Personnel Management	1012,1041
Abbey Medical, Inc.; Williams *v.*	1048
Abdul *v.* United States	1027
Abidekun *v.* Coombe	1025
Abrams *v.* Johnson	1054
Abramson, *In re*	1038,1044
Adams, *In re*	1053
Adams *v.* Robertson	1056
Adams; Yontz *v.*	1005
Ahmad *v.* United States	1021
Airmont *v.* LeBlanc-Sternberg	1017
Air Wisconsin, Inc.; Williams *v.*	1020
Ake *v.* Ward	1042
Akers *v.* Palmer	1004
Alabama; Barbour *v.*	1021
Alabama Bd. of Pardons and Paroles; Tedder *v.*	1008,1047
Alford; Rodriguez *v.*	1009
Allegheny Health Ed. and Research Foundation; Gomez *v.*	1005
Allegheny Health Services, Inc.; Gomez *v.*	1005
Allen; Calhoun *v.*	1047
Alliance for Community Media *v.* FCC	727
Almstedt *v.* United States	1012
Alonso; Hernandez *v.*	1023
Alston *v.* United States	1027
Alvarez *v.* Office of Personnel Management	1040
Amarille *v.* Office of Personnel Management	1010,1040
American Basketball Assn., Inc.; Caldwell *v.*	1033
American Bd. of Psychiatry & Neurology, Inc.; Sanjuan *v.*	1034
American Telephone & Telegraph Co. of Mich.; Zimmer *v.*	1029

Page

Amigable *v.* United States 1020
Amos *v.* Esmor Mansfield, Inc. 1039
Anderson *v.* Davis 1039
Anderson *v.* Illinois 1023
Anderson *v.* Sharma 1039
Angelone; Savino *v.* 1036
Angelone *v.* Stewart 1035
Antonio Rodriguez *v.* United States 1025
Anudu *v.* United States 1012
A–1 Contractors; Strate *v.* 1056
Aragon *v.* Wade 1009
Araya *v.* University of D. C. 1024,1047
Arens *v.* United States 1006
Arizona; Arizonans for Official English *v.* 1054
Arizona; Gulbrandson *v.* 1022
Arizona; Mata *v.* 1045
Arizona; Murray *v.* 1010
Arizonans for Official English *v.* Arizona 1054
Armstead *v.* Johnson 1023
Artis *v.* Garraghty 1040
Associate Tribal Judge, Tribal Court of Three Affiliated Tribes of Fort Berthold Indian Reservation *v.* A–1 Contractors 1056
Atchison, T. & S. F. R. Co. *v.* Roth 1018
Atherton *v.* Federal Deposit Ins. Corp. 1049
Atkins *v.* Moore 1052
Attorney General *v.* Doe 1014
Attorney General of Mo. *v.* Carver 1033
Attorney General of Mo. *v.* Shrink Mo. Government PAC 1033
Attorney General of N. Y. *v.* Quill 1055
Attorney Regist. & Discip. Comm'n, Sup. Ct. of Ill.; Levin *v.* 1020
Auer *v.* Robbins 1016
Augusta County Sheriff's Dept.; Turner *v.* 1010,1040
Austin *v.* United States 1026,1027
Ayars *v.* New Jersey 1040
Babbitt; Parravano *v.* 1016
Babbitt; Shangreau *v.* 1017
Babbitt *v.* Youpee 1050
Babcock & Wilcox *v.* Matson Navigation Co. 1005
Babcock & Wilcox *v.* Superior Court of Cal., San Francisco Cty. 1005
Balele *v.* Klauser 1029
Ballard, *In re* 1016,1041
Ballenger *v.* Mississippi 1025,1048
Bankruptcy Judge, U. S. District Court; Youngs *v.* 1047
Barbour *v.* Alabama 1021

Page
Barfield *v.* BellSouth Telecommunications, Inc. 1026
Barnett, *In re* 1038,1046
Barr, *In re* 1037
Barrios *v.* United States 1022
Barton *v.* Landmark Land Co. of Carolina, Inc. 1034
Bartron, *In re* 1052
Barzilla *v.* U. S. Postal Service 1010
Bashir *v.* United States 1021
Bates *v.* True 1009
Baxter *v.* Los Angeles 1041
Beck *v.* United States 1012
Becker *v.* United States 1029
Beeman; Ohio *v.* 1018
Bell, *In re* 1058
Bell *v.* Moore 1009,1047
Bellis *v.* United States 1012
BellSouth Telecommunications, Inc.; Barfield *v.* 1026
Benitez *v.* California 1023
Bennett *v.* Spear 1049
Bennett *v.* U. S. Parole Comm'n 1012
Bentsen *v.* Vera 1048
Bertagnolli, *In re* 1049
Bey *v.* United States 1026
Biederman, *In re* 1043
Binda; California *v.* 1005
Bingham *v.* Mentor Corp. 1031
Bingham; Mentor Corp. *v.* 1031
Birdseye *v.* Pennsylvania 1019
Black Television Workshop of Los Angeles, Inc. *v.* FCC 1017,1046
Blanchard; Forrest *v.* 1013
Blessing *v.* Freestone 1058
Bloomfield, *In re* 1043
Blue Cross/Blue Shield of La.; Kornman *v.* 1007,1046
Board of County Comm'rs, Wabaunsee County *v.* Umbehr 668
Borden *v.* Massachusetts 1010,1047
Botero-Ospina *v.* United States 1007
Bounds *v.* United States 1040
Bowell *v.* Prunty 1025
Bowersox; Oxford *v.* 1031,1041
Braddock; Dees *v.* 1024
Bramhall, *In re* 1043
Brattman *v.* Galvin 1025
Braun *v.* Stotts 1022
Breedlove *v.* Tysons Manor Homeowners Assn. 1006

Page
Brennan *v.* Singletary 1024,1047
Bright *v.* California 1006
Bristol-Myers Squibb Co.; Duvall *v.* 1030
Brockamp; United States *v.* 1050
Brown, *In re* 1043
Brown; Grimmett *v.* 1003,1054
Brown *v.* Illinois 1025
Brown; Perkins *v.* 1017
Brown *v.* Pro Football, Inc. 231
Brown *v.* United States 1021,1033
Brown *v.* Washington Redskins 231
Buc-Hanan *v.* California 1040
Burkhart, *In re* 1002,1052
Burress *v.* Unitarian-Universalist Society of Sacramento, Inc. . . . 1039
Burton; France *v.* 1025
Caballero; Henry *v.* 1033
Cabiles *v.* Office of Personnel Management 1039
Cabrerra *v.* United States 1012
Cain; Pizzo *v.* 1025,1048
Calderon *v.* Moore 149
Caldwell *v.* American Basketball Assn., Inc. 1033
Calhoun *v.* Allen 1047
California *v.* Binda 1005
California; Bright *v.* 1006
California; Buc-Hanan *v.* 1040
California; Dunn *v.* 1022
California; Medina *v.* 1015
California; Plantillas Benitez *v.* 1023
California; Scott *v.* 1028
California Dept. of Corrections; Gerwig *v.* 1029
California Div. of Labor Stds. Enforcement *v.* Dillingham Constr. 1053
Campbell *v.* United States 1041
Campos *v.* United States 1027
Cane; Worcester County *v.* 1016
Cannon; McQueen *v.* 1040
Capers *v.* United States 1039
CapitolBank Sacramento; Tokerud *v.* 1007
Capps *v.* United States 1027
Carlsen *v.* Utah 1009
Carlson; Thiry *v.* 1036
Caron, *In re* 1053
Caron *v.* United States 1027
Carpio *v.* Office of Personnel Management 1039
Carrico; Zaidi *v.* 1006

Page
Carroll *v.* Commissioner 1017
Carver; Nixon *v.* 1033
Casey; Lewis *v.* 343
Caterpillar Inc. *v.* Lewis 1050
Center for Humanities, Inc.; Gasperini *v.* 415
Central States, S. E. & S. W. Areas Pens. Fd.; Sherwin-Williams *v.* 1019
Century Mortgage Co.; Lewis *v.* 1040
Chamblee *v.* Jim Walter Resources, Inc. 1019
Champion; Dale *v.* 1013
Chandler *v.* Miller 1057
Chapman *v.* North Carolina 1023
Charney *v.* Panitz 1018
Charron *v.* Gammon 1009
Chater; McCoy *v.* 1022
Chaulk Services, Inc.; Mass. Comm'n Against Discrimination *v.* 1005
Cheguina *v.* Merit Systems Protection Bd. 1019
Chief Justice of Va.; Zaidi *v.* 1006
Chief Justice, Supreme Court of Ohio; Scott *v.* 1040
Cincinnati; Equality Foundation of Greater Cincinnati, Inc. *v.* . . . 1001
City. See name of city.
Clinard, *In re* 1043
Clinton *v.* Jones 1016
Clinton; Turner *v.* 1010,1040
Coastal Nursery; Imazio Nursery, Inc. *v.* 1018
Collagen Corp. *v.* Kennedy 1033
Collagen Corp.; Mitchell *v.* 1030
Colorado; Parrish *v.* 1011,1041
Colorado Republican Federal Campaign Committee *v.* FEC 604
Commissioner; Carroll *v.* 1017
Commissioner *v.* Hubert's Estate 1054
Commissioner; Okolie *v.* 1039
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Connecticut Comm'r of Revenue Services; Covelli *v.* 1031
Conner *v.* United States 1021
Connor *v.* Flynn 1039
Connors; Petitte Brothers Mining Co. *v.* 1038
Consolidated Rail Corp.; Idemudia *v.* 1013
Consorti *v.* Owens-Corning Fiberglas Corp. 1031
Constellation Development Corp. *v.* Dowden 1017
Cook, *In re* 1015,1046
Cooke, *In re* 1038
Coombe; Abidekun *v.* 1025
Corrections Commissioner. See name of commissioner.

Page
Corrections Corp. of America; Fica *v.* 1024
Coughenour *v.* Maryland 1027
County. See name of county.
Court of Appeal of Cal., Second Appellate Dist.; Siegel *v.* . . . 1022,1047
Cousin-Williams; Williams *v.* 1031
Covelli *v.* Crystal 1031
Crabtree; Sanabria-Casares *v.* 1021
Crapps; Waits *v.* 1009
Crawford *v.* Department of Agriculture 1029
Crawford; Fica *v.* 1023
Crawford; Prieto *v.* 1040
Crawford *v.* United States 1012
Cretacci *v.* United States 1007
Croasmun *v.* Frank 1010
Crowder, *In re* 1040
Crystal; Covelli *v.* 1031
Cudal *v.* Office of Personnel Management 1039
Cuellar *v.* United States 1014
Cummings; Espinosa Guerrero *v.* 1018
Cunningham, *In re* 1052
D. *v.* M. H. M. 1023
D'Agnillo *v.* Department of Housing and Urban Development . . . 1025
Dale *v.* Champion 1013
Dalton; Williams *v.* 1025
D'Amario *v.* Rhode Island 1034
Danao *v.* Office of Personnel Management 1028
Daniels *v.* Greater Baltimore Medical Center 1006
Daniels *v.* United States 1011
Davidson *v.* United States 1027
Davis; Anderson *v.* 1039
Davis; McClaran *v.* 1041
Davis *v.* Mississippi 1039
Davis *v.* Shanor 1018
Day, *In re* 1013
Dedes *v.* Page 1040
Dees *v.* Braddock 1024
De Guzman *v.* Office of Personnel Management 1039
De Jesus *v.* Office of Personnel Management 1028
Dela Rama Lorenzo *v.* Immigration and Naturalization Service . . 1011
Delaware; Johnson *v.* 1010
Demetress W. *v.* San Bernardino Cty. Dept. of Public Social Servs. 1021
Denver Area Ed. Telecommunications Consortium, Inc. *v.* FCC . . 727
Department of Agriculture; Crawford *v.* 1029
Department of Air Force; Hill *v.* 1015

Page
Department of Health of Wash.; Heinmiller *v.* 1006
Department of Housing and Urban Development; D'Agnillo *v.* . . . 1025
Department of State *v.* Legal Assistance for Vietnamese Asylum Seekers, Inc. 1003,1057
Department of Veterans Affairs; Herring *v.* 1023
Desimone; Nevada *v.* 1030
Diaz *v.* New York City 1017
Diaz Matos *v.* Puerto Rico 1016
Dillingham Constr., N. A.; Cal. Div. of Labor Stds. Enf. *v.* 1053
Dime Savings Bank of N. Y.; Glavey *v.* 1046
DiPaolo; Hall *v.* 1010
Director of penal or correctional institution. See name or title of director.
Dirks; Link *v.* 1024
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
Dixon Lumber Co.; Lightner *v.* 1022
Doe; Regents of Univ. of Cal. *v.* 1004,1036
Doe; Reno *v.* 1014
Doucette *v.* San Diego Unified Port Dist. 1006
Doucette *v.* Superior Court of Cal., San Diego County 1006
Dowden; Constellation Development Corp. *v.* 1017
Doyle *v.* Singletary 1023
Dubin *v.* United States 1042,1052
Dubuisson; Gilleland *v.* 1006
Duffus; Klump *v.* 1004
Dunn *v.* California 1022
Dupree *v.* Moore 1050
Duvall *v.* Bristol-Myers Squibb Co. 1030
Dye *v.* Michigan 1023
Early *v.* United States 1007
Eberwien *v.* Virginia 1020
Edison Community College; McCallum *v.* 1022
Edwards *v.* United States 1014
Egelhoff; Montana *v.* 37
Eickleberry *v.* United States 1012
Elramly; Immigration and Naturalization Service *v.* 1049–1051
English *v.* Mentor Corp. 1030
EEOC *v.* Metropolitan Ed. Enterprises, Inc. 1053
Equality Foundation of Greater Cincinnati, Inc. *v.* Cincinnati . . . 1001
Ervin; Turner *v.* 1010,1040
Escusa *v.* Office of Personnel Management 1039
Esmor Mansfield, Inc.; Amos *v.* 1039
Espinosa Guerrero *v.* Cummings 1018

Page
Essrick, *In re* 1044
Estate. See name of estate.
Ewing, *In re* 1002
Express Container Services, Inc.; Sidwell *v.* 1028
Exxon Chemical Patents, Inc. *v.* Lubrizol Corp. 1020
Fabian *v.* Shade 1039
Fabricacion Metalica de Matamoros, S. A. de C. V. *v.* Hernandez 1019
Faish *v.* Pennsylvania Higher Ed. Assistance Agency 1009,1047
Farmer *v.* United States 1028
FCC; Alliance for Community Media *v.* 727
FCC; Black Television Workshop of Los Angeles, Inc. *v.* 1017,1046
FCC; Denver Area Ed. Telecommunications Consortium, Inc. *v.* 727
FCC; Turner Broadcasting System, Inc. *v.* 1032
FCC; Ware *v.* 1017,1046
Federal Deposit Ins. Corp.; Atherton *v.* 1049
FEC; Colorado Republican Federal Campaign Committee *v.* 604
Federal Home Loan Mortgage Corp.; Hinchliffe *v.* 1039
Feldt *v.* Mentor Corp. 1030
Feldt; Mentor Corp. *v.* 1030
Felker *v.* Turpin 651,1047,1051
Fica *v.* Corrections Corp. of America 1024
Fica *v.* Crawford 1023
Fike *v.* Ruger 1032
Fitzhugh *v.* United States 1032
Flatley *v.* Whitman 1019,1046
Flores *v.* United States 1027
Floyd *v.* United States 1012
Flynn; Connor *v.* 1039
Food and Commercial Workers *v.* Lundy Packing Co. 1019
Fook-Kai; Stocking *v.* 1008
Fordice; Young *v.* 1055
Forrest *v.* Blanchard 1013
$405,089.23 in U. S. Currency; United States *v.* 267
France *v.* Burton 1025
Frank; Croasmun *v.* 1010
Frazier; Minix *v.* 1006
Freestone; Blessing *v.* 1058
Fuller *v.* United States 1013
Gaither *v.* United States 1013
Galvin; Brattman *v.* 1025
Gammon; Charron *v.* 1009
Gammon; Hudson *v.* 1025
Garcia *v.* United States 1028
Garraghty; Artis *v.* 1040

Page
Garrigan, *In re* 1043
Gary *v.* United States 1026
Gasperini *v.* Center for Humanities, Inc. 415
Gaston *v.* Whitley 1023
Gee; Lucas *v.* 1006
Georgia; McIntyre *v.* 1021
Georgia; Nolen *v.* 1018
Gerwig *v.* California Dept. of Corrections 1029
GICC Capital Corp. *v.* Technology Finance Group, Inc. 1017
Gill *v.* Texas Dept. of Criminal Justice, Institutional Division . . . 1024
Gilleland *v.* Dubuisson 1006
Glavey *v.* Dime Savings Bank of N. Y. 1046
Glenn, *In re* 1002
Glickman *v.* Wileman Brothers & Elliott, Inc. 1054
Glucksberg; Washington *v.* 1057
Gold *v.* Morrison-Knudsen Co. 1040
Golkin, *In re* 1049
Gomez *v.* Allegheny Health Ed. and Research Foundation 1005
Gomez *v.* Allegheny Health Services, Inc. 1005
Gonzales; United States *v.* 1003
Gottfried, *In re* 1043
Governor of Ala.; Phillips *v.* 1010
Governor of Colo.; Ragland *v.* 1025
Governor of Ga.; Chandler *v.* 1057
Governor of N. J.; Flatley *v.* 1019,1046
Governor of Ohio *v.* Quilter 1014
Governor of Utah *v.* Jane L. 137
Governor of Utah; Utah Women's Clinic, Inc. *v.* 1019
Gray *v.* Netherland 152,1047
Greater Baltimore Medical Center; Daniels *v.* 1006
Great Western Directories, Inc.; Southwestern Bell Corp. *v.* 1048
Great Western Directories, Inc. *v.* Southwestern Bell Telephone 1048
Green; Northrop Grumman Corp. *v.* 1018
Green *v.* Texas 1021
Green Construction Co. *v.* VanKirk 1028
Gribetz, *In re* 1045
Grimmett *v.* Brown 1003,1054
Grines, *In re* 1038
Grismore *v.* Ryder Truck Rental 1024,1047
Groose; Hay *v.* 1008
Grossman, *In re* 1045
Grubb *v.* United States 1011
Guerrero *v.* Cummings 1018
Gulbrandson *v.* Arizona 1022

Page
Guzman *v.* Office of Personnel Management 1026,1048
H. *v.* T. J. 1028
Hagar *v.* Nottingham 1023
Hall *v.* DiPaolo 1010
Hampton, *In re* 1016
Hankins *v.* Melton 1005
Hanks; Taylor *v.* 1039
Hansen's Estate *v.* New Haven 1003
Harbor Tug & Barge Co. *v.* Papai 1055
Harnish *v.* Keystone Farm Credit 1020
Harper; Young *v.* 1015
Harris County Appraisal Dist. *v.* Virginia Indonesia Co. 1004
Harvey *v.* United States 1020
Hatch, *In re* 1041,1042
Hatch *v.* Oklahoma 1042
Hatcher, *In re* 1044
Havener *v.* United States 1027
Hay *v.* Groose 1008
Hayden *v.* Nassau County 1035
Hayes; McQueen *v.* 1028
Haynes *v.* United States 1026
Hays; Louisiana *v.* 1014
Hays; Louisiana Legislative Black Caucus *v.* 1014
Hays; United States *v.* 1014
Heinmiller *v.* Department of Health of Wash. 1006
Hendricks *v.* Kansas 1004
Hendricks; Kansas *v.* 1004
Henry, *In re* 1037
Henry *v.* Caballero 1033
Hernandez *v.* Alonso 1023
Hernandez; Fabricacion Metalica de Matamoros, S. A. de C. V. *v.* 1019
Herrera *v.* United States 1026
Herring *v.* Department of Veterans Affairs 1023
Herring; Smith *v.* 1039
Hicks *v.* United States 1051
Hill *v.* Department of Air Force 1015
Hinchliffe *v.* Federal Home Loan Mortgage Corp. 1039
Hinkle *v.* Illinois 1024
Hinson; Richard *v.* 1004
Hirsh, *In re* 1043
Hoare, *In re* 1044
Hofmann *v.* Iowa 1007
Holliday *v.* Page 1008,1047
Holly *v.* Mississippi 1025,1048

Page
Hopkins; Joubert *v.* 1029,1031
Hopkins *v.* United States 1026
Hopkins Bey *v.* United States 1026
Hopwood; Texas *v.* 1016,1033
Hopwood; Thurgood Marshall Legal Society *v.* 1033
Hotcaveg *v.* Kennedy 1004
Houston *v.* Norris 1026
Hubert's Estate; Commissioner *v.* 1054
Hudson *v.* Gammon 1025
Hughes, *In re* 1053
Idemudia *v.* Consolidated Rail Corp. 1013
Illinois; Anderson *v.* 1023
Illinois; Brown *v.* 1025
Illinois; Hinkle *v.* 1024
Illinois *v.* Kimery 1031
Illinois; MacDonald *v.* 1024
Illinois; Simms *v.* 1021
Illinois Civil Service Comm'n; Rucker *v.* 1019
Imazio Nursery, Inc. *v.* Coastal Nursery 1018
Immigration and Naturalization Service; Dela Rama Lorenzo *v.* . 1011
Immigration and Naturalization Service *v.* Elramly 1049–1051
Immigration and Naturalization Service; Yanez-Penaloza *v.* 1004
Indiana; Smith *v.* 1035
Infante *v.* United States 1012
In re. See name of party.
Internal Revenue Service; MacKenzie *v.* 1027
International. For labor union, see name of trade.
Investors Equity Life Holding Co. *v.* Metcalf 1018
Iowa; Hofmann *v.* 1007
Isla *v.* Office of Personnel Management 1039
Israel *v.* United States 1027
Ivester *v.* United States 1011
J.; M. H. *v.* 1028
Jabaar *v.* Kruger 1024
Jackson *v.* Rubin 1020,1047
Jackson *v.* Ylst 1022
Jacobs *v.* Kern Community College Dist. 1038
Jaffee *v.* Redmond 1
Jaffer, *In re* 1003,1040
James; Phillips *v.* 1010
James *v.* United States 1027
Jane L.; Leavitt *v.* 137
Janneh *v.* The Regency 1047
Jaynes *v.* North Carolina 1024

Page
Jedrzejewski *v.* Menacker 1041
Jeffress *v.* Suter 1039
Jennings, *In re* 1043
Jim Walter Resources, Inc.; Chamblee *v.* 1019
Johnson; Abrams *v.* 1054
Johnson; Armstead *v.* 1023
Johnson *v.* Delaware 1010
Johnson *v.* Moore 1045
Johnson; Nichols *v.* 1022
Johnson; Rodriguez *v.* 1007
Johnson; Stephens *v.* 1008
Johnson; Stitt *v.* 1040
Johnson *v.* United States 1007
Johnson; United States *v.* 1054
Jones, *In re* 1043
Jones; Clinton *v.* 1016
Jones *v.* North Carolina 1010
Jones *v.* United States 1011,1040
Joubert, *In re* 1032
Joubert *v.* Hopkins 1029,1031
Joubert *v.* Nebraska 1035
Joubert *v.* Nebraska Bd. of Pardons 1035
J & T Coal, Inc. *v.* United States 1032
Judge, Johnson Circuit Court; Minix *v.* 1006
Judge, Superior Court of Cal., Butte County; Kukes *v.* 1009
Judge, Superior Court of Ga., Gwinnett County; McCauley *v.* . . . 1013
Juvenile Male *v.* United States 1022
Juvenile Male C. L. O. *v.* United States 1027
Kadic; Karadzic *v.* 1005
Kansas *v.* Hendricks 1004
Kansas; Hendricks *v.* 1004
Karadzic *v.* Kadic 1005
Kelly, *In re* 1002
Kelly *v.* Penson 1039
Keltner *v.* United States 1021
Kennedy; Collagen Corp. *v.* 1033
Kennedy; Hotcaveg *v.* 1004
Kennedy; Schafer *v.* 1018
Kern Community College Dist.; Jacobs *v.* 1038
Keystone Farm Credit; Harnish *v.* 1020
Kiely, *In re* 1002,1037
Kilgore; Pennsylvania *v.* 938
Kimery; Illinois *v.* 1031
Klat *v.* San Diego County 1019

Page
Klauser; Balele *v.* 1029
Klump *v.* Duffus 1004
Knapp *v.* United States 1020
Knight *v.* United States 1011
Knox; Lewis *v.* 1008
Koon *v.* United States 81
Kornahrens, *In re* 1036
Kornahrens *v.* Moore 1013,1035
Kornman *v.* Blue Cross/Blue Shield of La. 1007,1046
Koss, *In re* 1032,1049
Kruger; Jabaar *v.* 1024
Kukes *v.* Mulkey 1009
Kuykendall; Turner *v.* 1010,1040
L.; Leavitt *v.* 137
LaBonte; United States *v.* 1016,1037,1050
Labor Union. See name of trade.
Labron; Pennsylvania *v.* 938
Lacey *v.* U. S. District Court 1008
Laconia; St. Hilaire *v.* 1017
Lakoski *v.* University of Tex. Medical Branch at Galveston 1003
Lamb *v.* North Dakota State Bar Bd. 1008
Landmark Land Co. of Carolina, Inc.; Barton *v.* 1034
Lane *v.* Peña 187
Lane *v.* Virginia 1023
Laney *v.* Vera 1048
Lanier; United States *v.* 1004,1054
LaRene, *In re* 1046
Lawson *v.* Vera 1048
Leary; Rodenbaugh *v.* 1040
Leavitt *v.* Jane L. 137
Leavitt; Utah Women's Clinic, Inc. *v.* 1019
LeBlanc-Sternberg; Airmont *v.* 1017
LeBon *v.* United States 1048
Lebron *v.* United States 1011
Lee *v.* McDaniel 1026
Lee Fook-Kai; Stocking *v.* 1008
Legal Assistance for Vietnamese Asylum Seekers, Inc.; Department of State *v.* 1003,1057
Lehman, *In re* 1044
Lekhovitser *v.* Lekhovitser 1022
Levin, *In re* 1045
Levin *v.* Attorney Regist. & Discip. Comm'n, Sup. Ct. of Ill. 1020
Levine *v.* United States 1040
Lewis *v.* Casey 343

Page
Lewis; Caterpillar Inc. *v.* 1050
Lewis *v.* Century Mortgage Co. 1040
Lewis *v.* Knox 1008
Lewis; Spychala *v.* 1040
Lewis *v.* United States 322
Liberty Natural Products, Inc. *v.* National Labor Relations Bd. 1007
Lightner *v.* Dixon Lumber Co. 1022
Link *v.* Dirks 1024
Link *v.* United States 1010
Little *v.* United States 1045
Local. For labor union, see name of trade.
Lohman *v.* United States 1018
Lohr *v.* Medtronic, Inc. 470
Lohr; Medtronic, Inc. *v.* 470
Londre *v.* Merkle 1002
Long *v.* United States 1022
Longshoremen; Minetti *v.* 1013
Lopez *v.* Monterey County 1050
Lopez *v.* United States 1008
Lopez; United States *v.* 1057
Lorenz, *In re* 1041
Lorenzo *v.* Immigration and Naturalization Service 1011
Los Angeles; Baxter *v.* 1041
Louisiana *v.* Hays 1014
Louisiana Legislative Black Caucus *v.* Hays 1014
Lovell; Poway Unified School District *v.* 1048
Lubrizol Corp.; Exxon Chemical Patents, Inc. *v.* 1020
Lucas *v.* Gee 1006
Ludy *v.* United States 1012
Luna *v.* Miller 1009
Lundy Packing Co.; Food and Commercial Workers *v.* 1019
M. *v.* Pamela N. 1007
M.; R. A. D. *v.* 1023
MacDonald *v.* Illinois 1024
Mack *v.* United States 1003
MacKenzie *v.* Internal Revenue Service 1027
Magante *v.* Office of Personnel Management 1039
Mansfield, Inc.; Amos *v.* 1039
Manville Personal Injury Trust; Walker *v.* 1006
Marshall Legal Society *v.* Hopwood 1033
Martin *v.* Telectronics Pacing Systems, Inc. 1030
Martini *v.* Office of Public Defender 1042
Marx; Schnuck Markets, Inc. *v.* 1019
Maryland; Coughenour *v.* 1027

Page
Maryland *v.* Wilson 1003,1053
Massachusetts; Borden *v.* 1010,1047
Massachusetts Comm'n Against Discrim. *v.* Chaulk Services 1005
Mata, *In re* 1046
Mata *v.* Arizona 1045
Mata; McQueen *v.* 1040
Mata *v.* Stewart 1043
Mata; Stewart *v.* 1042
Matos *v.* Puerto Rico 1016
Matson Navigation Co.; Babcock & Wilcox Co. *v.* 1005
Mauricio *v.* Office of Personnel Management 1028
Mayfield *v.* United States 1026
Mayor of Baltimore City; Penn Advertising of Baltimore, Inc. *v.* 1030
McAtee, *In re* 1032,1052
McCallum *v.* Edison Community College 1022
McCann *v.* United States 1021
McCargo *v.* New York 1008
McCauley *v.* Winegarden 1013
McClaran *v.* Davis 1041
McCoy *v.* Chater 1022
McDaniel; Lee *v.* 1026
McDonald *v.* Youakim 1028
McIntyre *v.* Georgia 1021
McKenna *v.* Twin Cities Area New Party 1013
McKensley *v.* United States 1038
McQueen *v.* Cannon 1040
McQueen *v.* Hayes 1028
McQueen *v.* Mata 1040
McQueen *v.* Turner 1040
Medina *v.* California 1015
Medtronic, Inc. *v.* Lohr 470
Medtronic, Inc.; Lohr *v.* 470
Mehta *v.* Pamrapo Savings Bank 1011
Melendez *v.* United States 120
Melton; Hankins *v.* 1005
Menacker; Jedrzejewski *v.* 1041
Mentor Corp. *v.* Bingham 1031
Mentor Corp.; Bingham *v.* 1031
Mentor Corp.; English *v.* 1030
Mentor Corp. *v.* Feldt 1030
Mentor Corp.; Feldt *v.* 1030
Merit Systems Protection Bd.; Cheguina *v.* 1019
Merkle; Londre *v.* 1002
Mestman, *In re* 1053

Page
Metcalf; Investors Equity Life Holding Co. *v.* 1018
Methodist Hospital of Ind.; Tinsley *v.* 1029
Metropolitan Ed. Enterprises, Inc.; EEOC *v.* 1053
Metropolitan Ed. Enterprises, Inc.; Walters *v.* 1053
M. H. *v.* T. J. 1028
M. H. M.; R. A. D. *v.* 1023
Michigan; Dye *v.* 1023
Michigan; Washington *v.* 1009
Middlebrook *v.* United States 1011
Miller; Chandler *v.* 1057
Miller; Luna *v.* 1009
Miller; Slaton *v.* 1047
Mims, *In re* 1043
Minetti *v.* Longshoremen 1013
Minix *v.* Frazier 1006
Minix *v.* Minix 1006
Minneapolis; Minnesota Council of Dog Clubs *v.* 1005
Minnesota Council of Dog Clubs *v.* Minneapolis 1005
Mississippi; Ballenger *v.* 1025,1048
Mississippi; Davis *v.* 1039
Mississippi; Holly *v.* 1025,1048
Mississippi Dept. of Corrections; Nash *v.* 1008
Missouri; Sharp *v.* 1007
Mitchell *v.* Collagen Corp. 1030
Modine Mfg. Co.; Showa Aluminum Corp. *v.* 1005
Montana *v.* Egelhoff 37
Montana; Schindler *v.* 1025
Monterey County; Lopez *v.* 1050
Montgomery Ward Credit Corp.; Tucker *v.* 1047
Moody *v.* Security Pacific Financial Corp. 1024
Moomchi *v.* University of N. M. 1040
Moo & Oink, Inc.; Stancil *v.* 1047
Moore; Atkins *v.* 1052
Moore; Bell *v.* 1009,1047
Moore; Calderon *v.* 149
Moore; Dupree *v.* 1050
Moore; Johnson *v.* 1045
Moore; Kornahrens *v.* 1013,1035
Morris *v.* United States 1048
Morrison-Knudsen Co.; Gold *v.* 1040
Morrow, *In re* 1032,1049
Moyer; Scott *v.* 1040
Mulkey; Kukes *v.* 1009
Murphy *v.* United States 1033

Page
Murray *v.* Arizona 1010
Murray *v.* United States 1027
N.; Stephen M. *v.* 1007
Nance *v.* South Carolina 1026
Nash *v.* Mississippi Dept. of Corrections 1008
Nassau County; Hayden *v.* 1035
National Basketball Assn.; Williams *v.* 1016
National Labor Relations Bd.; Liberty Natural Products, Inc. *v.* 1007
Nava *v.* U. S. Soccer Federation 1047
Navarro *v.* Office of Personnel Management 1028
Nave, *In re* 1036
Nebraska; Joubert *v.* 1035
Nebraska *v.* Wyoming 1002
Nebraska Bd. of Pardons; Joubert *v.* 1035
Netherland; Gray *v.* 152,1047
Nevada *v.* Desimone 1030
New Haven; Hansen's Estate *v.* 1003
New Jersey; Ayars *v.* 1040
New Jersey Republican Party; Weinstein *v.* 1036
New York; McCargo *v.* 1008
New York; Scott *v.* 1009
New York; Sussman *v.* 1029
New York; Welz *v.* 1015
New York City; Diaz *v.* 1017
Nichols *v.* Johnson 1022
Niewald *v.* Scafe 1006
Nixon *v.* Carver 1033
Nixon *v.* Shrink Mo. Government PAC 1033
Nolen *v.* Georgia 1018
Norris; Houston *v.* 1026
North Carolina; Chapman *v.* 1023
North Carolina; Jaynes *v.* 1024
North Carolina; Jones *v.* 1010
North Dakota State Bar Bd.; Lamb *v.* 1008
Northlake; O'Hare Truck Service, Inc. *v.* 712
Northrop Grumman Corp. *v.* United States *ex rel.* Green 1018
Northwest Environmental Advocates; Portland *v.* 1018
Nottingham; Hagar *v.* 1023
Obajuluwa *v.* United States 1012
O'Callaghan; Republican Party of Alaska *v.* 1034
O'Connor, *In re* 1003
Office of Personnel Management; Abayan *v.* 1012,1041
Office of Personnel Management; Alvarez *v.* 1040
Office of Personnel Management; Amarille *v.* 1010,1040

Page
Office of Personnel Management; Cabiles *v.* 1039
Office of Personnel Management; Carpio *v.* 1039
Office of Personnel Management; Cudal *v.* 1039
Office of Personnel Management; Danao *v.* 1028
Office of Personnel Management; De Guzman *v.* 1039
Office of Personnel Management; De Jesus *v.* 1028
Office of Personnel Management; Escusa *v.* 1039
Office of Personnel Management; Guzman *v.* 1026,1048
Office of Personnel Management; Isla *v.* 1039
Office of Personnel Management; Magante *v.* 1039
Office of Personnel Management; Mauricio *v.* 1028
Office of Personnel Management; Navarro *v.* 1028
Office of Personnel Management; Paje *v.* 1039
Office of Personnel Management; Sandoval *v.* 1039
Office of Personnel Management; Siwa *v.* 1028
Office of Personnel Management; Tillo *v.* 1028
Office of Public Defender; Martini *v.* 1042
Ogbomon *v.* United States 1056
O'Gilvie *v.* United States 1049
O'Hare Truck Service, Inc. *v.* Northlake 712
Ohio *v.* Beeman 1018
Ohio; Pierce *v.* 1019
Oklahoma; Hatch *v.* 1042
Oklahoma Dept. of Human Services; Wilder *v.* 1009,1047
Okolie *v.* Richardson 1039
O'Leary *v.* United States 1046
Olsen *v.* Sabal Marketing, Inc. 1013
Owens-Corning Fiberglas Corp.; Consorti *v.* 1031
Owens-Illinois, Inc. *v.* Rekdahl 1013
Oxford, *In re* 1032,1041
Oxford *v.* Bowersox 1031,1041
Pacific Gas & Electric Co. *v.* United States 1017
Page; Dedes *v.* 1040
Page; Holliday *v.* 1008,1047
Page *v.* Runyon 1024
Paje *v.* Office of Personnel Management 1039
Palmer; Akers *v.* 1004
Pamela N.; Stephen M. *v.* 1007
Pamrapo Savings Bank; Mehta *v.* 1011
Pandey *v.* Paul Revere Life Ins. Co. 1041
Panitz; Charney *v.* 1018
Papai; Harbor Tug & Barge Co. *v.* 1055
Pararas-Carayannis *v.* United States 1052
Parke; Smith *v.* 1031

Page
Parker, *In re* 1041
Parker County; Teel *v.* 1023
Parks, *In re* 1052
Parravano *v.* Babbitt 1016
Parrish *v.* Colorado 1011,1041
Patton; TIC United Corp. *v.* 1005
Paul Revere Life Ins. Co.; Pandey *v.* 1041
Peavy, *In re* 1052
Peguero *v.* United States 1011
Peña; Lane *v.* 187
Penn Advertising of Baltimore, Inc. *v.* Schmoke 1030
Pennsylvania; Birdseye *v.* 1019
Pennsylvania *v.* Kilgore 938
Pennsylvania *v.* Labron 938
Pennsylvania Higher Ed. Assistance Agency; Faish *v.* 1009,1047
Penson; Kelly *v.* 1039
Perkins *v.* Brown 1017
Peters; Porrata *v.* 1022
Petitte Brothers Mining Co. *v.* Connors 1038
Phillips *v.* James 1010
Pierce *v.* Ohio 1019
Pierce *v.* United States 1033
Pincham, *In re* 1002
Pirtle *v.* Washington 1026
Pizzo *v.* Cain 1025,1048
Plantillas Benitez *v.* California 1023
Polanco *v.* United States 1021
Pollack, *In re* 1032
Porrata *v.* Peters 1022
Portland *v.* Northwest Environmental Advocates 1018
Postmaster General; Page *v.* 1024
Poway Unified School District *v.* Lovell 1048
Powell *v.* United States 81
Powers *v.* United States 1026
Prado *v.* Superior Court of Cal., San Bernardino County 1008
President of U. S.; Turner *v.* 1010,1040
Price *v.* United States 1017
Prieto *v.* Crawford 1040
Printz *v.* United States 1003
Pro-Choice Network of Western N. Y.; Schenck *v.* 1050
Pro Football, Inc.; Brown *v.* 231
Prunty; Bowell *v.* 1025
Public Utilities Comm'n of Cal.; Aaron *v.* 1006
Puerto Rico; Diaz Matos *v.* 1016

Page

Pulido *v.* United States 1039
Queens College of City Univ. of N. Y.; Soffer *v.* 1046
Quill; Vacco *v.* 1055
Quilter; Voinovich *v.* 1014
R. A. D. *v.* M. H. M. 1023
Ragen; Wilson *v.* 1009
Ragland *v.* Romer 1025
Ready, *In re* 1002
Redmond; Jaffee *v.* 1
Reese *v.* United States 1007
Regency; Janneh *v.* 1047
Regents of Univ. of Cal. *v.* Doe 1004,1036
Reilly, *In re* 1043
Rekdahl; Owens-Illinois, Inc. *v.* 1013
Reno *v.* Doe 1014
Reorganized CF&I Fabricators of Utah, Inc.; United States *v.* . . 213
Republican Party of Alaska *v.* O'Callaghan 1034
Revere Life Ins. Co.; Pandey *v.* 1041
Rhode Island; D'Amario *v.* 1034
Rice *v.* United States 1011
Richard *v.* Hinson 1004
Richardson; Okolie *v.* 1039
Ritter; Sun Village *v.* 1018
Rivera, *In re* 1016,1048
Robbins; Auer *v.* 1016
Robertson; Adams *v.* 1056
Robinett *v.* United States 1020,1047
Robinson *v.* Shell Oil Co. 1054
Robinson *v.* United States 1027
Rodenbaugh *v.* Leary 1040
Rodriguez *v.* Alford 1009
Rodriguez *v.* Johnson 1007
Rodriguez *v.* United States 1025
Romer; Ragland *v.* 1025
Roth; Atchison, T. & S. F. R. Co. *v.* 1018
Rubin; Jackson *v.* 1020,1047
Rucker *v.* Illinois Civil Service Comm'n 1019
Ruel *v.* Saco & Biddeford Savings Institution 1008,1047
Ruger; Fike *v.* 1032
Runyon; Page *v.* 1024
Rybicki *v.* United States 1014
Ryder Truck Rental; Grismore *v.* 1024,1047
Sabal Marketing, Inc.; Olsen *v.* 1013
Saco & Biddeford Savings Institution; Ruel *v.* 1008,1047

Page

Saenz *v.* United States 1020
St. Hilaire *v.* Laconia 1017
St. Louis *v.* Texas Workers' Compensation Comm'n 1024
Sanabria-Casares *v.* Crabtree 1021
San Bernardino Cty. Dept. of Public Social Servs.; Demetress *v.* . 1021
San Diego County; Klat *v.* 1019
San Diego Unified Port Dist.; Doucette *v.* 1006
Sandoval *v.* Office of Personnel Management 1039
Sandvoss, *In re* 1044
Sanjuan *v.* American Bd. of Psychiatry & Neurology, Inc. 1034
Sarno *v.* United States 1020
Saturn Distribution Corp.; Woods *v.* 1051
Savino, *In re* 1035
Savino *v.* Angelone 1036
Scafe; Niewald *v.* 1006
Schafer *v.* Kennedy 1018
Schenck *v.* Pro-Choice Network of Western N. Y. 1050
Schimenti, *In re* 1037
Schindler *v.* Montana 1025
Schmoke; Penn Advertising of Baltimore, Inc. *v.* 1030
Schneider, *In re* 1015,1048
Schnuck Markets, Inc. *v.* Marx 1019
Schoor, *In re* 1045
Scolari *v.* United States 1012
Scott, *In re* 1038
Scott *v.* California 1028
Scott *v.* Moyer 1040
Scott *v.* New York 1009
Scott; United States *v.* 1050
Scott; Wooldridge *v.* 1010
Seabold; West *v.* 1027
Secretary of Agriculture *v.* Wileman Brothers & Elliott, Inc. . . . 1054
Secretary of Commonwealth of Mass.; Brattman *v.* 1025
Secretary of Interior; Parravano *v.* 1016
Secretary of Interior; Shangreau *v.* 1017
Secretary of Interior *v.* Youpee 1050
Secretary of Navy; Williams *v.* 1025
Secretary of Transportation; Lane *v.* 187
Secretary of Transportation of Kan.; Thiry *v.* 1036
Secretary of Treasury; Jackson *v.* 1020,1047
Secretary of Veterans Affairs; Perkins *v.* 1017
Security Pacific Financial Corp.; Moody *v.* 1024
Shade; Fabian *v.* 1039
Shangreau *v.* Babbitt 1017

Page
Shanor; Davis *v.* 1018
Sharma; Anderson *v.* 1039
Sharp *v.* Missouri 1007
Shaw, *In re* 1045
Sheffey, *In re* 1015,1046
Shell Oil Co.; Robinson *v.* 1054
Sherwin-Williams Co. *v.* Central States Areas Pension Fund 1019
ShisInday *v.* Texas 1021
Showa Aluminum Corp. *v.* Modine Mfg. Co. 1005
Shrink Mo. Government PAC; Nixon *v.* 1033
Sidwell *v.* Express Container Services, Inc. 1028
Siegel *v.* Court of Appeal of Cal., Second Appellate Dist. 1022,1047
Simms *v.* Illinois 1021
Singletary; Brennan *v.* 1024,1047
Singletary; Doyle *v.* 1023
Sisk, *In re* 1041
Siwa *v.* Office of Personnel Management 1028
Slaton *v.* Miller 1047
Smith, *In re* 1035
Smith *v.* Herring 1039
Smith *v.* Indiana 1035
Smith *v.* Parke 1031
Smith-Bowman *v.* United States 1011
Smyth *v.* United States 1022
Sobina; Younkin *v.* 1010
Soffer *v.* Queens College of City Univ. of N. Y. 1046
Somes *v.* United States 1026
South Carolina; Nance *v.* 1026
South Carolina; Truesdale *v.* 1036
Southwestern Bell Corp. *v.* Great Western Directories, Inc. 1048
Southwestern Bell Telephone; Great Western Directories, Inc. *v.* 1048
Spann, *In re* 1044
Speaker Pro Tem. of Ohio House of Representatives; Voinovich *v.* 1014
Spear; Bennett *v.* 1049
Spellman, *In re* 1040
Spychala *v.* Lewis 1040
Stahler *v.* United States 1011
Stamps *v.* United States 1011
Stancil *v.* Moo & Oink, Inc. 1047
State. See name of State.
Stephen M. *v.* Pamela N. 1007
Stephens *v.* Johnson 1008
Stewart, *In re* 1051
Stewart; Angelone *v.* 1035

Page
Stewart *v.* Mata 1042
Stewart; Mata *v.* 1043
Stewart *v.* Washington 1033
Stitt *v.* Johnson 1040
Stocking *v.* Lee Fook-Kai 1008
Stotts; Braun *v.* 1022
Strate *v.* A–1 Contractors 1056
Summers, *In re* 1032
Sun Village *v.* Ritter 1018
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., Alameda Cty.; Wood *v.* 1005
Superior Court of Cal., San Bernardino Cty.; Prado *v.* 1008
Superior Court of Cal., San Diego Cty.; Doucette *v.* 1006
Superior Court of Cal., San Francisco Cty.; Babcock & Wilcox *v.* 1005
Sussman *v.* New York 1029
Suter; Jeffress *v.* 1039
Swaim, *In re* 1038
Swendra, *In re* 1016
Talus Properties Ltd. Partnership; Williams Natural Gas Co. *v.* . 1019
Tapia Garcia *v.* United States 1028
Taylor, *In re* 1044
Taylor *v.* Hanks 1039
Technology Finance Group, Inc.; GICC Capital Corp. *v.* 1017
Tedder *v.* Alabama Bd. of Pardons and Paroles 1008,1047
Teel *v.* Parker County 1023
Telectronics Pacing Systems, Inc.; Martin *v.* 1030
Texas; Green *v.* 1021
Texas *v.* Hopwood 1016,1033
Texas; ShisInday *v.* 1021
Texas; Thomas *v.* 1021
Texas Dept. of Criminal Justice, Institutional Division; Gill *v.* . . . 1024
Texas Workers' Compensation Comm'n; St. Louis *v.* 1024
Theodosopoulos *v.* United States 1021
Thiry *v.* Carlson 1036
Thomas *v.* Texas 1021
Thurgood Marshall Legal Society *v.* Hopwood 1033
Tibolt *v.* United States 1020
TIC United Corp. *v.* Patton 1005
Tilli *v.* Van Antwerpen 1040
Tillo *v.* Office of Personnel Management 1028
Tinsley *v.* Methodist Hospital of Ind. 1029
Titus *v.* United States 1021
T. J.; M. H. *v.* 1028

Page
Tokerud *v.* CapitolBank Sacramento 1007
Town. See name of town.
True; Bates *v.* 1009
Truesdale *v.* South Carolina 1036
Truesdale *v.* United States 1041
Tucker *v.* Montgomery Ward Credit Corp. 1047
Turner *v.* Augusta County Sheriff's Dept. 1010,1040
Turner *v.* Clinton 1010,1040
Turner *v.* Ervin 1010,1040
Turner *v.* Kuykendall 1010,1040
Turner; McQueen *v.* 1040
Turner Broadcasting System, Inc. *v.* FCC 1032
Turpin; Felker *v.* 651,1047,1051
Twin Cities Area New Party; McKenna *v.* 1013
$227,865 in U. S. Currency *v.* United States 1007,1047
Tysons Manor Homeowners Assn.; Breedlove *v.* 1006
Umbehr; Board of County Comm'rs, Wabaunsee County *v.* 668
Union. For labor union, see name of trade.
Unitarian-Universalist Society of Sacramento, Inc.; Burress *v.* . . . 1039
United. For labor union, see name of trade.
United International Holdings, Inc.; Wharf Cable Ltd. *v.* 1005
United States. See name of other party.
U. S. District Court; Lacey *v.* 1008
U. S. District Judge; Hagar *v.* 1023
U. S. District Judge; Tilli *v.* 1040
U. S. Parole Comm'n; Bennett *v.* 1012
U. S. Postal Service; Barzilla *v.* 1010
U. S. Soccer Federation; Nava *v.* 1047
University of D. C.; Araya *v.* 1024,1047
University of N. M.; Moomchi *v.* 1040
University of Tex. Medical Branch at Galveston; Lakoski *v.* 1003
Ursery; United States *v.* 267
Utah; Carlsen *v.* 1009
Utah Women's Clinic, Inc. *v.* Leavitt 1019
Vacco *v.* Quill 1055
Van, *In re* 1016
Van Antwerpen; Tilli *v.* 1040
VanKirk; Green Construction Co. *v.* 1028
Velarde *v.* United States 1055
Vera; Bentsen *v.* 1048
Vera; Laney *v.* 1048
Vera; Lawson *v.* 1048
Village. See name of village.
Virginia; Eberwien *v.* 1020

Page
Virginia; Lane *v.* 1023
Virginia *v.* United States 515
Virginia; United States *v.* 515
Virginia Indonesia Co.; Harris County Appraisal Dist. *v.* 1004
Voinovich *v.* Quilter 1014
W. *v.* San Bernardino County Dept. of Public Social Services 1021
Wade; Aragon *v.* 1009
Waits *v.* Crapps 1009
Walker *v.* Manville Personal Injury Trust 1006
Wall, *In re* 1043
Wal-Mart; Woods *v.* 1020
Walter Resources, Inc.; Chamblee *v.* 1019
Walters *v.* Metropolitan Ed. Enterprises, Inc. 1053
Wapnick *v.* United States 1021,1047
Ward; Ake *v.* 1042
Warden. See name of warden.
Ware *v.* Federal Communications Comm'n 1017,1046
Washington, *In re* 1003
Washington *v.* Glucksberg 1057
Washington *v.* Michigan 1009
Washington; Pirtle *v.* 1026
Washington; Stewart *v.* 1033
Washington Redskins; Brown *v.* 231
Weinig, *In re* 1015
Weinstein *v.* New Jersey Republican Party 1036
Wells *v.* United States 1011
Welz *v.* New York 1015
West *v.* Seabold 1027
Wharf Cable Ltd. *v.* United International Holdings, Inc. 1005
Wheless; Youngs *v.* 1047
White *v.* Zimmers 1029
Whitley; Gaston *v.* 1023
Whitman; Flatley *v.* 1019,1046
Wilder *v.* Oklahoma Dept. of Human Services 1009,1047
Wileman Brothers & Elliott, Inc.; Glickman *v.* 1054
Williams *v.* Abbey Medical, Inc. 1048
Williams *v.* Air Wisconsin, Inc. 1020
Williams *v.* Cousin-Williams 1031
Williams *v.* Dalton 1025
Williams *v.* National Basketball Assn. 1016
Williams *v.* Workers' Compensation Appeals Bd. 1040
Williams Natural Gas Co. *v.* Talus Properties Ltd. Partnership . . 1019
Willis *v.* United States 1007
Wilson; Maryland *v.* 1003,1053

Page

Wilson *v.* Ragen 1009
Winegarden; McCauley *v.* 1013
Winstar Corp.; United States *v.* 839
Witt, *In re* 1043
Wood *v.* Superior Court of Cal., Alameda County 1005
Woods *v.* Saturn Distribution Corp. 1051
Woods *v.* Wal-Mart 1020
Wooldridge *v.* Scott 1010
Worcester County *v.* Cane 1016
Workers' Compensation Appeals Bd.; Williams *v.* 1040
Wyoming; Nebraska *v.* 1002
Yanez-Penaloza *v.* Immigration and Naturalization Service 1004
Ylst; Jackson *v.* 1022
Yontz *v.* Adams 1005
Youakim; McDonald *v.* 1028
Young *v.* Fordice 1055
Young *v.* Harper 1015
Youngs *v.* Wheless 1047
Younkin *v.* Sobina 1010
Youpee; Babbitt *v.* 1050
Yu *v.* United States 1028
Zaidi *v.* Carrico 1006
Zimmer *v.* American Telephone & Telegraph Co. of Mich. 1029
Zimmers; White *v.* 1029

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1995

JAFFEE, SPECIAL ADMINISTRATOR FOR ALLEN, DECEASED *v.* REDMOND ET AL.

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

No. 95–266. Argued February 26, 1996—Decided June 13, 1996

Petitioner, the administrator of decedent Allen's estate, filed this action alleging that Allen's constitutional rights were violated when he was killed by respondent Redmond, an on-duty police officer employed by respondent village. The court ordered respondents to give petitioner notes made by Karen Beyer, a licensed clinical social worker, during counseling sessions with Redmond after the shooting, rejecting their argument that a psychotherapist-patient privilege protected the contents of the conversations. Neither Beyer nor Redmond complied with the order. At trial, the jury awarded petitioner damages after being instructed that the refusal to turn over the notes was legally unjustified and the jury could presume that the notes would have been unfavorable to respondents. The Court of Appeals reversed and remanded, finding that "reason and experience," the touchstones for acceptance of a privilege under Federal Rule of Evidence 501, compelled recognition of a psychotherapist-patient privilege. However, it found that the privilege would not apply if, in the interests of justice, the evidentiary need for disclosure outweighed the patient's privacy interests. Balancing those interests, the court concluded that Beyer's notes should have been protected.

Syllabus

Held: The conversations between Redmond and her therapist and the notes taken during their counseling sessions are protected from compelled disclosure under Rule 501. Pp. 8–18.

(a) Rule 501 authorizes federal courts to define new privileges by interpreting "the principles of the common law . . . in the light of reason and experience." The Rule thus did not freeze the law governing privileges at a particular point in history, but rather directed courts to "continue the evolutionary development of testimonial privileges." *Trammel* v. *United States*, 445 U. S. 40, 47. An exception from the general rule disfavoring testimonial privileges is justified when the proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." *Id.*, at 51. Pp. 8–10.

(b) Significant private interests support recognition of a psychotherapist privilege. Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance. In contrast, the likely evidentiary benefit that would result from the denial of the privilege is modest. That it is appropriate for the federal courts to recognize a psychotherapist privilege is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of the privilege, see *Trammel* v. *United States*, 445 U. S., at 48–50, and reinforced by the fact that the privilege was among the specific privileges recommended in the proposed privilege rules that were rejected in favor of the more open-ended language of the present Rule 501. Pp. 10–15.

(c) The federal privilege, which clearly applies to psychiatrists and psychologists, also extends to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing the privilege for treatment by psychiatrists and psychologists apply with equal force to clinical social workers, and the vast majority of States explicitly extend a testimonial privilege to them. The balancing component implemented by the Court of Appeals and a few States is rejected, for it would eviscerate the effectiveness of the privilege by making it impossible for participants to predict whether their confidential conversations will be protected. Because this is the first case in which this Court has recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would govern all future questions. Pp. 15–18.

51 F. 3d 1346, affirmed.

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

Kenneth N. Flaxman argued the cause for petitioner. With him on the briefs were *Ronald L. Futterman* and *Craig B. Futterman.*

Gregory E. Rogus argued the cause for respondents. With him on the brief were *Paul E. Wojcicki*, *Robert E. Wilens*, and *Richard N. Williams.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days* and *Deputy Solicitor General Bender.**

JUSTICE STEVENS delivered the opinion of the Court.

After a traumatic incident in which she shot and killed a man, a police officer received extensive counseling from a

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*Briefs of *amici curiae* urging affirmance were filed for the American Association of State Social Work Boards by *John F. Atkinson;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Harvey Grossman*, *Leonard S. Rubenstein*, *Bruce J. Winick*, and *Daniel W. Shuman;* for the American Counseling Association by *Lee H. Simowitz;* for the American Psychiatric Association et al. by *Richard G. Taranto;* for the American Psychoanalytic Association et al. by *Carter G. Phillips*, *Rex E. Lee*, and *Joseph R. Guerra;* for the American Psychological Association by *Paul M. Smith*, *Robert M. Portman*, and *James L. McHugh, Jr.;* for the Employee Assistance Professionals Association, Inc., by *Peter J. Rubin;* for the Menninger Foundation by *James C. Geoly*, *Michael T. Zeller*, and *Kevin R. Gustafson;* for the National Association of Police Organizations, Inc., by *William J. Johnson;* for the National Association of Social Workers et al. by *Michael B. Trister*, *Carolyn I. Polowy*, *Sandra G. Nye*, *Kenneth L. Adams*, *James van R. Springer*, and *Peter M. Brody;* and for George R. Caesar et al. by *Kurt W. Melchior.*

Briefs of *amici curiae* were filed for the International Union of Police Associations, AFL–CIO, by *Michael T. Leibig;* and for the National Network to End Domestic Violence et al. by *William C. Brashares.*

licensed clinical social worker. The question we address is whether statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal civil action brought by the family of the deceased. Stated otherwise, the question is whether it is appropriate for federal courts to recognize a "psychotherapist privilege" under Rule 501 of the Federal Rules of Evidence.

I

Petitioner is the administrator of the estate of Ricky Allen. Respondents are Mary Lu Redmond, a former police officer, and the Village of Hoffman Estates, Illinois, her employer during the time that she served on the police force.[1] Petitioner commenced this action against respondents after Redmond shot and killed Allen while on patrol duty.

On June 27, 1991, Redmond was the first officer to respond to a "fight in progress" call at an apartment complex. As she arrived at the scene, two of Allen's sisters ran toward her squad car, waving their arms and shouting that there had been a stabbing in one of the apartments. Redmond testified at trial that she relayed this information to her dispatcher and requested an ambulance. She then exited her car and walked toward the apartment building. Before Redmond reached the building, several men ran out, one waving a pipe. When the men ignored her order to get on the ground, Redmond drew her service revolver. Two other men then burst out of the building, one, Ricky Allen, chasing the other. According to Redmond, Allen was brandishing a butcher knife and disregarded her repeated commands to drop the weapon. Redmond shot Allen when she believed he was about to stab the man he was chasing. Allen died at the scene. Redmond testified that before other officers

[1] Redmond left the police department after the events at issue in this lawsuit.

arrived to provide support, "people came pouring out of the buildings," App. 134, and a threatening confrontation between her and the crowd ensued.

Petitioner filed suit in Federal District Court alleging that Redmond had violated Allen's constitutional rights by using excessive force during the encounter at the apartment complex. The complaint sought damages under Rev. Stat. § 1979, 42 U. S. C. § 1983, and the Illinois wrongful-death statute, Ill. Comp. Stat., ch. 740, § 180/1 *et seq.* (1994). At trial, petitioner presented testimony from members of Allen's family that conflicted with Redmond's version of the incident in several important respects. They testified, for example, that Redmond drew her gun before exiting her squad car and that Allen was unarmed when he emerged from the apartment building.

During pretrial discovery petitioner learned that after the shooting Redmond had participated in about 50 counseling sessions with Karen Beyer, a clinical social worker licensed by the State of Illinois and employed at that time by the Village of Hoffman Estates. Petitioner sought access to Beyer's notes concerning the sessions for use in cross-examining Redmond. Respondents vigorously resisted the discovery. They asserted that the contents of the conversations between Beyer and Redmond were protected against involuntary disclosure by a psychotherapist-patient privilege. The district judge rejected this argument. Neither Beyer nor Redmond, however, complied with his order to disclose the contents of Beyer's notes. At depositions and on the witness stand both either refused to answer certain questions or professed an inability to recall details of their conversations.

In his instructions at the end of the trial, the judge advised the jury that the refusal to turn over Beyer's notes had no "legal justification" and that the jury could therefore presume that the contents of the notes would have been un-

favorable to respondents.[2] The jury awarded petitioner $45,000 on the federal claim and $500,000 on her state-law claim.

The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. Addressing the issue for the first time, the court concluded that "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist-patient privilege.[3] 51 F. 3d 1346, 1355 (1995). "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.*, at 1355–1356. As to experience, the court observed that all 50 States have adopted some form of the psychotherapist-patient privilege. *Id.*, at 1356. The court attached particular significance to the fact that Illinois law expressly extends such a privilege to social workers like Karen Beyer.[4] *Id.*, at 1357. The court also noted that, with one exception, the federal decisions rejecting the privilege were more than five years old and that the "need and demand for counseling services has skyrocketed during the past several years." *Id.*, at 1355–1356.

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[2] App. to Pet. for Cert. 67.

[3] Rule 501 provides as follows: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

[4] See Illinois Mental Health and Developmental Disabilities Confidentiality Act, Ill. Comp. Stat., ch. 740, §§ 110/1–110/17 (1994).

The Court of Appeals qualified its recognition of the privilege by stating that it would not apply if, "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." *Id.*, at 1357. Balancing those conflicting interests, the court observed, on the one hand, that the evidentiary need for the contents of the confidential conversations was diminished in this case because there were numerous eyewitnesses to the shooting, and, on the other hand, that Officer Redmond's privacy interests were substantial.[5] *Id.*, at 1358. Based on this assessment, the court concluded that the trial court had erred by refusing to afford protection to the confidential communications between Redmond and Beyer.

The United States Courts of Appeals do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501. Compare *In re Doe*, 964 F. 2d 1325 (CA2 1992) (recognizing privilege); *In re Zuniga*, 714 F. 2d 632 (CA6) (same), cert. denied, 464 U. S. 983 (1983), with *United States* v. *Burtrum*, 17 F. 3d 1299 (CA10) (declining to recognize privilege), cert. denied, 513 U. S. 863 (1994); *In re Grand Jury Proceedings*, 867 F. 2d 562 (CA9) (same), cert. denied *sub nom. Doe* v. *United States*, 493 U. S. 906 (1989); *United States* v. *Corona*, 849 F. 2d 562 (CA11 1988) (same), cert. denied, 489 U. S. 1084 (1989); *United States* v. *Meagher*, 531 F. 2d 752 (CA5) (same), cert. denied, 429 U. S. 853 (1976). Because of the conflict among the Courts of

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[5] "Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited 'to protect and to serve.'" 51 F. 3d, at 1358.

Appeals and the importance of the question, we granted certiorari. 516 U. S. 930 (1995). We affirm.

II

Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed this phrase from our opinion in *Wolfle* v. *United States*, 291 U. S. 7, 12 (1934),[6] which in turn referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U. S. 371, 383 (1933). See also *Hawkins* v. *United States*, 358 U. S. 74, 79 (1958) (changes in privileges may be "dictated by 'reason and experience' "). The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis." S. Rep. No. 93–1277, p. 13 (1974).[7] The Rule thus

[6] "[T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk* v. *United States*, 290 U. S. 371." *Wolfle* v. *United States*, 291 U. S., at 12–13.

[7] In 1972 the Chief Justice transmitted to Congress proposed Rules of Evidence for United States Courts and Magistrates. 56 F. R. D. 183 (hereinafter Proposed Rules). The Rules had been formulated by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. *Trammel* v. *United States*, 445 U. S. 40, 47 (1980). The Proposed Rules defined nine specific testimonial privileges, including a psychotherapist-patient privilege, and indicated that these were to be the exclusive privileges absent constitutional mandate, Act of Congress, or revision of the Rules. Proposed Rules 501–513, 56 F. R. D., at 230–261. Congress rejected this recommendation in favor of Rule 501's general mandate. *Trammel*, 445 U. S., at 47.

did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." *Trammel* v. *United States*, 445 U. S. 40, 47 (1980); see also *University of Pennsylvania* v. *EEOC*, 493 U. S. 182, 189 (1990).

The common-law principles underlying the recognition of testimonial privileges can be stated simply. "'For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'" *United States* v. *Bryan*, 339 U. S. 323, 331 (1950) (quoting 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940)).[8] See also *United States* v. *Nixon*, 418 U. S. 683, 709 (1974). Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel*, 445 U. S., at 50 (quoting *Elkins* v. *United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting)).

Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for

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[8] The familiar expression "every man's evidence" was a well-known phrase as early as the mid-18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. 12 T. Hansard, Parliamentary History of England 643, 675, 693, 697 (1812). The bill was defeated soundly. *Id.*, at 711.

probative evidence . . . .” 445 U. S., at 51. Both “reason and experience” persuade us that it does.

III

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is “rooted in the imperative need for confidence and trust.” *Ibid.* Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[9] As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist’s ability to help her patients

> “‘is completely dependent upon [the patients’] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.’” Advisory Committee’s

[9] See studies and authorities cited in the Brief for American Psychiatric Association et al. as *Amici Curiae* 14–17 and the Brief for American Psychological Association as *Amicus Curiae* 12–17.

> Notes to Proposed Rules, 56 F. R. D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Our cases make clear that an asserted privilege must also "serv[e] public ends." *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981). Thus, the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Ibid.* And the spousal privilege, as modified in *Trammel*, is justified because it "furthers the important public interest in marital harmony," 445 U. S., at 53. See also *United States* v. *Nixon*, 418 U. S., at 705; *Wolfle* v. *United States*, 291 U. S., at 14. The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.[10]

In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conver-

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[10] This case amply demonstrates the importance of allowing individuals to receive confidential counseling. Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.

sations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege.[11] We have previously observed that the policy decisions of the States bear on the question whether federal courts should

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[11] Ala. Code § 34–26–2 (1975); Alaska Rule Evid. 504; Ariz. Rev. Stat. Ann. § 32–2085 (1992); Ark. Rule Evid. 503; Cal. Evid. Code Ann. §§ 1010, 1012, 1014 (West 1995); Colo. Rev. Stat. § 13–90–107(g) (Supp. 1995); Conn. Gen. Stat. § 52–146c (1995); Del. Uniform Rule Evid. 503; D. C. Code Ann. § 14–307 (1995); Fla. Stat. § 90.503 (Supp. 1992); Ga. Code Ann. § 24–9–21 (1995); Haw. Rules Evid. 504, 504.1; Idaho Rule Evid. 503; Ill. Comp. Stat., ch. 225, § 15/5 (1994); Ind. Code § 25–33–1–17 (1993); Iowa Code § 622.10 (1987); Kan. Stat. Ann. § 74–5323 (1985); Ky. Rule Evid. 507; La. Code Evid. Ann., Art. 510 (West 1995); Me. Rule Evid. 503; Md. Cts. & Jud. Proc. Code Ann. § 9–109 (1995); Mass. Gen. Laws § 233:20B (1995); Mich. Comp. Laws Ann. § 333.18237 (West Supp. 1996); Minn. Stat. § 595.02 (1988 and Supp. 1996); Miss. Rule Evid. 503; Mo. Rev. Stat. § 491.060 (1994); Mont. Code Ann. § 26–1–807 (1994); Neb. Rev. Stat. § 27–504 (1995); Nev. Rev. Stat. § 49.215 (1993); N. H. Rule Evid. 503; N. J. Stat. Ann. § 45:14B–28 (West 1995); N. M. Rule Evid. 11–504; N. Y. Civ. Prac. Law § 4507 (McKinney 1992); N. C. Gen. Stat. § 8–53.3 (Supp. 1995); N. D. Rule Evid. § 503; Ohio Rev. Code Ann. § 2317.02 (1995); Okla. Stat., Tit. 12, § 2503 (1991); Ore. Rules Evid. 504, 504.1; 42 Pa. Cons. Stat. § 5944 (1982); R. I. Gen. Laws §§ 5–37.3–3, 5–37.3–4 (1995); S. C. Code Ann. § 19–11–95 (Supp. 1995); S. D. Codified Laws §§ 19–13–6 to 19–13–11 (1995); Tenn. Code Ann. § 24–1–207 (1980); Tex. Rules Civ. Evid. 509, 510; Utah Rule Evid. 506; Vt. Rule Evid. 503; Va. Code Ann. § 8.01–400.2 (1992); Wash. Rev. Code § 18.83.110 (1994); W. Va. Code § 27–3–1 (1992); Wis. Stat. § 905.04 (1993–1994); Wyo. Stat. § 33–27–123 (Supp. 1995).

recognize a new privilege or amend the coverage of an existing one. See *Trammel*, 445 U. S., at 48–50; *United States* v. *Gillock*, 445 U. S. 360, 368, n. 8 (1980). Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court.[12] Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case. In *Funk* v. *United States*, 290 U. S. 371 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both "reason" and "experience." *Id.*, at 376–381. That rule is properly respectful of the States and at the same time reflects the fact that once a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection. The history of the psychotherapist privilege illustrates the latter point. In 1972 the members of the

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[12] At the outset of their relationship, the ethical therapist must disclose to the patient "the relevant limits on confidentiality." See American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, Standard 5.01 (Dec. 1992). See also National Federation of Societies for Clinical Social Work, Code of Ethics V(a) (May 1988); American Counseling Association, Code of Ethics and Standards of Practice A.3.a (effective July 1995).

Judicial Conference Advisory Committee noted that the common law "had indicated a disposition to recognize a psychotherapist-patient privilege when legislatures began moving into the field." Proposed Rules, 56 F. R. D., at 242 (citation omitted). The present unanimous acceptance of the privilege shows that the state lawmakers moved quickly. That the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed.[13]

The uniform judgment of the States is reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules. In *United States* v. *Gillock*, 445 U. S., at 367–368, our holding that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Commit-

[13] Petitioner acknowledges that all 50 state legislatures favor a psychotherapist privilege. She nevertheless discounts the relevance of the state privilege statutes by pointing to divergence among the States concerning the types of therapy relationships protected and the exceptions recognized. A small number of state statutes, for example, grant the privilege only to psychiatrists and psychologists, while most apply the protection more broadly. Compare Haw. Rules Evid. 504, 504.1 and N. D. Rule Evid. 503 (privilege extends to physicians and psychotherapists), with Ariz. Rev. Stat. Ann. § 32–3283 (1992) (privilege covers "behavioral health professional[s]"); Tex. Rule Civ. Evid. 510(a)(1) (privilege extends to persons "licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder" or "involved in the treatment or examination of drug abusers"); Utah Rule Evid. 506 (privilege protects confidential communications made to marriage and family therapists, professional counselors, and psychiatric mental health nurse specialists). The range of exceptions recognized by the States is similarly varied. Compare Ark. Code Ann. § 17–46–107 (1987) (narrow exceptions); Haw. Rules Evid. 504, 504.1 (same), with Cal. Evid. Code Ann. §§ 1016–1027 (West 1995) (broad exceptions); R. I. Gen. Laws § 5–37.3–4 (1995) (same). These variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate.

tee's draft. The reasoning in *Gillock* thus supports the opposite conclusion in this case. In rejecting the proposed draft that had specifically identified each privilege rule and substituting the present more open-ended Rule 501, the Senate Judiciary Committee explicitly stated that its action "should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules." S. Rep. No. 93–1277, at 13.

Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," *Trammel*, 445 U. S., at 50, we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.[14]

IV

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer.[15] Today, social workers pro-

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[14] Like other testimonial privileges, the patient may of course waive the protection.

[15] If petitioner had filed her complaint in an Illinois state court, respondents' claim of privilege would surely have been upheld, at least with respect to the state wrongful-death action. An Illinois statute provides that conversations between a therapist and her patients are privileged from compelled disclosure in any civil or criminal proceeding. Ill. Comp. Stat., ch. 740, § 110/10 (1994). The term "therapist" is broadly defined to encompass a number of licensed professionals including social work-

vide a significant amount of mental health treatment. See, *e. g.*, U. S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85–87, 107–114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5–7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6–7 (citing authorities), but whose counseling sessions serve the same public goals.[16] Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed

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ers. Ch. 740, § 110/2. Karen Beyer, having satisfied the strict standards for licensure, qualifies as a clinical social worker in Illinois. 51 F. 3d 1346, 1358, n. 19 (CA7 1995).

Indeed, if only a state-law claim had been asserted in federal court, the second sentence in Rule 501 would have extended the privilege to that proceeding. We note that there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law. See C. Wright & K. Graham, 23 Federal Practice and Procedure § 5434 (1980). Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

[16] The Judicial Conference Advisory Committee's proposed psychotherapist privilege defined psychotherapists as psychologists and medical doctors who provide mental health services. Proposed Rules, 56 F. R. D., at 240. This limitation in the 1972 recommendation does not counsel against recognition of a privilege for social workers practicing psychotherapy. In the quarter century since the Committee adopted its recommendations, much has changed in the domains of social work and psychotherapy. See generally Brief for National Association of Social Workers et al. as *Amici Curiae* 5–13 (and authorities cited). While only 12 States regulated social workers in 1972, all 50 do today. See American Association of State Social Work Boards, Social Work Laws and Board Regulations: A State Comparison Study 29, 31 (1996). Over the same period, the relative portion of therapeutic services provided by social workers has increased substantially. See U. S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85–87, 107–114.

social workers.[17] We therefore agree with the Court of Appeals that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F. 3d, at 1358, n. 19.

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States.[18] Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As

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[17] See Ariz. Rev. Stat. Ann. § 32–3283 (1992); Ark. Code Ann. § 17–46–107 (1995); Cal. Evid. Code Ann. §§ 1010, 1012, 1014 (West 1995); Colo. Rev. Stat. § 13–90–107 (1987); Conn. Gen. Stat. § 52–146q (1995); Del. Code Ann., Tit. 24, § 3913 (1987); D. C. Code Ann. § 14–307 (1995); Fla. Stat. § 90.503 (1991); Ga. Code Ann. § 24–9–21 (1995); Idaho Code § 54–3213 (1994); Ill. Comp. Stat., ch. 225, § 20/16 (1994); Ind. Code § 25–23.6–6–1 (1993); Iowa Code § 622.10 (1987); Kan. Stat. Ann. § 65–6315 (Supp. 1990); Ky. Rule Evid. 507; La. Code Evid. Ann., Art. 510 (West 1995); Me. Rev. Stat. Ann., Tit. 32, § 7005 (1988); Md. Cts. & Jud. Proc. Code Ann. § 9–121 (1995); Mass. Gen. Laws § 112:135A (1994); Mich. Comp. Laws Ann. § 339.1610 (West 1992); Minn. Stat. § 595.02(g) (1994); Miss. Code Ann. § 73–53–29 (1995); Mo. Rev. Stat. § 337.636 (Supp. 1996); Mont. Code Ann. § 37–22–401 (1995); Neb. Rev. Stat. § 71–1,335 (1995); Nev. Rev. Stat. §§ 49.215, 49.225, 49.235 (1993); N. H. Rev. Stat. Ann. § 330–A:19 (1995); N. J. Stat. Ann. § 45:15BB–13 (West 1995); N. M. Stat. Ann. § 61–31–24 (Supp. 1995); N. Y. Civ. Prac. Law § 4508 (McKinney 1992); N. C. Gen. Stat. § 8–53.7 (1986); Ohio Rev. Code Ann. § 2317.02 (1995); Okla. Stat., Tit. 59, § 1261.6 (1991); Ore. Rev. Stat. § 40.250 (1991); R. I. Gen. Laws §§ 5–37.3–3, 5–37.3–4 (1995); S. C. Code Ann. § 19–11–95 (Supp. 1995); S. D. Codified Laws § 36–26–30 (1994); Tenn. Code Ann. § 63–23–107 (1990); Tex. Rule Civ. Evid. 510; Utah Rule Evid. 506; Vt. Rule Evid. 503; Va. Code Ann. § 8.01–400.2 (1992); Wash. Rev. Code § 18.19.180 (1994); W. Va. Code § 30–30–12 (1993); Wis. Stat. § 905.04 (1993–1994); Wyo. Stat. § 33–38–109 (Supp. 1995).

[18] See, *e. g.*, Me. Rev. Stat. Ann., Tit. 32, § 7005 (1964); N. H. Rev. Stat. Ann. § 330–A:19 (1995); N. C. Gen. Stat. § 8–53.7 (1986); Va. Code Ann. § 8.01–400.2 (1992).

we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U. S., at 393.

These considerations are all that is necessary for decision of this case. A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area." *Id.*, at 386.[19]

V

The conversations between Officer Redmond and Karen Beyer and the notes taken during their counseling sessions are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins as to Part III, dissenting.

The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and

[19] Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

probative evidence—or at least every one categorical enough to achieve its announced policy objective. In the case of some of these rules, such as the one excluding confessions that have not been properly "Mirandized," see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the victim of the injustice is always the impersonal State or the faceless "public at large." For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense. The latter is particularly unpalatable for those who love justice, because it causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong.

In the past, this Court has well understood that the particular value the courts are distinctively charged with preserving—justice—is severely harmed by contravention of "the fundamental principle that '"the public . . . has a right to every man's evidence."'" *Trammel* v. *United States*, 445 U. S. 40, 50 (1980) (citation omitted). Testimonial privileges, it has said, "*are not lightly created nor expansively construed*, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U. S. 683, 710 (1974) (emphasis added). Adherence to that principle has caused us, in the Rule 501 cases we have considered to date, to reject new privileges, see *University of Pennsylvania* v. *EEOC*, 493 U. S. 182 (1990) (privilege against disclosure of academic peer review materials); *United States* v. *Gillock*, 445 U. S. 360 (1980) (privilege against disclosure of "legislative acts" by member of state legislature), and even to construe narrowly the scope of existing privileges, see, *e. g.*, *United States* v. *Zolin*, 491 U. S. 554, 568–570 (1989) (permitting *in camera* review of documents alleged to come within crime-fraud exception to attorney-client privilege); *Trammel*, *supra* (holding that voluntary testimony by spouse is not covered by husband-wife privilege). The Court today ignores this traditional judicial preference for the truth, and ends up creat-

ing a privilege that is new, vast, and ill defined. I respectfully dissent.

I

The case before us involves confidential communications made by a police officer to a state-licensed clinical social worker in the course of psychotherapeutic counseling. Before proceeding to a legal analysis of the case, I must observe that the Court makes its task deceptively simple by the manner in which it proceeds. It begins by characterizing the issue as "whether it is appropriate for federal courts to recognize a 'psychotherapist privilege,'" *ante*, at 4, and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether "the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy," *ante*, at 15.

Of course the prototypical evidentiary privilege analogous to the one asserted here—the lawyer-client privilege—is not identified by the broad area of advice giving practiced by the person to whom the privileged communication is given, but rather by the *professional status* of that person. Hence, it seems a long step from a lawyer-client privilege to a tax advisor-client or accountant-client privilege. But if one recharacterizes it as a "legal advisor" privilege, the extension seems like the most natural thing in the world. That is the illusion the Court has produced here: It first frames an overly general question ("Should there be a psychotherapist privilege?") that can be answered in the negative only by excluding from protection office consultations with professional psychiatrists (*i. e.*, doctors) and clinical psychologists. And then, having answered that in the affirmative, it comes to the *only* question that the facts of this case present ("Should there be a social worker-client privilege with regard to psychotherapeutic counseling?") with the answer

seemingly a foregone conclusion. At that point, to conclude against the privilege one must subscribe to the difficult proposition, "Yes, there is a psychotherapist privilege, but not if the psychotherapist is a social worker."

Relegating the question actually posed by this case to an afterthought makes the impossible possible in a number of wonderful ways. For example, it enables the Court to treat the Proposed Federal Rules of Evidence developed in 1972 by the Judicial Conference Advisory Committee as strong support for its holding, whereas they in fact counsel clearly and directly against it. The Committee did indeed recommend a "psychotherapist privilege" of sorts; but more precisely, and more relevantly, it recommended a privilege for psychotherapy conducted by "a person authorized to practice medicine" or "a person licensed or certified as a psychologist," Proposed Rule of Evidence 504, 56 F. R. D. 183, 240 (1972), which is to say that *it recommended against the privilege at issue here.* That condemnation is obscured, and even converted into an endorsement, by pushing a "psychotherapist privilege" into the center ring. The Proposed Rule figures prominently in the Court's explanation of why that privilege deserves recognition, *ante*, at 13–15, and is ignored in the single page devoted to the sideshow which happens to be the issue presented for decision, *ante*, at 15–16.

This is the most egregious and readily explainable example of how the Court's misdirection of its analysis makes the difficult seem easy; others will become apparent when I give the social-worker question the fuller consideration it deserves. My initial point, however, is that the Court's very methodology—giving serious consideration only to the more general, and much easier, question—is in violation of our duty to proceed cautiously when erecting barriers between us and the truth.

II

To say that the Court devotes the bulk of its opinion to the much easier question of psychotherapist-patient privilege is

not to say that its answer to that question is convincing. At bottom, the Court's decision to recognize such a privilege is based on its view that "successful [psychotherapeutic] treatment" serves "important private interests" (namely, those of patients undergoing psychotherapy) as well as the "public good" of "[t]he mental health of our citizenry." *Ante*, at 10–11. I have no quarrel with these premises. Effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society. But merely mentioning these values does not answer the critical question: Are they of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice? On that central question I find the Court's analysis insufficiently convincing to satisfy the high standard we have set for rules that "are in derogation of the search for truth." *Nixon*, 418 U. S., at 710.

When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders—none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.

How likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation? And even more pertinent to today's decision, to what extent will the evidentiary privilege reduce that deterrent? The Court does not try to answer the first of

these questions; and it *cannot possibly have any notion* of what the answer is to the second, since that depends entirely upon the scope of the privilege, which the Court amazingly finds it "neither necessary nor feasible to delineate," *ante*, at 18. If, for example, the psychotherapist can give the patient no more assurance than "A court will not be able to make me disclose what you tell me, unless you tell me about a harmful act," I doubt whether there would be much benefit from the privilege at all. That is not a fanciful example, at least with respect to extension of the psychotherapist privilege to social workers. See Del. Code Ann., Tit. 24, § 3913(2) (1987); Idaho Code § 54–3213(2) (1994).

Even where it is certain that absence of the psychotherapist privilege will inhibit disclosure of the information, it is not clear to me that that is an unacceptable state of affairs. Let us assume the very worst in the circumstances of the present case: that to be truthful about what was troubling her, the police officer who sought counseling would have to confess that she shot without reason, and wounded an innocent man. If (again to assume the worst) such an act constituted the crime of negligent wounding under Illinois law, the officer would of course have the absolute right not to admit that she shot without reason in criminal court. But I see no reason why she should be enabled *both* not to admit it in criminal court (as a good citizen should), *and* to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else. And even less reason why she should be enabled to *deny* her guilt in the criminal trial—or in a civil trial for negligence—while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify. It seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences. To be sure, in most cases the statements to the psychotherapist will be only marginally relevant, and one of the purposes of the privilege (though not one relied upon by the Court) may be simply to spare

patients needless intrusion upon their privacy, and to spare psychotherapists needless expenditure of their time in deposition and trial. But surely this can be achieved by means short of excluding even evidence that is of the most direct and conclusive effect.

The Court confidently asserts that not much truth-finding capacity would be destroyed by the privilege anyway, since "[w]ithout a privilege, much of the desirable evidence to which litigants such as petitioner seek access . . . is unlikely to come into being." *Ante*, at 12. If that is so, how come psychotherapy got to be a thriving practice before the "psychotherapist privilege" was invented? Were the patients paying money to lie to their analysts all those years? Of course the evidence-generating effect of the privilege (if any) depends entirely upon its scope, which the Court steadfastly declines to consider. And even if one assumes that scope to be the broadest possible, is it really true that most, or even many, of those who seek psychological counseling have the worry of litigation in the back of their minds? I doubt that, and the Court provides no evidence to support it.

The Court suggests one last policy justification: since psychotherapist privilege statutes exist in all the States, the failure to recognize a privilege in federal courts "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Ante*, at 13. This is a novel argument indeed. A sort of inverse preemption: The truth-seeking functions of *federal* courts must be adjusted so as not to conflict with the policies *of the States*. This reasoning cannot be squared with *Gillock*, which declined to recognize an evidentiary privilege for Tennessee legislators in federal prosecutions, even though the Tennessee Constitution guaranteed it in state criminal proceedings. *Gillock*, 445 U. S., at 368. Moreover, since, as I shall discuss, state policies regarding the psychotherapist privilege vary considerably from State to State, *no* uniform federal policy can possibly honor most of them. If further-

ance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, *à la Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

The Court's failure to put forward a convincing justification of its own could perhaps be excused if it were relying upon the unanimous conclusion of state courts in the reasoned development of their common law. It cannot do that, since *no* State has such a privilege apart from legislation.[1]

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[1] The Court observes: "In 1972 the members of the Judicial Conference Advisory Committee noted that the common law 'had indicated a disposition to recognize a psychotherapist-patient privilege when legislatures began moving into the field.' Proposed Rules, 56 F. R. D., at 242 (citation omitted)." *Ante*, at 13–14. The sole support the Committee invoked was a student Note entitled Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw. U. L. Rev. 384 (1952). That source, in turn, cites (and discusses) a single case recognizing a common-law psychotherapist privilege: the unpublished opinion of a judge of the Circuit Court of Cook County, Illinois, *Binder* v. *Ruvell*, No. 52–C–2535 (June 24, 1952)—which, in turn, cites no other cases.

I doubt whether the Court's failure to provide more substantial support for its assertion stems from want of trying. Respondents and all of their *amici* pointed us to only four other state-court decisions supposedly adopting a common-law psychotherapist privilege. See Brief for American Psychiatric Association et al. as *Amici Curiae* 8, n. 5; Brief for American Psychoanalytic Association et al. as *Amici Curiae* 15–16; Brief for American Psychological Association as *Amicus Curiae* 8. It is not surprising that the Court thinks it not worth the trouble to cite them: (1) In *In re "B,"* 482 Pa. 471, 394 A. 2d 419 (1978), the opinions of four of the seven justices *explicitly rejected* a nonstatutory privilege; and the two justices who did recognize one recognized, not a common-law privilege, but rather *(mirabile dictu)* a privilege "constitutionally based," "emanat[ing] from the penumbras of the various guarantees of the Bill of Rights, . . . as well as from the guarantees of the Constitution of this Commonwealth." *Id.*, at 484, 394 A. 2d, at 425. (2) *Allred* v. *State*, 554 P. 2d 411 (Alaska 1976), held that no privilege was available in the case before the court, so what it says about the existence of a common-law privilege is the purest dictum. (3) *Falcon* v. *Alaska Pub. Offices Comm'n*, 570 P. 2d 469 (1977), a later Alaska Supreme Court case, proves the last statement. It *rejected* the claim by a physician that he did not have to disclose the names of his patients, even though some of the physician's practice consisted of psycho-

What it relies upon, instead, is "the fact that all 50 States and the District of Columbia have [1] *enacted into law* [2] *some form* of psychotherapist privilege." *Ante*, at 12 (emphasis added). Let us consider both the verb and its object: The fact [1] that all 50 States have *enacted* this privilege argues not *for*, but *against*, our adopting the privilege judicially. At best it suggests that the matter has been found not to lend itself to judicial treatment—perhaps because the pros and cons of adopting the privilege, or of giving it one or another shape, are not that clear; or perhaps because the rapidly evolving uses of psychotherapy demand a flexibility that only legislation can provide. At worst it suggests that the privilege commends itself only to decisionmaking bodies in which reason is tempered, so to speak, by political pressure from organized interest groups (such as psychologists and social workers), and decisionmaking bodies that are not overwhelmingly concerned (as courts of law are and should be) with justice.

And the phrase [2] "some form of psychotherapist privilege" covers a multitude of difficulties. The Court concedes that there is "divergence among the States concerning the types of therapy relationships protected and the exceptions recognized." *Ante*, at 14, n. 13. To rest a newly announced federal common-law psychotherapist privilege, assertable

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therapy; it made no mention of *Allred*'s dictum that there was a common-law psychiatrist-patient privilege (though if that existed it would seem relevant), and cited *Allred* only for the proposition that there was no *statutory* privilege, 570 P. 2d, at 473, n. 12. And finally, (4) *State* v. *Evans*, 104 Ariz. 434, 454 P. 2d 976 (1969), created a limited privilege, applicable to court-ordered examinations to determine competency to stand trial, *which tracked a privilege that had been legislatively created after the defendant's examination.*

In light of this dearth of case support—from all the courts of 50 States, down to the county-court level—it seems to me the Court's assertion should be revised to read: "The common law had indicated *scant* disposition to recognize a psychotherapist-patient privilege when *(or even after)* legislatures began moving into the field."

from this day forward in all federal courts, upon "the States' *unanimous judgment* that some form of psychotherapist privilege is appropriate," *ibid.* (emphasis added), is rather like announcing a new, immediately applicable, federal common law of torts, based upon the States' "unanimous judgment" that *some* form of tort law is appropriate. In the one case as in the other, the state laws vary to such a degree that the parties and lower federal judges confronted by the new "common law" have barely a clue as to what its content might be.

III

Turning from the general question that was not involved in this case to the specific one that is: The Court's conclusion that a social-worker psychotherapeutic privilege deserves recognition is even less persuasive. In approaching this question, the fact that five of the state legislatures that have seen fit to enact "some form" of psychotherapist privilege have elected not to extend *any form* of privilege to social workers, see *ante*, at 17, n. 17, ought to give one pause. So should the fact that the Judicial Conference Advisory Committee was similarly discriminating in its conferral of the proposed Rule 504 privilege, see *supra*, at 21. The Court, however, has "no hesitation in concluding . . . that the federal privilege should also extend" to social workers, *ante*, at 15—and goes on to prove that by polishing off the reasoned analysis with a topic sentence and two sentences of discussion, as follows (omitting citations and nongermane footnote):

> "The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psy-

> chologist, but whose counseling sessions serve the same public goals." *Ante*, at 15–16.

So much for the rule that privileges are to be narrowly construed.

Of course this brief analysis—like the earlier, more extensive, discussion of the general psychotherapist privilege—contains no explanation of why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice. Moreover, it considers only the respects in which social workers providing therapeutic services are *similar* to licensed psychiatrists and psychologists; not a word about the respects in which they are different. A licensed psychiatrist or psychologist is an expert in psychotherapy—and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family, or friends. One must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill—more than a minister or rabbi, for example? I have no idea, and neither does the Court. The social worker in the present case, Karen Beyer, was a "licensed clinical social worker" in Illinois, App. 18, a job title whose training requirements consist of a "master's degree in social work from an approved program," and "3,000 hours of satisfactory, supervised clinical professional experience." Ill. Comp. Stat., ch. 225, § 20/9 (1994). It is not clear that the degree in social work requires *any* training in psychotherapy. The "clinical professional experience" apparently will impart some such training, but only of the vaguest sort, judging from the Illinois Code's definition of "[c]linical social work practice," viz., "the providing of mental health services for the evaluation, treatment, and prevention of mental and

emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." Ch. 225, § 20/3(5). But the rule the Court announces today—like the Illinois evidentiary privilege which that rule purports to respect, ch. 225, § 20/16[2]—is not limited to "licensed clinical social workers," but includes all "licensed social worker[s]." "Licensed social worker[s]" may also provide "mental health services" as described in § 20/3(5), so long as it is done under supervision of a licensed clinical social worker. And the training requirement for a "licensed social worker" consists of either (a) "a degree from a graduate program of social work" approved by the State, or (b) "a degree in social work from an undergraduate program" approved by the State, plus "3 years of supervised professional experience." Ch. 225, § 20/9A. With due respect, it does not seem to me that any of this training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom the Advisory Committee and this Court proposed extension of a privilege in 1972. Of course these are only *Illinois'* requirements for "social workers." Those of

[2] Section 20/16 is the provision of the Illinois statutes cited by the Court to show that Illinois has "explicitly extend[ed] a testimonial privilege to licensed social workers." *Ante*, at 16–17, and n. 17. The Court elsewhere observes that Redmond's communications to Beyer would have been privileged in state court under another provision of the Illinois statutes, the Mental Health and Developmental Disabilities Confidentiality Act, Ill. Comp. Stat., ch. 740, § 110/10 (1994). *Ante*, at 15–16, n. 15. But the privilege conferred by § 110/10 extends to an even more ill-defined class: not only to *licensed* social workers, but to *all* social workers, to nurses, and indeed to "any other person not prohibited by law from providing [mental health or developmental disabilities] services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so." Ch. 740, § 110/2.

other States, for all we know, may be even less demanding. Indeed, I am not even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

Another critical distinction between psychiatrists and psychologists, on the one hand, and social workers, on the other, is that the former professionals, in their consultations with patients, *do nothing but psychotherapy.* Social workers, on the other hand, interview people for a multitude of reasons. The Illinois definition of "[l]icensed social worker," for example, is as follows:

> "Licensed social worker" means a person who holds a license authorizing the practice of social work, which includes social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social welfare administration or social work education." Ch. 225, §20/3(9).

Thus, in applying the "social worker" variant of the "psychotherapist" privilege, it will be necessary to determine whether the information provided to the social worker was provided to him *in his capacity as a psychotherapist*, or in his capacity as an administrator of social welfare, a community organizer, etc. Worse still, if the privilege is to have its desired effect (and is not to mislead the client), it will presumably be necessary for the social caseworker to advise, as the conversation with his welfare client proceeds, which portions are privileged and which are not.

Having concluded its three sentences of reasoned analysis, the Court then invokes, as it did when considering the psychotherapist privilege, the "experience" of the States—once again an experience I consider irrelevant (if not counterindicative) because it consists entirely of legislation rather

than common-law decision. It says that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers." *Ante*, at 16–17. There are two elements of this impressive statistic, however, that the Court does not reveal.

First—and utterly conclusive of the irrelevance of this supposed consensus to the question before us—the majority of the States that accord a privilege to social workers do *not* do so as a subpart of a "psychotherapist" privilege. The privilege applies to *all* confidences imparted to social workers, and not just those provided in the course of psychotherapy.[3] In Oklahoma, for example, the social-worker-privilege statute prohibits a licensed social worker from disclosing, or being compelled to disclose, "*any information* acquired from persons consulting the licensed social worker in his or her professional capacity" (with certain exceptions to be discussed *infra*, at 33). Okla. Stat., Tit. 59, § 1261.6 (1991) (emphasis added). The social worker's "professional capacity" is expansive, for the "[P]ractice of social work" in Oklahoma is defined as:

> "[T]he professional activity of helping individuals, groups, or communities enhance or restore their capacity for physical, social and economic functioning and the

[3] See Ariz. Rev. Stat. Ann. § 32–3283 (1992); Ark. Code Ann. § 17–46–107 (1995); Del. Code Ann., Tit. 24, § 3913 (1987); Idaho Code § 54–3213 (1994); Ind. Code § 25–23.6–6–1 (1993); Iowa Code §§ 154C.5 and 622.10 (1987); Kan. Stat. Ann. § 65–6315 (Supp. 1990); Me. Rev. Stat. Ann., Tit. 32, § 7005 (1988); Mass. Gen. Laws § 112:135A (1994); Mich. Comp. Laws Ann. § 339.1610 (West 1992); Miss. Code Ann. § 73–53–29 (1995); Mo. Rev. Stat. § 337.636 (1994); Mont. Code Ann. § 37–22–401 (1995); Neb. Rev. Stat. § 71–1,335 (Supp. 1994); N. J. Stat. Ann. § 45:15BB–13 (West 1995); N. M. Stat. Ann. § 61–31–24 (1993); N. Y. Civ. Prac. Law § 4508 (McKinney 1992); N. C. Gen. Stat. § 8–53.7 (1986); Ohio Rev. Code Ann. § 2317.02(G)(1) (1995); Okla. Stat., Tit. 59, § 1261.6 (1991); Ore. Rev. Stat. § 40.250 (1991); S. D. Codified Laws § 36–26–30 (1994); Tenn. Code Ann. § 63–23–107 (1990); Wash. Rev. Code § 18.19.180 (1994); W. Va. Code § 30–30–12 (1993); Wyo. Stat. § 33–38–109 (Supp. 1995).

> professional application of social work values, principles and techniques in areas such as clinical social work, social service administration, social planning, social work consultation and social work research to one or more of the following ends: Helping people obtain tangible services; counseling with individuals, families and groups; helping communities or groups provide or improve social and health services; and participating in relevant social action. The practice of social work requires knowledge of human development and behavior; of social economic and cultural institutions and forces; and of the interaction of all of these factors. Social work practice includes the teaching of relevant subject matter and of conducting research into problems of human behavior and conflict." Tit. 59, § 1250.1(2).

Thus, in Oklahoma, as in most other States having a social-worker privilege, it is not a subpart or even a derivative of the psychotherapist privilege, but rather a piece of special legislation similar to that achieved by many other groups, from accountants, see, *e. g.,* Miss. Code Ann. § 73–33–16(2) (1995) (certified public accountant "shall not be required by any court of this state to disclose, and shall not voluntarily disclose," client information), to private detectives, see, *e. g.*, Mich. Comp. Laws § 338.840(2) (1979) ("Any communications . . . furnished by a professional man or client to a [licensed private detective], or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state").[4] These social-worker statutes give no support, therefore, to

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[4] These ever-multiplying evidentiary-privilege statutes, which the Court today emulates, recall us to the original meaning of the word "privilege." It is a composite derived from the Latin words "privus" and "lex": private law.

the theory (importance of psychotherapy) upon which the Court rests its disposition.

Second, the Court does not reveal the enormous degree of disagreement among the States as to the scope of the privilege. It concedes that the laws of four States are subject to such gaping exceptions that they are "'little better than no privilege at all,'" *ante*, at 17, 18, and n. 18, so that they should more appropriately be categorized with the five States whose laws contradict the action taken today. I would add another State to those whose privilege is illusory. See Wash. Rev. Code § 18.19.180 (1994) (disclosure of information required "[i]n response to a subpoena from a court of law"). In adopting *any* sort of a social-worker privilege, then, the Court can at most claim that it is following the legislative "experience" of 40 States, and contradicting the "experience" of 10.

But turning to those States that do have an appreciable privilege of some sort, the diversity is vast. In Illinois and Wisconsin, the social-worker privilege does not apply when the confidential information pertains to homicide, see Ill. Comp. Stat., ch. 740, § 110/10(a)(9) (1994); Wis. Stat. § 905.04(4)(d) (1993–1994), and in the District of Columbia when it pertains to any crime "inflicting injuries" upon persons, see D. C. Code Ann. § 14–307(a)(1) (1995). In Missouri, the privilege is suspended as to information that pertains to a criminal act, see Mo. Rev. Stat. § 337.636(2) (1994), and in Texas when the information is sought in any criminal prosecution, compare Tex. Rule Civ. Evid. 510(d) with Tex. Rule Crim. Evid. 501 *et seq.* In Kansas and Oklahoma, the privilege yields when the information pertains to "violations of any law," see Kan. Stat. Ann. § 65–6315(a)(2) (Supp. 1990); Okla. Stat., Tit. 59, § 1261.6(2) (1991); in Indiana, when it reveals a "serious harmful act," see Ind. Code § 25–23.6–6–1(2) (1993); and in Delaware and Idaho, when it pertains to any "harmful act," see Del. Code Ann., Tit. 24, § 3913(2) (1987); Idaho Code § 54–3213(2) (1994). In Oregon, a state-

employed social worker like Karen Beyer loses the privilege where her supervisor determines that her testimony "is necessary in the performance of the duty of the social worker as a public employee." See Ore. Rev. Stat. § 40.250(5) (1991). In South Carolina, a social worker is forced to disclose confidences "when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding." See S. C. Code Ann. § 19–11–95(D)(1) (Supp. 1995). The majority of social-worker-privilege States declare the privilege inapplicable to information relating to child abuse.[5] And the States that do not fall into any of the above categories provide exceptions for commitment proceedings, for proceedings in which the patient relies on his mental or emotional condition as an element of his claim or defense, or for communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.[6]

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[5] See, *e. g.*, Ariz. Rev. Stat. Ann. § 32–3283 (1992); Ark. Code Ann. § 17–46–107(3) (1995); Cal. Evid. Code Ann. § 1027 (West 1995); Colo. Rev. Stat. § 19–3–304 (Supp. 1995); Del. Rule Evid. 503(d)(4); Ga. Code Ann. § 19–7–5(c)(1)(G) (1991); Idaho Code § 54–3213(3) (1994); La. Code Evid. Ann., Art. 510(B)(2)(k) (West 1995); Md. Cts. & Jud. Proc. Code Ann. § 9–121(e)(4) (1995); Mass. Gen. Laws § 119:51A (1994); Mich. Comp. Laws Ann. § 722.623 (West 1992 Supp. Pamph.); Minn. Stat. § 595.02.2(a) (1988); Miss. Code Ann. § 73–53–29(e) (1995); Mont. Code Ann. § 37–22–401(3) (1995); Neb. Rev. Stat. § 28–711 (1995); N. M. Stat. Ann. § 61–31–24(C) (Supp. 1995); N. Y. Civ. Prac. Law § 4508(a)(3) (McKinney 1992); Ohio Rev. Code Ann. § 2317.02(G)(1)(a) (1995); Ore. Rev. Stat. § 40.250(4) (1991); R. I. Gen. Laws § 5–37.3–4(b)(4) (1995); S. D. Codified Laws § 36–26–30(3) (1994); Tenn. Code Ann. § 63–23–107(b) (1990); Vt. Rule Evid. 503(d)(5); W. Va. Code § 30–30–12(a)(4) (1993); Wyo. Stat. § 14–3–205 (1994).

[6] See, *e. g.*, Fla. Stat. § 90.503(4) (Supp. 1992) (all three exceptions); Ky. Rule Evid. 507(c) (all three); Nev. Rev. Stat. § 49.245 (1993) (all three); Utah Rule Evid. 506(d) (all three); Conn. Gen. Stat. § 52–146q(c)(1) (1995) (commitment proceedings and proceedings in which patient's mental condition at issue); Iowa Code § 622.10 (1987) (proceedings in which patient's mental condition at issue).

Thus, although the Court is technically correct that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers," *ante*, at 16–17, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privilege entirely. It is fair to say that there is scant national consensus even as to the propriety of a social-worker psychotherapist privilege, and none whatever as to its appropriate scope. In other words, the state laws to which the Court appeals for support demonstrate most convincingly that adoption of a social-worker psychotherapist privilege is a job for Congress.

* * *

The question before us today is not whether there should be an evidentiary privilege for social workers providing therapeutic services. Perhaps there should. But the question before us is whether (1) the need for that privilege is so clear, and (2) the desirable contours of that privilege are so evident, that it is appropriate for this Court to craft it in common-law fashion, under Rule 501. Even if we were writing on a clean slate, I think the answer to that question would be clear. But given our extensive precedent to the effect that new privileges "in derogation of the search for truth" "are not lightly created," *United States* v. *Nixon*, 418 U. S., at 710, the answer the Court gives today is inexplicable.

In its consideration of this case, the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, the Employee Assistance Professionals Association, Inc., the American Counseling Association, and the National Association of Social Workers. Not a single *ami-*

cus brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts. The expectation is, however, that *this Court* will have that interest prominently—indeed, primarily—in mind. Today we have failed that expectation, and that responsibility. It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable for the purpose of encouraging psychotherapy by social workers. But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court. I respectfully dissent.

Syllabus

MONTANA *v.* EGELHOFF

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 95–566. Argued March 20, 1996—Decided June 13, 1996

On trial for two counts of deliberate homicide—defined by Montana law as "purposely" or "knowingly" causing another's death—respondent claimed that extreme intoxication had rendered him physically incapable of committing the murders and accounted for his inability to recall the events of the night in question. After being instructed, pursuant to Mont. Code Ann. § 45–2–203, that respondent's "intoxicated condition" could not be considered "in determining the existence of a mental state which is an element of the offense," the jury found respondent guilty. In reversing, the Supreme Court of Montana reasoned that respondent had a right, under the Due Process Clause, to present and have the jury consider "all relevant evidence" to rebut the State's evidence on all elements of the offense charged, and that evidence of his voluntary intoxication was "clearly relevant" to the issue whether he acted knowingly and purposely. Because § 45–2–203 prevented the jury from considering that evidence, the court concluded that the State had been relieved of part of its burden of proof and that respondent had therefore been denied due process.

Held: The judgment is reversed.

272 Mont. 114, 900 P. 2d 260, reversed.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS, concluded that § 45–2–203 does not violate the Due Process Clause. Pp. 41–56.

(a) The State Supreme Court's proposition that the Due Process Clause guarantees the right to introduce *all relevant evidence* is indefensible. See, *e. g.*, *Taylor* v. *Illinois*, 484 U. S. 400, 410; Fed. Rule Evid. 403; Fed. Rule Evid. 802. The Clause does place limits upon restriction of the right to introduce evidence, but only where the restriction "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." See *Patterson* v. *New York*, 432 U. S. 197, 201–202. Respondent has failed to meet the heavy burden of establishing that a defendant's right to have a jury consider voluntary intoxication evidence in determining whether he possesses the requisite mental state is a "fundamental principle of justice." The primary guide in making such a determination, historical practice, gives respondent little support. It was firmly established at common law that a defendant's voluntary intoxication provided neither an "excuse"

nor a "justification" for his crimes; the common law's stern rejection of inebriation as a defense must be understood as also precluding a defendant from arguing that, because of his intoxication, he could not have possessed the *mens rea* necessary to commit the crime. The justifications for this common-law rule persist to this day, and have only been strengthened by modern research. Although a rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance since the 19th century, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications. Pp. 41–51.

(b) None of this Court's cases on which the Supreme Court of Montana's conclusion purportedly rested undermines the principle that a State can limit the introduction of relevant evidence for a "valid" reason, as Montana has. The Due Process Clause does not bar States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 89, n. 5. Pp. 51–56.

JUSTICE GINSBURG concluded that § 45–2–203 should not be categorized as simply an evidentiary rule. Rather, § 45–2–203 embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions. The provision judges equally culpable a person who commits an act stone sober, and one who engages in the same conduct after voluntary intoxication has reduced the actor's capacity for self-control. Comprehended as a measure redefining *mens rea*, § 45–2–203 encounters no constitutional shoal. States have broad authority to define the elements of criminal offenses in light of evolving perceptions of the extent to which moral culpability should be a prerequisite to conviction of a crime. Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a fundamental principle of justice, given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today. Pp. 56–61.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 56. O'CONNOR, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 61. SOUTER, J., filed a dissenting opinion, *post*, p. 73. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 79.

Joseph P. Mazurek, Attorney General of Montana, argued the cause for petitioner. With him on the briefs were *Pamela P. Collins,* Assistant Attorney General, *Clay R. Smith,* and *Carter G. Phillips.*

Miguel A. Estrada argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *Nina Goodman.*

Ann C. German argued the cause for respondent. With her on the brief was *Amy N. Guth.**

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

We consider in this case whether the Due Process Clause is violated by Montana Code Annotated § 45–2–203, which provides, in relevant part, that voluntary intoxication "may

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*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *Margery S. Bronster,* Attorney General of Hawaii, and *Steven S. Michaels,* Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Carla J. Stovall* of Kansas, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Tom Udall* of New Mexico, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Charles Molony Condon* of South Carolina, *Dan Morales* of Texas, *Darrell V. McGraw, Jr.,* of West Virginia, *Malaetasi Togafau* of American Samoa, and *Richard Weil* of the Northern Mariana Islands; for the American Alliance for Rights and Responsibilities et al. by *Philip Allen Lacovara* and *Robert Teir;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Diane Marie Amann and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."

I

In July 1992, while camping out in the Yaak region of northwestern Montana to pick mushrooms, respondent made friends with Roberta Pavola and John Christenson, who were doing the same. On Sunday, July 12, the three sold the mushrooms they had collected and spent the rest of the day and evening drinking, in bars and at a private party in Troy, Montana. Some time after 9 p.m., they left the party in Christenson's 1974 Ford Galaxy station wagon. The drinking binge apparently continued, as respondent was seen buying beer at 9:20 p.m. and recalled "sitting on a hill or a bank passing a bottle of Black Velvet back and forth" with Christenson. 272 Mont. 114, 118, 900 P. 2d 260, 262 (1995).

At about midnight that night, officers of the Lincoln County, Montana, sheriff's department, responding to reports of a possible drunk driver, discovered Christenson's station wagon stuck in a ditch along U. S. Highway 2. In the front seat were Pavola and Christenson, each dead from a single gunshot to the head. In the rear of the car lay respondent, alive and yelling obscenities. His blood-alcohol content measured .36 percent over one hour later. On the floor of the car, near the brake pedal, lay respondent's .38-caliber handgun, with four loaded rounds and two empty casings; respondent had gunshot residue on his hands.

Respondent was charged with two counts of deliberate homicide, a crime defined by Montana law as "purposely" or "knowingly" causing the death of another human being. Mont. Code Ann. § 45–5–102 (1995). A portion of the jury charge, uncontested here, instructed that "[a] person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result," and that "[a] person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct consti-

tutes a crime; or, when he is aware there exists the high probability that his conduct will cause a specific result." App. to Pet. for Cert. 28a–29a. Respondent's defense at trial was that an unidentified fourth person must have committed the murders; his own extreme intoxication, he claimed, had rendered him physically incapable of committing the murders, and accounted for his inability to recall the events of the night of July 12. Although respondent was allowed to make this use of the evidence that he was intoxicated, the jury was instructed, pursuant to Mont. Code Ann. § 45–2–203 (1995), that it could not consider respondent's "intoxicated condition . . . in determining the existence of a mental state which is an element of the offense." App. to Pet. for Cert. 29a. The jury found respondent guilty on both counts, and the court sentenced him to 84 years' imprisonment.

The Supreme Court of Montana reversed. It reasoned (1) that respondent "had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged," 272 Mont., at 125, 900 P. 2d, at 266, and (2) that evidence of respondent's voluntary intoxication was "clear[ly] . . . relevant to the issue of whether [respondent] acted knowingly and purposely," *id.*, at 122, 900 P. 2d, at 265. Because § 45–2–203 prevented the jury from considering that evidence with regard to that issue, the court concluded that the State had been "relieved of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged," *id.*, at 124, 900 P. 2d, at 266, and that respondent had therefore been denied due process. We granted certiorari. 516 U. S. 1021 (1995).

II

The cornerstone of the Montana Supreme Court's judgment was the proposition that the Due Process Clause guarantees a defendant the right to present and have considered

by the jury "*all relevant evidence* to rebut the State's evidence on all elements of the offense charged." 272 Mont., at 125, 900 P. 2d, at 266 (emphasis added). Respondent does not defend this categorical rule; he acknowledges that the right to present relevant evidence "has not been viewed as absolute." Brief for Respondent 31. That is a wise concession, since the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U. S. 400, 410 (1988). Relevant evidence may, for example, be excluded on account of a defendant's failure to comply with procedural requirements. See *Michigan* v. *Lucas*, 500 U. S. 145, 151 (1991). And any number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence. For example, Federal (and Montana) Rule of Evidence 403 provides: "*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) Hearsay rules, see Fed. Rule Evid. 802, similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.[1] Of course, to say that the right to intro-

[1] JUSTICE O'CONNOR agrees that "a defendant does not enjoy an absolute right to present evidence relevant to his defense," *post*, at 62, and does not dispute the validity of the evidentiary rules mentioned above. She contends, however, that Montana's Rule is not like these because it "places a blanket exclusion on a *category* of evidence that would allow the accused to negate the offense's mental-state element." *Ibid.* (emphasis added). Of course hearsay is a "category" of evidence as well; what JUSTICE O'CONNOR apparently has in mind is that this particular category relates to evidence tending to prove a particular fact. That is indeed a distinction, but it is hard to understand why it should make

duce relevant evidence is not absolute is not to say that the Due Process Clause places *no* limits upon restriction of that right. But it is to say that the defendant asserting such a limit must sustain the usual heavy burden that a due process claim entails:

> "[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson* v. *New York*, 432 U. S. 197, 201–202 (1977) (citations omitted).

See also *Cooper* v. *Oklahoma*, 517 U. S. 348, 355 (1996) (applying *Patterson* test); *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). Respondent's task, then, is to establish that a defendant's right to have a jury consider evidence of his voluntary intoxication in determining whether he possesses the requisite mental state is a "fundamental principle of justice."

Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice.

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a difference. So long as the category of excluded evidence is selected on a basis that has good and traditional policy support, it ought to be valid.

We do not entirely understand JUSTICE O'CONNOR's argument that the vice of § 45–2–203 is that it excludes evidence "essential to the accused's defense," *post*, at 64; see also *post*, at 72. Evidence of intoxication is not always "essential," any more than hearsay evidence is always "nonessential."

See *Medina* v. *California*, 505 U. S. 437, 446 (1992). Here that gives respondent little support. By the laws of England, wrote Hale, the intoxicated defendant "shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." 1 M. Hale, Pleas of the Crown *32–*33. According to Blackstone and Coke, the law's condemnation of those suffering from *dementia affectata* was harsher still: Blackstone, citing Coke, explained that the law viewed intoxication "as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour." 4 W. Blackstone, Commentaries *25–*26. This stern rejection of inebriation as a defense became a fixture of early American law as well. The American editors of the 1847 edition of Hale wrote:

> "Drunkenness, it was said in an early case, can never be received as a ground to excuse or palliate an offence: this is not merely the opinion of a speculative philosopher, the argument of counsel, or the *obiter dictum* of a single judge, but it is a sound and long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found. But if no other authority could be adduced, the uniform decisions of our own Courts from the first establishment of the government, would constitute it now a part of the common law of the land." 1 Hale, *supra*, at *32, n. 3.

In an opinion citing the foregoing passages from Blackstone and Hale, Justice Story rejected an objection to the exclusion of evidence of intoxication as follows:

> "This is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another. Drunkenness is a gross vice, and in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation

of its malignity." *United States* v. *Cornell,* 25 F. Cas. 650, 657–658 (No. 14,868) (CC R. I. 1820).

The historical record does not leave room for the view that the common law's rejection of intoxication as an "excuse" or "justification" for crime would nonetheless permit the defendant to show that intoxication prevented the requisite *mens rea.* Hale, Coke, and Blackstone were familiar, to say the least, with the concept of *mens rea,* and acknowledged that drunkenness "deprive[s] men of the use of reason," 1 Hale, *supra,* at *32; see also Blackstone, *supra,* at *25. It is inconceivable that they did not realize that an offender's drunkenness might impair his ability to form the requisite intent; and inconceivable that their failure to note this massive exception from the general rule of disregard of intoxication was an oversight. Hale's statement that a drunken offender shall have the same judgment "as if he were in his right senses" must be understood as precluding a defendant from arguing that, because of his intoxication, he could not have possessed the *mens rea* required to commit the crime. And the same must be said of the exemplar of the common-law rule cited by both Hale and Blackstone, see 1 Hale, *supra,* at *32; Blackstone, *supra,* at *26, n. *w,* which is Serjeant Pollard's argument to the King's Bench in *Reniger* v. *Fogossa,* 1 Plowd. 1, 19, 75 Eng. Rep. 1, 31 (1550): "[I]f a person that is drunk kills another, this shall be Felony, and he shall be hanged for it, and yet he did it through Ignorance, for when he was drunk he had *no Understanding* nor Memory; but inasmuch as that Ignorance was occasioned by his own Act and Folly, and he might have avoided it, he shall not be privileged thereby." (Emphasis added.) See also *Beverley's Case,* 4 Co. Rep. 123b, 125a, 76 Eng. Rep. 1118, 1123 (K. B. 1603) ("although he who is drunk, is for the time *non compos mentis,* yet his drunkenness does not extenuate his act or offence, *nor turn to his avail*" (emphasis added) (footnote omitted)).

Against this extensive evidence of a lengthy common-law tradition decidedly against him, the best argument available to respondent is the one made by his *amicus* and conceded by the State: Over the course of the 19th century, courts carved out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring a "specific intent." The emergence of this new rule is often traced to an 1819 English case, in which Justice Holroyd is reported to have held that "though voluntary drunkenness cannot excuse from the commission of crime, yet where, as on a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated [is] a circumstance proper to be taken into consideration." 1 W. Russell, Crimes and Misdemeanors *8 (citing *King* v. *Grindley*, Worcester Sum. Assizes 1819, MS). This exception was "slow to take root," however, Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045, 1049 (1944), even in England. Indeed, in the 1835 case of *King* v. *Carroll*, 7 Car. & P. 145, 147, 173 Eng. Rep. 64, 65 (N. P.), Justice Park claimed that Holroyd had "retracted his opinion" in *Grindley*, and said "there is no doubt that that case is not law." In this country, as late as 1858 the Missouri Supreme Court could speak as categorically as this:

> "To look for deliberation and forethought in a man maddened by intoxication is vain, for drunkenness has deprived him of the deliberating faculties to a greater or less extent; and if this deprivation is to relieve him of all responsibility or to diminish it, the great majority of crimes committed will go unpunished. This however is not the doctrine of the common law; and to its maxims, based as they obviously are upon true wisdom and sound

> policy, we must adhere." *State* v. *Cross*, 27 Mo. 332, 338 (1858).

And as late as 1878, the Vermont Supreme Court upheld the giving of the following instruction at a murder trial:

> "'The voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, that is, although the intoxication amounts to a frenzy, does not excuse him from the same construction of his conduct, and the same legal inferences upon the question of premeditation and intent, as affecting the grade of his crime, which are applicable to a person entirely sober.'" *State* v. *Tatro*, 50 Vt. 483, 487 (1878).

See also *Harris* v. *United States*, 8 App. D. C. 20, 26–30 (1896); *Flanigan* v. *People*, 86 N. Y. 554, 559–560 (1881); *Commonwealth* v. *Hawkins*, 69 Mass. 463, 466 (1855); *State* v. *McCants*, 1 Spears 384, 391–395 (S. C. 1842). Eventually, however, the new view won out, and by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged. See Hall, *supra*, at 1049; *Hopt* v. *People*, 104 U. S. 631, 633–634 (1882) (citing cases).

On the basis of this historical record, respondent's *amicus* argues that "[t]he old common-law rule . . . was no longer deeply rooted at the time the Fourteenth Amendment was ratified." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 23. That conclusion is questionable, but we need not pursue the point, since the argument of *amicus* mistakes the nature of our inquiry. It is not the State which bears the burden of demonstrating that its rule is "deeply rooted," but rather respondent who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson* v. *New York*, 432 U. S., at 202.

Thus, even assuming that when the Fourteenth Amendment was adopted the rule Montana now defends was no longer generally applied, this only cuts off what might be called an *a fortiori* argument in favor of the State. The burden remains upon respondent to show that the "new common-law" rule—that intoxication may be considered on the question of intent—was so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined.

That showing has not been made. Instead of the uniform and continuing acceptance we would expect for a rule that enjoys "fundamental principle" status, we find that fully one-fifth of the States either never adopted the "new common-law" rule at issue here or have recently abandoned it.[2] Cf. *Cooper* v. *Oklahoma*, 517 U. S. 348 (1996) (finding due process violation in a rule having no common-law pedigree whatever, and adopted, very recently, by only four States). See also *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987)

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[2] Besides Montana, those States are Arizona, see *State* v. *Ramos*, 133 Ariz. 4, 6, 648 P. 2d 119, 121 (1982) (upholding statute precluding jury consideration of intoxication for purposes of determining whether defendant acted "knowingly"); Ariz. Rev. Stat. Ann. § 13–503 (Supp. 1995–1996) (voluntary intoxication "is not a defense for any criminal act or requisite state of mind"); Arkansas, see *White* v. *State*, 290 Ark. 130, 134–137, 717 S. W. 2d 784, 786–788 (1986) (interpreting Ark. Code Ann. § 5–2–207 (1993)); Delaware, see *Wyant* v. *State*, 519 A. 2d 649, 651 (1986) (interpreting Del. Code Ann., Tit. 11, § 421 (1995)); Georgia, see *Foster* v. *State*, 258 Ga. 736, 742–745, 374 S. E. 2d 188, 194–196 (1988) (interpreting Ga. Code Ann. § 16–3–4 (1992)), cert. denied, 490 U. S. 1085 (1989); Hawaii, see Haw. Rev. Stat. § 702–230(2) (1993), *State* v. *Souza*, 72 Haw. 246, 248, 813 P. 2d 1384, 1386 (1991) (§ 702–230(2) is constitutional); Mississippi, see *Lanier* v. *State*, 533 So. 2d 473, 478–479 (1988); Missouri, see Mo. Rev. Stat. § 562.076 (1994), *State* v. *Erwin*, 848 S. W. 2d 476, 482 (§ 562.076 is constitutional), cert. denied, 510 U. S. 826 (1993); South Carolina, see *State* v. *Vaughn*, 268 S. C. 119, 124–126, 232 S. E. 2d 328, 330–331 (1977); and Texas, see *Hawkins* v. *State*, 605 S. W. 2d 586, 589 (Tex. Crim. App. 1980) (interpreting Tex. Penal Code Ann. § 8.04 (1974)).

("We are aware that all but two of the States . . . have abandoned the common-law rule . . . . But the question remains whether those [two] States are in violation of the Constitution").

It is not surprising that many States have held fast to or resurrected the common-law rule prohibiting consideration of voluntary intoxication in the determination of *mens rea*, because that rule has considerable justification[3]—which alone casts doubt upon the proposition that the opposite rule is a "fundamental principle." A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example. See, *e. g.*, Third Special Report to the U. S. Congress on Alcohol and Health from the Secretary of Health, Education, and Welfare 64 (1978); Note, Alcohol Abuse and the Law, 94 Harv. L. Rev. 1660, 1681–1682 (1981). Disallowing consideration of voluntary intoxication has the

[3] In his dissent, JUSTICE SOUTER acknowledges that there *may be* valid policy reasons supporting the Montana law, some of which were brought forward by States that appeared as *amici*, see *post*, at 77–78 (citing Brief for State of Hawaii et al. as *Amici Curiae* 16). He refuses to consider the adequacy of those reasons, however, because they were not brought forward *by Montana's lawyers*. We do not know why the constitutionality of Montana's enactment should be subject to the condition subsequent that its lawyers be able to guess a policy justification that satisfies this Court. Whatever they guess will of course not necessarily be the *real reason* the Montana Legislature adopted the provision; Montana's lawyers must speculate about that, just as we must. Our standard formulation has been: "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end." *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980). JUSTICE SOUTER would change that to: "Where there are plausible reasons that counsel for the party supporting the legislation have mentioned." Or perhaps it is: "Where there are plausible reasons that counsel for the Government (or State) have mentioned"—so that in this case Hawaii's *amicus* brief would count if a Hawaiian statute were at issue. Either way, it is strange for the constitutionality of a state law to depend upon whether the lawyers hired by the State (or elected by its people) to defend the law happen to hit the right boxes on our bingo card of acceptable policy justifications.

effect of increasing the punishment for all unlawful acts committed in that state, and thereby deters drunkenness or irresponsible behavior while drunk. The rule also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison. And finally, the rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences. See, *e. g.*, *McDaniel* v. *State*, 356 So. 2d 1151, 1160–1161 (Miss. 1978).[4]

There is, in modern times, even more justification for laws such as § 45–2–203 than there used to be. Some recent studies suggest that the connection between drunkenness and crime is as much cultural as pharmacological—that is, that drunks are violent not simply because alcohol makes them that way, but because they are behaving in accord with their learned belief that drunks are violent. See, *e. g.*, Collins, Suggested Explanatory Frameworks to Clarify the Alcohol Use/Violence Relationship, 15 Contemp. Drug Prob. 107, 115 (1988); Critchlow, The Powers of John Barleycorn, 41 Am. Psychologist 751, 754–755 (July 1986). This not only adds additional support to the traditional view that an intoxicated criminal is not deserving of exoneration, but it suggests that juries—who possess the same learned belief as the intoxicated offender—will be too quick to accept the claim that the defendant was biologically incapable of forming the requisite

[4] As appears from this analysis, we are in complete agreement with the concurrence that § 45–2–203 "embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions," *post*, at 57. We also agree that the statute "'extract[s] the entire subject of voluntary intoxication from the mens rea inquiry,'" *post*, at 58. We believe that this judgment may be implemented, and this effect achieved, with equal legitimacy by amending the substantive requirements for each crime, or by simply excluding intoxication evidence from the trial. We address this as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it.

mens rea. Treating the matter as one of excluding misleading evidence therefore makes some sense.[5]

In sum, not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice. Although the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today.[6]

III

The Supreme Court of Montana's conclusion that Mont. Code Ann. § 45–2–203 (1995) violates the Due Process Clause purported to rest on two lines of our jurisprudence. First,

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[5] These many valid policy reasons for excluding evidence of voluntary intoxication refute JUSTICE O'CONNOR's claim that § 45–2–203 has no purpose other than to improve the State's likelihood of winning a conviction, see *post*, at 66–67, 72–73. Such a claim is no more accurate as applied to this provision than it would have been as applied to the New York law in *Patterson* v. *New York*, 432 U. S. 197 (1977), which placed upon the defendant the burden of proving the affirmative defense of extreme emotional disturbance. We upheld that New York law, even though we found it "very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here." *Id.*, at 209. Here, as in *Patterson*, any increase in the chance of obtaining a conviction is merely a consequence of pursuing legitimate penological goals.

[6] JUSTICE O'CONNOR maintains that "to determine whether a fundamental principle of justice has been violated here, we cannot consider only the historical disallowance of intoxication evidence, but must also consider the 'fundamental principle' that a defendant has a right to a fair opportunity to put forward his defense." *Post*, at 71. What JUSTICE O'CONNOR overlooks, however, is that the historical disallowance of intoxication evidence sheds light upon what our society has understood by a "fair opportunity to put forward [a] defense." That "fundamental principle" has demonstrably not included the right to introduce intoxication evidence.

it derived its view that the Due Process Clause requires the admission of all relevant evidence from the statement in *Chambers* v. *Mississippi*, 410 U. S. 284, 294 (1973), that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Respondent relies heavily on this statement, which he terms "the *Chambers* principle," Brief for Respondent 30.

We held in *Chambers* that "the exclusion of [certain] critical evidence, coupled with the State's refusal to permit [petitioner] to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." 410 U. S., at 302. We continued, however:

> "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that *under the facts and circumstances of this case* the rulings of the trial court deprived Chambers of a fair trial." *Id.*, at 302–303 (emphasis added).

In other words, *Chambers* was an exercise in highly case-specific error correction. At issue were two rulings by the state trial court at Chambers' murder trial: denial of Chambers' motion to treat as an adverse witness one McDonald, who had confessed to the murder for which Chambers was on trial, but later retracted the confession; and exclusion, on hearsay grounds, of testimony of three witnesses who would testify that McDonald had confessed to them. We held that both of these rulings were erroneous, the former because McDonald's testimony simply *was* adverse, *id.*, at 297–298, and the second because the statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *id.*,

at 300, and were "well within the basic rationale of the exception for declarations against interest," *id.*, at 302. Thus, the holding of *Chambers*—if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Respondent cites our decision in *Crane* v. *Kentucky*, 476 U. S. 683 (1986), as evidence that his version of the "*Chambers* principle" governs our jurisprudence. He highlights statements in *Crane* to the effect that "an essential component of procedural fairness is an opportunity to be heard," which would effectively be denied "if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Id.*, at 690; Brief for Respondent 31. But the very next sentence of that opinion (which respondent omits) makes perfectly clear that we were *not* setting forth an absolute entitlement to introduce crucial, relevant evidence: "*In the absence of any valid state justification*, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." 476 U. S., at 690–691 (emphasis added) (internal quotation marks omitted). Our holding that the exclusion of certain evidence in that case violated the defendant's constitutional rights rested not on a theory that all "competent, reliable evidence" must be admitted, but rather on the ground that the Supreme Court of Kentucky's sole rationale for the exclusion (that the evidence "did not relate to the credibility of the confession," *Crane* v. *Commonwealth*, 690 S. W. 2d 753, 755 (1985)) was wrong. See 476 U. S., at 687. *Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a "valid" reason, as it has been by Montana.

The second line of our cases invoked by the Montana Supreme Court's opinion requires even less discussion. *In re Winship*, 397 U. S. 358, 364 (1970), announced the proposition that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979), established a corollary, that a jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process. These decisions simply are not implicated here because, as the Montana court itself recognized, "[t]he burden is not shifted" under § 45–2–203. 272 Mont., at 124, 900 P. 2d, at 266. The trial judge instructed the jury that "[t]he State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt," App. to Pet. for Cert. 27a, and that "[a] person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being," *id.*, at 28a. Thus, failure by the State to produce evidence of respondent's mental state would have resulted in an acquittal. That acquittal did not occur was presumably attributable to the fact, noted by the Supreme Court of Montana, that the State introduced considerable evidence from which the jury might have concluded that respondent acted "purposely" or "knowingly." See 272 Mont., at 122, 900 P. 2d, at 265. For example, respondent himself testified that, several hours before the murders, he had given his handgun to Pavola and asked her to put it in the glove compartment of Christenson's car. *Ibid.;* 5 Tr. 1123. That he had to retrieve the gun from the glove compartment before he used it was strong evidence that it was his "conscious object" to commit the charged crimes; as was the execution-style manner in which a single shot was fired into the head of each victim.

Recognizing that *Sandstrom* is not directly on point, the Supreme Court of Montana described § 45–2–203 as a burden-*reducing*, rather than burden-shifting, statute. 272

Mont., at 122–123, 124, 900 P. 2d, at 265, 266. This obviously was not meant to suggest that the statute formally reduced the burden of proof to clear and convincing, or to a mere preponderance; there is utterly no basis for that, neither in the text of the law nor in the jury instruction that was given. What the court evidently meant is that, by excluding a significant line of evidence that might refute *mens rea*, the statute made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt—reduced the burden in the sense of making the burden easier to bear. But *any* evidentiary rule can have that effect. "Reducing" the State's burden in this manner is not unconstitutional, unless the rule of evidence itself violates a fundamental principle of fairness (which, as discussed, this one does not). We have "reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." *McMillan* v. *Pennsylvania*, 477 U. S. 79, 89, n. 5 (1986).

Finally, we may comment upon the Montana Supreme Court's citation of the following passage in *Martin* v. *Ohio*, 480 U. S. 228 (1987), a case upholding a state law that placed on the defendant the burden of proving self-defense by a preponderance of the evidence:

> "It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i. e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *[In re] Winship*'s mandate. The instructions in this case . . . are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the

> State's proof of the elements of the crime." *Id.*, at 233–234 (citation omitted).

See also 272 Mont., at 122–123, 900 P. 2d, at 265. This passage can be explained in various ways—*e. g.*, as an assertion that the right to have a jury consider self-defense evidence (unlike the right to have a jury consider evidence of voluntary intoxication) is fundamental, a proposition that the historical record may support. But the only explanation needed for present purposes is the one given in *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994): "It is to the holdings of our cases, rather than their dicta, that we must attend." If the *Martin* dictum means that the Due Process Clause requires all relevant evidence bearing on the elements of a crime to be admissible, the decisions we have discussed show it to be incorrect.

* * *

"The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell* v. *Texas*, 392 U. S. 514, 535–536 (1968) (plurality opinion). The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

The Court divides in this case on a question of characterization. The State's law, Mont. Code Ann. § 45–2–203 (1995),

prescribes that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." For measurement against federal restraints on state action, how should we type that prescription? If § 45–2–203 is simply a rule designed to keep out "relevant, exculpatory evidence," JUSTICE O'CONNOR maintains, *post*, at 67, Montana's law offends due process. If it is, instead, a redefinition of the mental-state element of the offense, on the other hand, JUSTICE O'CONNOR's due process concern "would not be at issue," *post*, at 71, for "[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish," *post*, at 64, and to exclude evidence irrelevant to the crime it has defined.

Beneath the labels (rule excluding evidence or redefinition of the offense) lies the essential question: Can a State, without offense to the Federal Constitution, make the judgment that two people are equally culpable where one commits an act stone sober, and the other engages in the same conduct after his voluntary intoxication has reduced his capacity for self-control? For the reasons that follow, I resist categorizing § 45–2–203 as merely an evidentiary prescription, but join the Court's judgment refusing to condemn the Montana statute as an unconstitutional enactment.

Section 45–2–203 does not appear in the portion of Montana's Code containing evidentiary rules (Title 26), the expected placement of a provision regulating solely the admissibility of evidence at trial. Instead, Montana's intoxication statute appears in Title 45 ("Crimes"), as part of a chapter entitled "General Principles of Liability." Mont. Code Ann., Tit. 45, ch. 2 (1995). No less than adjacent provisions governing duress and entrapment, § 45–2–203 embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.

As urged by Montana and its *amici*, § 45–2–203 "extract[s] the entire subject of voluntary intoxication from the mens rea inquiry," Reply Brief for Petitioner 2, thereby rendering evidence of voluntary intoxication logically irrelevant to proof of the requisite mental state. Thus, in a prosecution for deliberate homicide, the State need not prove that the defendant "purposely or knowingly cause[d] the death of another," Mont. Code Ann. § 45–5–102(a) (1995), in a purely subjective sense. To obtain a conviction, the prosecution must prove only that (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication." Brief for American Alliance for Rights and Responsibilities et al. as *Amici Curiae* 6. See also Brief for Petitioner 35–36; Brief for United States as *Amicus Curiae* 10–12. Accordingly, § 45–2–203 does not "lighte[n] the prosecution's burden to prove [the] mental-state element beyond a reasonable doubt," as JUSTICE O'CONNOR suggests, *post*, at 64, for "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged," *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977).

Comprehended as a measure redefining *mens rea*, § 45–2–203 encounters no constitutional shoal. States enjoy wide latitude in defining the elements of criminal offenses, see, *e. g.*, *Martin* v. *Ohio*, 480 U. S. 228, 232 (1987); *Patterson*, 432 U. S., at 201–202, particularly when determining "the extent to which moral culpability should be a prerequisite to conviction of a crime," *Powell* v. *Texas*, 392 U. S. 514, 545 (1968) (Black, J., concurring). When a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U. S., at 202 (internal quotation marks omitted). Defining *mens*

rea to eliminate the exculpatory value of voluntary intoxication does not offend a "fundamental principle of justice," given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today. See *ante*, at 43–49; see also *post*, at 73 (SOUTER, J., dissenting) ("[A] State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process.").

Other state courts have upheld statutes similar to § 45–2–203, not simply as evidentiary rules, but as legislative redefinitions of the mental-state element. See *State* v. *Souza*, 72 Haw. 246, 249, 813 P. 2d 1384, 1386 (1991) ("legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind"); *State* v. *Ramos*, 133 Ariz. 4, 6, 648 P. 2d 119, 121 (1982) ("Perhaps the state of mind which needs to be proven here is a watered down *mens rea;* however, this is the prerogative of the legislature."); *Commonwealth* v. *Rumsey*, 309 Pa. Super. 137, 139, 454 A. 2d 1121, 1122 (1983) (quoting *Powell*, 392 U. S., at 536 (plurality opinion)) ("Redefinition of the kind and quality of mental activity that constitutes the *mens rea* element of crimes is a permissible part of the legislature's role in the 'constantly shifting adjustment between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.' "). Legislation of this order, if constitutional in Arizona, Hawaii, and Pennsylvania, ought not be declared unconstitutional by this Court when enacted in Montana.

If, as the plurality, JUSTICE O'CONNOR, and JUSTICE SOUTER agree, it is within the legislature's province to instruct courts to treat a sober person and a voluntarily intoxicated person as equally responsible for conduct—to place a voluntarily intoxicated person on a level with a sober person—then the Montana law is no less tenable under the Federal

Constitution than are the laws, with no significant difference in wording, upheld in sister States.[1] The Montana Supreme Court did not disagree with the courts of other States; it simply did not undertake an analysis in line with the principle that legislative enactments plainly capable of a constitutional construction ordinarily should be given that construction. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); *State* v. *Lilburn*, 265 Mont. 258, 266, 875 P. 2d 1036, 1041 (1994).

The Montana Supreme Court's judgment, in sum, strikes down a statute whose text displays no constitutional infirmity. If the Montana court considered its analysis forced by this Court's precedent,[2] it is proper for this Court to say

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[1] JUSTICE BREYER questions the States' authority to treat voluntarily intoxicated and sober defendants as equally culpable for their actions. See *post*, at 80. He asks, moreover, *post*, at 79–80, why a legislature concerned with the high incidence of crime committed by individuals in an alcohol-impaired condition would choose the course Montana and several other States have taken. It would be more sensible, he suggests, to "equate voluntary intoxication [with] knowledge, and purpose," *post*, at 80, thus dispensing entirely with the *mens rea* requirement when individuals act under the influence of a judgment-impairing substance. It does not seem to me strange, however, that States have resisted such a catchall approach and have enacted, instead, a measure less sweeping, one that retains a *mens rea* requirement, but "define[s] culpable mental state so as to give voluntary intoxication no exculpatory relevance." See *post*, at 75 (SOUTER, J., dissenting). Nor is it at all clear to me that "a jury unaware of intoxication would likely infer knowledge or purpose" in the example JUSTICE BREYER provides, *post*, at 79. It is not only in fiction, see J. Thurber, The Secret Life of Walter Mitty (1983) (originally published in *The New Yorker* in 1939), but, sadly, in real life as well, that sober people drive while daydreaming or otherwise failing to pay attention to the road.

[2] The United States, as *amicus curiae*, so suggested at oral argument. See Tr. of Oral Arg. 20 ("[T]he State court never really got to the question of whether there has been a [substantive] change in the State law, because it [assumed] that, to the extent that there had been one, it was barred by [*In re Winship*, 397 U. S. 358 (1970)].").

what prescriptions federal law leaves to the States,[3] and thereby dispel confusion to which we may have contributed, and attendant state-court misperception.

Justice O'Connor, with whom Justice Stevens, Justice Souter, and Justice Breyer join, dissenting.

The Montana Supreme Court unanimously held that Mont. Code Ann. § 45–2–203 (1995) violates due process. I agree. Our cases establish that due process sets an outer limit on the restrictions that may be placed on a defendant's ability to raise an effective defense to the State's accusations. Here, to impede the defendant's ability to throw doubt on the State's case, Montana has removed from the jury's consideration a category of evidence relevant to determination of mental state where that mental state is an essential element of the offense that must be proved beyond a reasonable doubt. Because this disallowance eliminates evidence with which the defense might negate an essential element, the State's burden to prove its case is made correspondingly easier. The justification for this disallowance is the State's desire to increase the likelihood of conviction of a certain class of defendants who might otherwise be able to prove that they did not satisfy a requisite element of the offense. In my view, the statute's effect on the criminal proceeding violates due process.

I

This Court's cases establish that limitations placed on the accused's ability to present a fair and complete defense can, in some circumstances, be severe enough to violate due process. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi*, 410 U. S. 284, 294 (1973). Applying our precedent, the Mon-

[3] As the United States observed, it is generally within the States' domain "to determine what are the elements of criminal responsibility." *Id.*, at 19–20.

tana Supreme Court held that keeping intoxication evidence away from the jury, where such evidence was relevant to establishment of the requisite mental state, violated the due process right to present a defense, 272 Mont. 114, 123, 900 P. 2d 260, 265 (1995), and that the instruction pursuant to § 45–2–203 was not harmless error, *id.*, at 124, 900 P. 2d, at 266. In rejecting the Montana Supreme Court's conclusion, the plurality emphasizes that "any number of familiar and unquestionably constitutional evidentiary rules" permit exclusion of relevant evidence. *Ante*, at 42. It is true that a defendant does not enjoy an absolute right to present evidence relevant to his defense. See *Crane* v. *Kentucky*, 476 U. S. 683, 690–691 (1986). But none of the "familiar" evidentiary rules operates as Montana's does. The Montana statute places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element. In so doing, it frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state. In my view, this combination of effects violates due process.

The proposition that due process requires a fair opportunity to present a defense in a criminal prosecution is not new. See *id.*, at 690; *California* v. *Trombetta*, 467 U. S. 479, 485 (1984). In *Chambers*, the defendant had been prevented from cross-examining a witness and from presenting witnesses on his own behalf by operation of Mississippi's "voucher" and hearsay rules. The Court held that the application of these evidentiary rules deprived the defendant of a fair trial. "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U. S., at 302. The plurality's characterization of *Chambers* as "case-specific error correction," *ante*, at 52, cannot diminish its force as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to

the establishment of guilt by suppression of evidence supporting the defendant's case.

In *Crane*, a trial court had held that the defendant could not introduce testimony bearing on the circumstances of his confession, on the grounds that this information bore only on the "voluntariness" of the confession, a matter already resolved. We held that by keeping such critical information from the jury this exclusion "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." 476 U. S., at 687. The Court emphasized that, while States have the power to exclude evidence through evidentiary rules that serve the interests of fairness and reliability, limitations on evidence may exceed the bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a valid state justification.

In *Washington* v. *Texas*, 388 U. S. 14 (1967), the trial court refused to permit a defense witness to testify on the basis of Texas statutes providing that persons charged or convicted as coparticipants in the same crime could not testify for one another, although they could testify for the State. The Court held that the Constitution prohibited a State from establishing rules to prevent whole categories of defense witnesses from testifying out of a belief that such witnesses were untrustworthy. Such action by the State detracted too severely and arbitrarily from the defendant's right to call witnesses in his favor.

These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence. To be sure, the right to present evidence is not limitless; for example, it does not permit the defendant to introduce any and all evidence he believes

might work in his favor, *Crane*, *supra*, at 690, nor does it generally invalidate the operation of testimonial privileges, *Washington* v. *Texas*, *supra*, at 23, n. 21. Nevertheless, "an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" that is essential to the accused's defense. *Crane*, *supra*, at 690 (citations omitted). Section 45–2–203 forestalls the defendant's ability to raise an effective defense by placing a blanket exclusion on the presentation of a type of evidence that directly negates an element of the crime, and by doing so, it lightens the prosecution's burden to prove that mental-state element beyond a reasonable doubt.

This latter effect is as important to the due process analysis as the former. A state legislature certainly has the authority to identify the elements of the offenses it wishes to punish, but once its laws are written, a defendant has the right to insist that the State prove beyond a reasonable doubt every element of an offense charged. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986); *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977) ("The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged"). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970); *Patterson*, *supra*, at 210. Because the Montana Legislature has specified that a person commits "deliberate homicide" only if he "purposely or knowingly causes the death of another human being," Mont. Code Ann. § 45–5–102(1)(a) (1995), the prosecution must prove the existence of such mental state in order to convict. That is, unless the defendant is shown to have acted purposely or knowingly, *he is not guilty of the offense of deliberate homicide.* The Montana Supreme Court found that it was inconsistent with the legislature's

requirement of the mental state of "purposely" or "knowingly" to prevent the jury from considering evidence of voluntary intoxication, where that category of evidence was relevant to establishment of that mental-state element. 272 Mont., at 122–123, 900 P. 2d, at 265–266.

Where the defendant may introduce evidence to negate a subjective mental-state element, the prosecution must work to overcome whatever doubts the defense has raised about the existence of the required mental state. On the other hand, if the defendant may *not* introduce evidence that might create doubt in the factfinder's mind as to whether that element was met, the prosecution will find its job so much the easier. A subjective mental state is generally proved only circumstantially. If a jury may not consider the defendant's evidence of his mental state, the jury may impute to the defendant the culpability of a mental state he did not possess.

In *Martin* v. *Ohio*, 480 U. S. 228 (1987), the Court considered an Ohio statute providing that a defendant bore the burden of proving, by a preponderance of the evidence, an affirmative defense such as self-defense. We held that placing that burden on the defendant did not violate due process. The Court noted in explanation that it would nevertheless have been error to instruct the jury that "self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case" where Ohio's definition of the intent element made self-defense evidence relevant to the State's burden. *Id.*, at 233–234. "Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate." *Id.*, at 234. In other words, the State's right to shift the burden of proving an affirmative defense did not include the power to prevent the defendant from attempting to prove self-defense in an effort to cast doubt on the State's case. Dictum or not, this observation explained our reasoning and is similarly applicable here, where the State has benefited from the defendant's in-

ability to make an argument which, if accepted, could throw reasonable doubt on the State's proof. The placement of the burden of proof for affirmative defenses should not be confused with the use of evidence to negate elements of the offense charged.

Crane noted: "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence [circumstances of confession] deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." 476 U. S., at 690–691 (internal quotation marks omitted). The State here had substantial proof of the defendant's knowledge or purpose in committing these homicides, and might well have prevailed even had the jury been permitted to consider the defendant's intoxication. But as in *Crane*, the prosecution's case has been insulated from meaningful adversarial testing by the scale-tipping removal of the necessity to face a critical category of defense evidence.

The plurality ignores *Crane*'s caution that the prosecution must be put to a full test. Rather, it invokes *Crane* to emphasize that "introduction of relevant evidence can be limited by the State for a 'valid' reason, as it has been by Montana." *Ante*, at 53. The State's brief to this Court enunciates a single reason: Due to the well-known risks related to voluntary intoxication, it seeks to prevent a defendant's use of his own voluntary intoxication as basis for exculpation. Brief for Petitioner 12, 17–19. That is, its interest is to ensure that even a defendant who lacked the required mental-state element—and is therefore not guilty—is nevertheless convicted of the offense. The plurality elaborates, *ante*, at 49–50, on reasons *why* Montana might wish to preclude exculpation on the basis of voluntary intoxication, but these reasons—increased punishment and concomitant deterrence for those who commit unlawful acts while drunk, and implementation of society's moral perception that those who become drunk should bear the consequences—merely explain

the State's purpose in trying to improve its likelihood of winning convictions. The final justification proffered by the plurality on Montana's behalf is that Montana's rule perhaps prevents juries, who might otherwise be misled, from being "too quick to accept the claim that the [drunk] defendant was biologically incapable of forming the requisite *mens rea*," *ante*, at 50–51. But this proffered justification is inconsistent with § 45–2–203's exception for persons who are involuntarily intoxicated. That exception makes plain that Montana does *not* consider intoxication evidence misleading—but rather considers it relevant—for the determination of a person's capacity to form the requisite mental state.

A State's placement of a significant limitation on the right to defend against the State's accusations "requires that the competing interest be closely examined." *Chambers*, 410 U. S., at 295. Montana has specified that to prove guilt, the State must establish that the defendant acted purposely or knowingly, but has prohibited a category of defendants from effectively disputing guilt through presentation of evidence relevant to that essential element. And the evidence is indisputably relevant: The Montana Supreme Court held that evidence of intoxication is relevant to proof of mental state, 272 Mont., at 122–123, 900 P. 2d, at 265, and furthermore, § 45–2–203's exception for involuntary intoxication shows that the legislature does consider intoxication relevant to mental state. Montana has barred the defendant's use of a category of relevant, exculpatory evidence for the express purpose of improving the State's likelihood of winning a conviction against a certain type of defendant. The plurality's observation that all evidentiary rules that exclude exculpatory evidence reduce the State's burden to prove its case, *ante*, at 55, is beside the point. The *purpose* of the familiar evidentiary rules is not to alleviate the State's burden, but rather to vindicate some other goal or value—*e. g.*, to ensure the reliability and competency of evidence or to encourage effective communications within certain relationships.

Such rules may or may not help the prosecution, and when they do help, do so only incidentally. While due process does not "ba[r] States from making changes . . . that have the *effect* of making it easier for the prosecution to obtain convictions," *McMillan* v. *Pennsylvania*, 477 U. S., at 89, n. 5 (emphasis added), an evidentiary rule whose sole *purpose* is to boost the State's likelihood of conviction distorts the adversary process. Cf. *Washington*, 388 U. S., at 25 (Harlan, J., concurring in result). Unlike *Chambers* and *Washington*, where the State at least claimed that the evidence at issue was unreliable, Montana does not justify its rule on grounds such as that intoxication evidence is unreliable, cumulative, privileged, or irrelevant. The sole purpose for this disallowance is to keep from the jury's consideration a category of evidence that helps the defendant's case and weakens the government's case.

The plurality brushes aside this Court's precedents as variously fact bound, irrelevant, and dicta. I would afford more weight to principles enunciated in our case law than is accorded in the plurality's opinion today. It seems to me that a State may not first determine the elements of the crime it wishes to punish, and then thwart the accused's defense by categorically disallowing the very evidence that would prove him innocent.

II

The plurality does, however, raise an important argument for the statute's validity: the disallowance, at common law, of consideration of voluntary intoxication where a defendant's state of mind is at issue. Because this disallowance was permitted at common law, the plurality argues, its disallowance by Montana cannot amount to a violation of a "fundamental principle of justice." *Ante*, at 43–51.

From 1551 until its shift in the 19th century, the common-law rule prevailed that a defendant could not use intoxication as an excuse or justification for an offense, or, it must be assumed, to rebut establishment of a requisite mental state.

"Early law was indifferent to the defence of drunkenness because the theory of criminal liability was then too crude and too undeveloped to admit of exceptions. . . . But with the refinement in the theory of criminal liability . . . a modification of the rigid old rule on the defence of drunkenness was to be expected." Singh, History of the Defense of Drunkenness in English Criminal Law, 49 L. Q. Rev. 528, 537 (1933) (footnote omitted). As the plurality concedes, that significant modification took place in the 19th century. Courts acknowledged the fundamental incompatibility of a particular mental-state requirement on the one hand, and the disallowance of consideration of evidence that might defeat establishment of that mental state on the other. In the slow progress typical of the common law, courts began to recognize that evidence of intoxication was properly admissible for the purpose of ascertaining whether a defendant had met the required mental-state element of the offense charged.

This recognition, courts believed, was consistent with the common-law rule that voluntary intoxication did not excuse commission of a crime; rather, an element of the crime, the requisite mental state, was not satisfied and therefore the crime had not been committed. As one influential mid-19th century case explained: "Drunkenness is no excuse for crime; yet, in that class of crimes and offences which depend upon guilty knowledge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission . . . [drunkenness] should be submitted to the consideration of the Jury"; for, where the crime required a particular mental state, "it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind" in order "[t]o rebut" the mental state or "to enable the Jury to judge rightly of the matter." *Pigman* v. *State*, 14 Ohio 555, 556–557 (1846); accord, *Cline* v. *State*, 43 Ohio St. 332, 334, 1 N. E. Rep. 22, 23 (1885) ("The rule is well settled that intoxication is not a justification or an excuse for crime. . . . But in many cases evidence of intoxication is

admissible with a view to the question whether a crime has been committed; . . . . As [mental state], in such case, is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no offense was committed").

Courts across the country agreed that where a subjective mental state was an element of the crime to be proved, the defense must be permitted to show, by reference to intoxication, the absence of that element. One court commented that it seemed "incontrovertible and to be universally applicable" that "where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence but to show that it was not committed." *People* v. *Robinson*, 2 Park. Crim. 235, 306 (N. Y. Sup. Ct. 1855). See also *Swan* v. *State*, 23 Tenn. 136, 141–142 (1843); *State* v. *Donovan*, 61 Iowa 369, 370–371, 16 N. W. 206, 206–207 (1883); *Mooney* v. *State*, 33 Ala. 419, 420 (1859); *Aszman* v. *State*, 123 Ind. 347, 24 N. E. 123 (1890) (citing cases).

With similar reasoning, the Montana Supreme Court recognized the incompatibility of a jury instruction pursuant to § 45–2–203 in conjunction with the legislature's decision to require a mental state of "purposely" or "knowingly" for deliberate homicide. It held that intoxication is relevant to formation of the requisite mental state. Unless a defendant is proved beyond a reasonable doubt to have possessed the requisite mental state, he did not commit the offense. Elimination of a critical category of defense evidence precludes a defendant from effectively rebutting the mental-state element, while simultaneously shielding the State from the effort of proving the requisite mental state in the face of negating evidence. It was this effect on the adversarial process that persuaded the Montana Supreme Court that the disallowance was unconstitutional.

The Due Process Clause protects those "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson* v. *New York*, 432 U. S., at 202 (citations omitted). At the time the Fourteenth Amendment was ratified, the common-law rule on consideration of intoxication evidence was in flux. The plurality argues that rejection of the historical rule in the 19th century simply does not establish that the "'new common-law'" rule is a principle of procedure so "deeply rooted" as to be ranked "fundamental." *Ante,* at 46–48. But to determine whether a fundamental principle of justice has been violated here, we cannot consider only the historical disallowance of intoxication evidence, but must also consider the "fundamental principle" that a defendant has a right to a fair opportunity to put forward his defense, in adversarial testing where the State must prove the elements of the offense beyond a reasonable doubt. As concepts of *mens rea* and burden of proof developed, these principles came into conflict, as the shift in the common law in the 19th century reflects.

III

JUSTICE GINSBURG concurs in the Court's judgment based on her determination that § 45–2–203 amounts to a redefinition of the offense that renders evidence of voluntary intoxication irrelevant to proof of the requisite mental state. The concurrence emphasizes that States enjoy wide latitude in defining the elements of crimes and concludes that, "[c]omprehended as a measure redefining *mens rea,* § 45–2–203 encounters no constitutional shoal." *Ante,* at 58.

A state legislature certainly possesses the authority to define the offenses it wishes to punish. If the Montana Legislature chose to redefine this offense so as to alter the requisite mental-state element, the due process problem presented in this case would not be at issue.

There is, however, no indication that such a "redefinition" occurred. JUSTICE GINSBURG's reading of Montana law is

plainly inconsistent with that given by the Montana Supreme Court, and therefore cannot provide a valid basis to uphold § 45–2–203's operation. "We are, of course, bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint School Dist. No. 1* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 488 (1976); accord, *Groppi* v. *Wisconsin*, 400 U. S. 505, 507 (1971); *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.*, 360 U. S. 684, 688 (1959). The Montana Supreme Court held that evidence of voluntary intoxication *was* relevant to the requisite mental state. 272 Mont., at 122, 900 P. 2d, at 265. And in summing up the court's holding, Justice Nelson's concurrence explains that while the legislature may enact the statutes it chooses, § 45–2–203 "effectively and impermissibly . . . lessens the burden of the State to prove beyond a reasonable doubt an essential element of the offense charged—the mental state element—by statutorily precluding the jury from considering the very evidence that might convince them that the State had not proven that element." *Id.*, at 128, 900 P. 2d, at 268. The Montana Supreme Court's decision cannot be read consistently with a "redefinition" of the offense.

Because the management of criminal justice is within the province of the States, *Patterson*, *supra*, at 201–202, this Court is properly reluctant to interfere in the States' authority in these matters. Nevertheless, the Court must invalidate those rules that violate the requirements of due process. The plurality acknowledges that a reduction of the State's burden through disallowance of exculpatory evidence is unconstitutional if it violates a principle of fairness. *Ante*, at 55. I believe that such a violation is present here. Montana's disallowance of consideration of voluntary-intoxication evidence removes too critical a category of relevant, exculpatory evidence from the adversarial process by prohibiting the defendant from making an essential argument and permitting the prosecution to benefit from its suppression. Montana's purpose is to increase the likelihood of conviction

of a certain class of defendants, who might otherwise be able to prove that they did not satisfy a requisite element of the offense. The historical fact that this disallowance once existed at common law is not sufficient to save the statute today. I would affirm the judgment of the Montana Supreme Court.

JUSTICE SOUTER, dissenting.

I have no doubt that a State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process. I would have thought the statute at issue here (Mont. Code Ann. § 45–2–203 (1995)) had implicitly accomplished such a redefinition, but I read the opinion of the Supreme Court of Montana as indicating that it had no such effect, and I am bound by the state court's statement of its domestic law.

Even on the assumption that Montana's definitions of the purposeful and knowing culpable mental states were untouched by § 45–2–203, so that voluntary intoxication remains relevant to each, it is not a foregone conclusion that our cases preclude the State from declaring such intoxication evidence inadmissible. A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so. There may (or may not) be a valid justification to support a State's decision to exclude, rather than render irrelevant, evidence of a defendant's voluntary intoxication. Montana has not endeavored, however, to advance an argument to that effect. Rather, the State has effectively restricted itself to advancing undoubtedly sound reasons for defining the mental state element so as to make voluntary intoxication generally irrelevant (though its own Supreme Court has apparently said the legislature failed to do that) and to demonstrating that evidence of voluntary intoxication was irrelevant at common law (a fact that goes

part way, but not all the way, to answering the due process objection). In short, I read the State Supreme Court opinion as barring one interpretation that would leave the statutory scheme constitutional, while the State's failure to offer a justification for excluding relevant evidence leaves us unable to discern whether there may be a valid reason to support the statute as the State Supreme Court appears to view it. I therefore respectfully dissent from the Court's judgment.

I

The plurality opinion convincingly demonstrates that when the Fourteenth Amendment's Due Process Clause was added to the Constitution in 1868, the common law as it then stood either rejected the notion that voluntary intoxication might be exculpatory, *ante*, at 43–45, or was at best in a state of flux on that issue. See also *ante*, at 68–71 (O'CONNOR, J., dissenting). That is enough to show that Montana's rule that evidence of voluntary intoxication is inadmissible on the issue of culpable mental state contravenes no principle "'so rooted in the traditions and conscience of our people,'" as they stood in 1868, "'as to be ranked as fundamental,'" *ante*, at 47 (quoting *Patterson* v. *New York*, 432 U. S. 197, 202 (1977)). But this is not the end of the due process enquiry. Justice Harlan's dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961), teaches that the "tradition" to which we are tethered "is a living thing."[1] What the historical practice does not rule out as inconsistent with "the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325

[1] "The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Poe* v. *Ullman*, 367 U. S., at 542 (Harlan, J., dissenting).

(1937), must still pass muster as rational in today's world. Cf. *Medina* v. *California*, 505 U. S. 437, 454 (1992) (O'CONNOR, J., concurring in judgment) (although "historical pedigree can give a procedural practice a presumption of constitutionality . . . , the presumption must surely be rebuttable").

In this case, the second step of the due process enquiry leads to a line of precedent discussed in JUSTICE O'CONNOR's dissent, *ante*, at 61–68, involving the right to present a defense. See, *e. g.*, *Washington* v. *Texas*, 388 U. S. 14, 22 (1967) (a State cannot arbitrarily bar "whole categories of defense witnesses from testifying"); *id.*, at 25 (Harlan, J., concurring in result) (State may not "recogniz[e] [testimony as] relevant and competent [but] arbitrarily ba[r] its use by the defendant"); *Chambers* v. *Mississippi*, 410 U. S. 284, 294 (1973) (defendant entitled to a "fair opportunity to defend against the State's accusations"); *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986) (States may not exclude "competent, reliable evidence" that is "central to the defendant's claim of innocence" absent an adequate justification). Collectively, these cases stand for the proposition, as the Court put it in *Chambers*, *supra*, at 295, that while the right to present relevant evidence may be limited, the Constitution "requires that the competing interest [said to justify the limitation] be closely examined."

II

Given the foregoing line of authority, Montana had at least one way to give effect to its judgment that defendants should not be permitted to use evidence of their voluntary intoxication to defeat proof of culpable mental state, and perhaps a second. First, it could have defined culpable mental state so as to give voluntary intoxication no exculpatory relevance. While the Due Process Clause requires the government to prove the existence of every element of the offense beyond a reasonable doubt, *In re Winship*, 397 U. S. 358, 364 (1970), within fairly broad limits the definition of those elements is up to the State. We thus noted in *Patterson* v. *New York*,

432 U. S., at 211, n. 12, that the various "due process guarantees are dependent upon the law as defined in the legislative branches," particularly on the legislature's enumeration of the elements of an offense, see *id.*, at 210 ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged"). See also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive"); *Martin* v. *Ohio*, 480 U. S. 228, 233 (1987) (same).

While I therefore find no apparent constitutional reason why Montana could not render evidence of voluntary intoxication excludable as irrelevant by redefining "knowledge" and "purpose," as they apply to the mental state element of its substantive offenses, or by making some other provision for mental state,[2] I do not believe that I am free to conclude that Montana has done so here. Our view of state law is limited by its interpretation in the State's highest court, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 381 (1992); *Murdock* v. *Memphis*, 20 Wall. 590 (1875), and I am not able to square the State Supreme Court's opinion in this case with the position advanced by the State here (and supported by the United States as *amicus curiae*), that Montana's legislature changed the definition of culpable mental states when it enacted § 45–2–203. See 272 Mont. 114, 122, 900 P. 2d 260, 265 (1995) ("It is clear that such evidence [of intoxication] was relevant to the issue of whether Egelhoff acted knowingly and purposely"); *id.*, at 119–122, 900 P. 2d, at 263–265 (noting and not disputing Egelhoff's claim that § 45–2–203 removes from the jury's consideration facts relevant to a

[2] See *State* v. *Souza*, 72 Haw. 246, 249, 813 P. 2d 1384, 1386 (1991) ("The legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind").

determination of mental state, an essential element of the offense).

A second possible (although by no means certain) option may also be open. Even under a definition of the mental state element that would treat evidence of voluntary intoxication as relevant and exculpatory, the exclusion of such evidence is typically permissible so long as a State presents a "'valid' reason," *ante,* at 66 (O'CONNOR, J., dissenting), to justify keeping it out. *Chambers* and its line of precedent certainly recognize that such evidence may often properly be excluded. See *Chambers, supra,* at 295. As the plurality notes, *ante,* at 42, Federal Rules of Evidence 403 (addressing prejudice, confusion, misleading the jury, waste of time, etc.) and 802 (hearsay) provide two examples of an adequate reason for excluding relevant evidence.

Hence, I do not rule out the possibility of justifying exclusion of relevant intoxication evidence in a case like this. At the least, there may be reasons beyond those actually advanced by Montana that might have induced a State to reject its prior law freely admitting intoxication evidence going to mental state.

A State (though not necessarily Montana) might, for example, argue that admitting intoxication evidence on the issue of culpable mental state but not on a defense of incapacity (as to which it is widely assumed to be excludable as generally irrelevant[3]) would be irrational since both capacity to obey the law and purpose to accomplish a criminal result presuppose volitional ability. See Model Penal Code § 4.01 ("A person is not responsible for criminal conduct if at the time of

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[3] See American Law Institute, Model Penal Code § 2.08(4) (1985), which deems intoxication relevant for this purpose only where by reason of "pathological intoxication" an "actor at the time of his conduct lacks substantial capacity . . . to conform his conduct to the requirements of law." The Model Penal Code further defines "pathological intoxication" as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." *Id.,* § 2.08(5)(c).

such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law") and § 2.02(2)(a)(i) ("A person acts purposely with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result"). And quite apart from any technical irrationality, a State might think that admitting the evidence in question on culpable mental state but not capacity (when each was a jury issue in a given case) would raise too high a risk of juror confusion. See Brief for State of Hawaii et al. as *Amici Curiae* 16 ("[U]se of [intoxication] evidence runs an unacceptable risk of potential manipulation by defendants and [will lead to] confusion of juries, who may not adequately appreciate that intoxication evidence is to be used for the question of mental state, not for purposes of showing an excuse"). While Thomas Reed Powell reportedly suggested that "learning to think like a lawyer is when you learn to think about one thing that is connected to another without thinking about the other thing it is connected to," Teachout, Sentimental Metaphors, 34 UCLA L. Rev. 537, 545 (1986), a State might argue that its law should be structured on the assumption that its jurors typically will not suffer from this facility.[4]

Quite apart from the fact that Montana has made no such arguments for justification here, however, I am not at all sure why such arguments would go any further than justify-

[4] Teachout notes that Powell acknowledged that this concept was not explicitly described in his essay entitled A Comment on Professor Sabine's "Pragmatic Approach to Politics," 81 Pol. Sci. Q. 52, 59 (1966), but in a letter wrote:

> "If you think you can think about a
> thing that is hitched to other
> things without thinking about the
> things that it is hitched to, then
> you have a legal mind."

Quoted in Teachout, Sentimental Metaphors, 34 UCLA L. Rev., at 545, n. 17.

ing redefinition of mental states (the first option above). I do not understand why they would justify the State in cutting the conceptual corner[5] by leaving the definitions of culpable mental states untouched but excluding evidence relevant to this proof. Absent a convincing argument for cutting that corner, *Chambers* and the like constrain us to hold the current Montana statute unconstitutional. I therefore respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I join JUSTICE O'CONNOR's dissent. As the dissent says, and as JUSTICE SOUTER agrees, the Montana Supreme Court did not understand Montana's statute to have redefined the mental element of deliberate homicide. In my view, however, this circumstance is not simply happenstance or a technical matter that deprives us of the power to uphold that statute. To have read the statute differently—to treat it as if it had redefined the mental element—would produce anomalous results. A statute that makes voluntary intoxication the legal equivalent of purpose or knowledge *but only where external circumstances would establish purpose or knowledge in the absence of intoxication*, see *ante*, at 58 (GINSBURG, J., concurring), is a statute that turns guilt or innocence not upon state of mind, but upon irrelevant external circumstances. An intoxicated driver stopped at an intersection who unknowingly accelerated into a pedestrian would likely be found guilty, for a jury unaware of intoxication would likely infer knowledge or purpose. An identically intoxicated driver racing along a highway who unknowingly sideswiped another car would likely be found innocent, for a jury unaware of intoxication would likely infer negligence. Why would a legislature want to write a statute that

[5] Cf. *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143 (1920) ("Men must turn square corners when they deal with the Government").

draws such a distinction, upon which a sentence of life imprisonment, or death, may turn? If the legislature wanted to equate voluntary intoxication, knowledge, and purpose, why would it not write a statute that plainly says so, instead of doing so in a roundabout manner that would affect, in dramatically different ways, those whose minds, deeds, and consequences seem identical? I would reserve the question of whether or not such a hypothetical statute might exceed constitutional limits. Cf. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85–86 (1986); *Patterson* v. *New York*, 432 U. S. 197, 210 (1977); *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–699 (1975).

Syllabus

KOON *v.* UNITED STATES

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

No. 94–1664. Argued February 20, 1996—Decided June 13, 1996*

After petitioners, Los Angeles police officers, were acquitted on state charges of assault and excessive use of force in the beating of a suspect during an arrest, they were convicted under 18 U. S. C. § 242 of violating the victim's constitutional rights under color of law. Although the applicable United States Sentencing Guideline, 1992 USSG § 2H1.4, indicated that they should be imprisoned for 70 to 87 months, the District Court granted them two downward departures from that range. The first was based on the victim's misconduct, which contributed significantly to provoking the offense. The second was based on a combination of four factors: (1) that petitioners were unusually susceptible to abuse in prison; (2) that petitioners would lose their jobs and be precluded from employment in law enforcement; (3) that petitioners had been subject to successive state and federal prosecutions; and (4) that petitioners posed a low risk of recidivism. The sentencing range after the departures was 30 to 37 months, and the court sentenced each petitioner to 30 months. The Ninth Circuit reviewed the departure decisions *de novo* and rejected all of them.

Held:

1. An appellate court should not review *de novo* a decision to depart from the Guideline sentencing range, but instead should ask whether the sentencing court abused its discretion. Pp. 92–100.

(a) Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable Guideline range in an ordinary case, 18 U. S. C. § 3553(a), it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the range if the court finds "there exists an aggravating or mitigating circumstance of a kind, to a degree, not adequately taken into consideration" by the Sentencing Commission in formulating the Guidelines, § 3553(b). The Commission states that it has formulated each Guideline to apply to a "heartland" of typical cases and that it did not "adequately . . . conside[r]" atypical cases, 1995 USSG ch. 1, pt. A,

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*Together with No. 94–8842, *Powell* v. *United States*, also on certiorari to the same court.

intro. comment. 4(b). The Commission prohibits consideration of a few factors, and it provides guidance as to the factors that are likely to make a case atypical by delineating certain of them as "encouraged" bases for departure and others as "discouraged" bases for departure. Courts may depart on the basis of an encouraged factor if the applicable Guideline does not already take the factor into account. A court may depart on the basis of a discouraged factor, or an encouraged factor already taken into account, however, only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case. If the Guidelines do not mention a factor, the court must, after considering the structure and theory of relevant individual Guidelines and the Guidelines as a whole, decide whether the factor is sufficiently unusual to take the case out of the Guideline's heartland, bearing in mind the Commission's expectation that departures based on factors not mentioned in the Guidelines will be "highly infrequent." Pp. 92–96.

(b) Although 18 U. S. C. § 3742 established a limited appellate review of sentencing decisions, § 3742(e)(4)'s direction to "give due deference to the district court's application of the guidelines to the facts" demonstrates that the Act was not intended to vest in appellate courts wide-ranging authority over district court sentencing decisions. See, *e. g.*, *Williams* v. *United States*, 503 U. S. 193, 205. The deference that is due depends on the nature of the question presented. A departure decision will in most cases be due substantial deference, for it embodies the sentencing court's traditional exercise of discretion. See *Mistretta* v. *United States*, 488 U. S. 361, 367. To determine if a departure is appropriate, the district court must make a refined assessment of the many facts that bear on the outcome, informed by its vantage point and day-to-day sentencing experience. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially given that they see so many more Guidelines cases. Such considerations require adoption of the abuse-of-discretion standard of review, not *de novo* review. See, *e. g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403. Pp. 96–100.

2. Because the Court of Appeals erred in rejecting certain of the downward departure factors relied upon by the District Judge, the foregoing principles require reversal of the appellate court's rulings in significant part. Pp. 100–114.

Syllabus

(a) Victim misconduct is an encouraged basis for departure under USSG § 5K2.10, and the District Court did not abuse its discretion in basing a departure on it. The court's analysis of this departure factor showed a correct understanding in applying § 2H1.4, the Guideline applicable to 18 U. S. C. § 242, both as a mechanical matter and in interpreting its heartland. As the court recognized, § 2H1.4 incorporates the Guideline for the offense underlying the § 242 violation, here § 2A2.2 for aggravated assault, and thus creates a Guideline range and a heartland for aggravated assault committed under color of law. A downward departure under § 5K2.10 was justified because the punishment prescribed by § 2A2.2 contemplates unprovoked assaults, not cases like this where what begins as legitimate force in response to provocation becomes excessive. The Court of Appeals misinterpreted the District Court to have found that the victim had been the but-for cause of the crime, but not that he had provoked it; it also misinterpreted the heartland of the applicable Guideline range by concentrating on whether the victim's misconduct made this an unusual case of excessive force. Pp. 101–105.

(b) This Court rejects the Government's contention that some of the four considerations underlying the District Court's second downward departure are impermissible departure factors under all circumstances. For a court to conclude that a factor must never be considered would be to usurp the policymaking authority that Congress vested in the Commission, and 18 U. S. C. § 3553(a)(2) does not compel such a result. A court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, that factor's consideration. If the answer is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the applicable Guideline's heartland. Pp. 106–109.

(c) The District Court abused its discretion in relying on petitioners' collateral employment consequences as support for its second departure. Because it is to be expected that a public official convicted of using his governmental authority to violate a person's rights will lose his or her job and be barred from similar employment in the future, it must be concluded that the Commission adequately considered these consequences in formulating 1992 USSG § 2H1.4. Thus, the career loss factor, as it exists in this suit, cannot take the suit out of § 2H1.4's heartland. Pp. 109–111.

(d) The low likelihood of petitioners' recidivism was also an inappropriate ground for departure, since the Commission specifically ad-

dressed this factor in formulating the sentencing range for petitioners' criminal history category. See § 4A1.3. P. 111.

(e) However, the District Court did not abuse its discretion in relying upon susceptibility to abuse in prison and the burdens of successive prosecutions. The District Court's finding that the case is unusual due to petitioners' exceptional susceptibility to abuse in prison is just the sort of determination that must be accorded deference on appeal. Moreover, although consideration of petitioners' successive prosecutions could be incongruous with the dual responsibilities of citizenship in our federal system, this Court cannot conclude the District Court abused its discretion by considering that factor. Pp. 111–112.

(f) Where a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless the reviewing court determines that the district court would have imposed the same sentence absent reliance on the invalid factors. *Williams, supra*, at 203. Because the District Court here stated that none of four factors standing alone would justify its second departure, it is not evident that the court would have imposed the same sentence had it relied only on susceptibility to abuse and the hardship of successive prosecutions. The Court of Appeals should therefore remand the action to the District Court. Pp. 113–114.

34 F. 3d 1416, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, which was unanimous except insofar as STEVENS, J., did not join Part IV–B–1, and SOUTER, GINSBURG, and BREYER, JJ., did not join Part IV–B–3. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 114. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post*, p. 114. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post*, p. 118.

Theodore B. Olson argued the cause for petitioner in No. 94–1664. With him on the briefs were *Theodore J. Boutrous, Jr.*, *John K. Bush*, *Richard J. Leighton*, *Joel Levine*, and *Ira M. Salzman*. *William J. Kopeny* argued the cause and filed briefs for petitioner in No. 94–8842.

Deputy Solicitor General Dreeben argued the cause for the United States in both cases. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Patrick*, *Acting Assistant Attorney General Keeney*, *Irving*

L. Gornstein, Jessica Dunsay Silver, Linda F. Thome, and *Vicki Marani.*†

JUSTICE KENNEDY delivered the opinion of the Court.

The United States Sentencing Commission Guidelines establish ranges of criminal sentences for federal offenses and offenders. A district court must impose a sentence within the applicable Guideline range, if it finds the case to be a typical one. See 18 U. S. C. § 3553(a). District courts may depart from the Guideline range in certain circumstances, however, see *ibid.*, and here the District Court departed downward eight levels. The Court of Appeals for the Ninth Circuit rejected the District Court's departure rulings, and, over the published objection of nine of its judges, declined to rehear the case en banc. In this suit we explore the appropriate standards of appellate review of a district court's decision to depart from the Guidelines.

I

A

The petitioners' guilt has been established, and we are concerned here only with the sentencing determinations made by the District Court and Court of Appeals. A sentencing court's departure decisions are based on the facts of the case, however, so we must set forth the details of the crime at some length.

On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, a city in Los Angeles County, and drank malt liquor for a num-

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†Briefs of *amici curiae* urging reversal were filed for the Law Enforcement Legal Defense Fund by *Richard K. Willard* and *David Henderson Martin* in No. 94–1664; for the National Association of Criminal Defense Lawyers by *Lawrence S. Goldman* in No. 94–1664; and for the National Association of Police Organizations, Inc., by *William J. Johnson* and *Byron L. Warnken* in both cases.

ber of hours. Then, with King driving, they left Altadena via a major freeway. King was intoxicated.

California Highway Patrol officers observed King's car traveling at a speed they estimated to be in excess of 100 m.p.h. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The Highway Patrol officers called on the radio for help. Units of the Los Angeles Police Department joined in the pursuit, one of them manned by petitioner Laurence Powell and his trainee, Timothy Wind.

King left the freeway, and after a chase of about eight miles, stopped at an entrance to a recreation area. The officers ordered King and his two passengers to exit the car and to assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their backs. King's two friends complied. King, too, got out of the car but did not lie down. Petitioner Stacey Koon arrived, at once followed by Ted Briseno and Roland Solano. All were officers of the Los Angeles Police Department, and as sergeant, Koon took charge. The officers again ordered King to assume the felony prone position. King got on his hands and knees but did not lie down. Officers Powell, Wind, Briseno and Solano tried to force King down, but King resisted and became combative, so the officers retreated. Koon then fired taser darts (designed to stun a combative suspect) into King.

The events that occurred next were captured on videotape by a bystander. As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th

second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. Powell began to reach for his handcuffs. (At the sentencing phase, the District Court found that Powell no longer perceived King to be a threat at this point.)

At one-minute-five-seconds (1:05) on the videotape, Briseno, in the District Court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. Where the baton blows fell and the intentions of King and the officers at various points were contested at trial, but, as noted, petitioners' guilt has been established.

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "'ooops'" and "'I havent *[sic]* beaten anyone this bad in a long time.'" 34 F. 3d 1416, 1425 (CA9 1994). Koon sent a message to the police station that said: "'U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time.'" *Ibid.*

King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. Learning that King worked at Dodger Stadium, Powell said to King: "'We played a little ball tonight, didn't we Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won.'" *Ibid.*

B

Koon, Powell, Briseno, and Wind were tried in state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge

against Powell that resulted in a hung jury. The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly $1 billion in property was destroyed. New Initiatives for a New Los Angeles: Final Report and Recommendations, Senate Special Task Force on a New Los Angeles, Dec. 9, 1992, pp. 10–11.

On August 4, 1992, a federal grand jury indicted the four officers under 18 U. S. C. § 242, charging them with violating King's constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. After a trial in United States District Court for the Central District of California, the jury convicted Koon and Powell but acquitted Wind and Briseno.

We now consider the District Court's sentencing determinations. Under the Sentencing Guidelines, a district court identifies the base offense level assigned to the crime in question, adjusts the level as the Guidelines instruct, and determines the defendant's criminal history category. United States Sentencing Commission, Guidelines Manual § 1B1.1 (Nov. 1992) (1992 USSG). Coordinating the adjusted offense level and criminal history category yields the appropriate sentencing range. *Ibid.*

The District Court sentenced petitioners pursuant to 1992 USSG § 2H1.4, which applies to violations of 18 U. S. C. § 242. Section 2H1.4 prescribes a base offense level which is the greater of the following: 10, or 6 plus the offense level applicable to any underlying offense. The District Court found the underlying offense was aggravated assault, which carries a base offense level of 15, 1992 USSG § 2A2.2(a), to which 6 was added for a total of 21.

The court increased the offense level by four because petitioners had used dangerous weapons, § 2A2.2(b)(2)(B). The Government asked the court also to add four levels for

King's serious bodily injury pursuant to §2A2.2(b)(3)(B). The court found, however, that King's serious injuries were sustained when the officers were using lawful force. (At trial, the Government contended that all the blows administered after King fell to the ground 30 seconds into the videotape violated §242. The District Court found that many of those blows "may have been tortious," but that the criminal violations did not commence until 1:07 on the videotape, after Briseno stomped King. 833 F. Supp. 769, 778 (CD Cal. 1993).) The court did add two levels for bodily injury pursuant to §2A2.2(b)(3)(A). The adjusted offense level totaled 27, and because neither petitioner had a criminal record, each fell within criminal history category I. The sentencing range for an offense level of 27 and a criminal history category I was, under the 1992 Guidelines, 70-to-87 months' imprisonment. Rather than sentencing petitioners to a term within the Guideline range, however, the District Court departed downward eight levels. The departure determinations are the subject of this controversy.

The court granted a five-level departure because "the victim's wrongful conduct contributed significantly to provoking the offense behavior," §5K2.10, p. s. 833 F. Supp., at 787. The court also granted a three-level departure, based on a combination of four factors. First, as a result of the "widespread publicity and emotional outrage which have surrounded this case," petitioners were "particularly likely to be targets of abuse" in prison. *Id.*, at 788. Second, petitioners would face job-termination proceedings, after which they would lose their positions as police officers, be disqualified from prospective employment in the field of law enforcement, and suffer the "anguish and disgrace these deprivations entail." *Id.*, at 789. Third, petitioners had been "significantly burden[ed]" by having been subjected to successive state and federal prosecutions. *Id.*, at 790. Fourth, petitioners were not "violent, dangerous, or likely to engage in future criminal conduct," so there was "no reason to

impose a sentence that reflects a need to protect the public from [them]." *Ibid.* The court concluded these factors justified a departure when taken together, although none would have been sufficient standing alone. *Id.*, at 786.

The departures yielded an offense level of 19 and a sentencing range of 30-to-37 months' imprisonment. The court sentenced each petitioner to 30 months' imprisonment. The petitioners appealed their convictions, and the Government appealed the sentences, arguing that the District Court erred in granting the downward departures and in failing to adjust the offense level upward for serious bodily injury. The Court of Appeals affirmed petitioners' convictions, and affirmed the District Court's refusal to adjust the offense level, but it reversed the District Court's departure determinations. Only the last ruling is before us.

The Court of Appeals reviewed "de novo whether the district court had authority to depart." 34 F. 3d, at 1451. The court reversed the five-level departure for victim misconduct, reasoning that misbehavior by suspects is typical in cases involving excessive use of force by police and is thus comprehended by the applicable Guideline. *Id.*, at 1460.

As for the three-level departure, the court rejected each factor cited. Acknowledging that a departure for susceptibility to abuse in prison may be appropriate in some instances and that police officers as a group are susceptible to prison abuse, the court nevertheless said the factor did not justify departure because "reliance *solely* on hostility toward a group of which the defendant is a member provides an unlimited open-ended rationale for departing." *Id.*, at 1455. The court further noted that, unlike cases in which a defendant is vulnerable to prison abuse due to physical characteristics over which he has no control, here the petitioners' vulnerability stemmed from public condemnation of their crimes. *Id.*, at 1456.

As for petitioners' collateral employment consequences, the court first held consideration of the factor by the trial

court inconsistent with the sentencing goals of 18 U. S. C. § 3553(a) because the factor did not "speak to the offender's character, the nature or seriousness of the offense, or some other legitimate sentencing concern." 34 F. 3d, at 1453. The court noted further that because the societal consequences of a criminal conviction are almost unlimited, reliance on them "would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make." *Id.*, at 1454. Third, the court noted the ease of using the factor to justify departures based on a defendant's socioeconomic status, a consideration that, under 1992 USSG § 5H1.10, is never a permitted basis for departure. As a final point, the Court of Appeals said the factor was "troubling" because petitioners, as police officers, held positions of trust they had abused. Section 3B1.3 of the Guidelines increases, rather than decreases, punishment for those who abuse positions of trust. 34 F. 3d, at 1454.

The Court of Appeals next found the successive state and federal prosecutions could not be a downward departure factor. It deemed the factor irrelevant to the sentencing goals of § 3553(a)(2) and contradictory to the Attorney General's determination that compelling federal interests warranted a second prosecution. *Id.*, at 1457. The court rejected the last departure factor as well, ruling that low risk of recidivism was comprehended in the criminal history category and so should not be double counted. *Id.*, at 1456–1457.

We granted certiorari to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines. 515 U. S. 1190 (1995). The appellate court should not review the departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion. Having invoked the wrong standard, the Court of Appeals erred further in rejecting certain of the downward departure factors relied upon by the District Judge.

II

The Sentencing Reform Act of 1984, as amended, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. §§ 991–998, made far-reaching changes in federal sentencing. Before the Act, sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated. *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). The discretion led to perceptions that "federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98–225, p. 38 (1983). In response, Congress created the United States Sentencing Commission and charged it with developing a comprehensive set of sentencing guidelines, 28 U. S. C. § 994. The Commission promulgated the United States Sentencing Guidelines, which "specify an appropriate [sentencing range] for each class of convicted persons" based on various factors related to the offense and the offender. United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, p. 1 (Nov. 1995) (1995 USSG). A district judge now must impose on a defendant a sentence falling within the range of the applicable Guideline, if the case is an ordinary one.

The Act did not eliminate all of the district court's discretion, however. Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances, see 28 U. S. C. § 991(b)(1)(B), Congress allows district courts to depart from the applicable Guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U. S. C. § 3553(b). To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to "consider only the sentencing guidelines, policy

statements, and official commentary of the Sentencing Commission." *Ibid.*

Turning our attention, as instructed, to the Guidelines Manual, we learn that the Commission did not adequately take into account cases that are, for one reason or another, "unusual." 1995 USSG ch. 1, pt. A, intro. comment. 4(b). The Introduction to the Guidelines explains:

> "The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." *Ibid.*

The Commission lists certain factors that never can be bases for departure (race, sex, national origin, creed, religion, socioeconomic status, 1995 USSG §5H1.10; lack of guidance as a youth, §5H1.12; drug or alcohol dependence, §5H1.4; and economic hardship, §5K2.12), but then states that with the exception of those listed factors, it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." 1995 USSG ch. 1, pt. A, intro. comment. 4(b). The Commission gives two reasons for its approach:

> "First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will

> be able to refine the guidelines to specify more precisely when departures should and should not be permitted.
>
> "Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice." *Ibid.*

So the Act authorizes district courts to depart in cases that feature aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the Commission. The Commission, in turn, says it has formulated each Guideline to apply to a heartland of typical cases. Atypical cases were not "adequately taken into consideration," and factors that may make a case atypical provide potential bases for departure. Potential departure factors "cannot, by their very nature, be comprehensively listed and analyzed in advance," 1995 USSG § 5K2.0, of course. Faced with this reality, the Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter, the considerations that might bear upon the decision to depart.

Sentencing courts are not left adrift, however. The Commission provides considerable guidance as to the factors that are apt or not apt to make a case atypical, by listing certain factors as either encouraged or discouraged bases for departure. Encouraged factors are those "the Commission has not been able to take into account fully in formulating the guidelines." § 5K2.0. Victim provocation, a factor relied upon by the District Court in this suit, is an example of an encouraged downward departure factor, § 5K2.10, whereas disruption of a governmental function is an example of an encouraged upward departure factor, § 5K2.7. Even an encouraged factor is not always an appropriate basis for departure, for on some occasions the applicable Guideline will have

taken the encouraged factor into account. For instance, a departure for disruption of a governmental function "ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense." *Ibid.* A court still may depart on the basis of such a factor but only if it "is present to a degree substantially in excess of that which ordinarily is involved in the offense." § 5K2.0.

Discouraged factors, by contrast, are those "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." 1995 USSG ch. 5, pt. H, intro. comment. Examples include the defendant's family ties and responsibilities, 1995 USSG § 5H1.6, his or her education and vocational skills, § 5H1.2, and his or her military, civic, charitable, or public service record, § 5H1.11. The Commission does not view discouraged factors "as necessarily inappropriate" bases for departure but says they should be relied upon only "in exceptional cases." 1995 USSG ch. 5, pt. H, intro. comment.

The Commission's treatment of departure factors led then-Chief Judge Breyer to explain that a sentencing court considering a departure should ask the following questions:

> "1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?
>
> "2) Has the Commission forbidden departures based on those features?
>
> "3) If not, has the Commission encouraged departures based on those features?
>
> "4) If not, has the Commission discouraged departures based on those features?" *United States* v. *Rivera*, 994 F. 2d 942, 949 (CA1 1993).

We agree with this summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis

for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. Cf. *ibid.* If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," *ibid.*, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent." 1995 USSG ch. 1, pt. A, p. 6.

Against this background, we consider the standard of review.

III

Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal. *Dorszynski* v. *United States*, 418 U. S. 424, 431 (1974) (reiterating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); *United States* v. *Tucker*, 404 U. S. 443, 447 (1972) (same). The Act altered this scheme in favor of a limited appellate jurisdiction to review federal sentences. 18 U. S. C. § 3742. Among other things, it allows a defendant to appeal an upward departure and the Government to appeal a downward one. §§ 3742(a), (b).

That much is clear. Less clear is the standard of review on appeal. The Government advocates *de novo* review, saying that, like the Guidelines themselves, appellate review of sentencing, and in particular of departure decisions, was intended to reduce unjustified disparities in sentencing. In its

view, *de novo* review of departure decisions is necessary "to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges." Brief for United States 12.

We agree that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion. Section 3742(e)(4), as enacted in 1984, provided "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous." In 1988, Congress amended the statute to impose the additional requirement that courts of appeals "give due deference to the district court's application of the guidelines to the facts." Examining § 3742 in *Williams* v. *United States*, 503 U. S. 193 (1992), we stated as follows:

> "Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. . . . The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Id.*, at 205 (quoting *Solem* v. *Helm*, 463 U. S. 277, 290, n. 16 (1983)).

See also S. Rep. No. 225, at 150 ("The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court").

That the district court retains much of its traditional discretion does not mean appellate review is an empty exercise. Congress directed courts of appeals to "give due deference to the district court's application of the guidelines to the facts." 18 U. S. C. § 3742(e)(4). The deference that is due depends on the nature of the question presented. The district court may be owed no deference, for instance, when the claim on appeal is that it made some sort of mathematical error in applying the Guidelines; under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance.

A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. See *Mistretta*, 488 U. S., at 367 (noting that although the Act makes the Guidelines binding on sentencing courts, "it preserves for the judge the discretion to depart from the guideline applicable to a particular case"). Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. In 1994, for example, 93.9% of Guidelines cases were not appealed. Letter from Pamela G. Montgomery, Deputy General Counsel, United States Sen-

tencing Commission (Mar. 29, 1996). "To ignore the district court's special competence—about the 'ordinariness' or 'unusualness' of a particular case—would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case. . . ." *Rivera*, 994 F. 2d, at 951.

Considerations like these persuaded us to adopt the abuse-of-discretion standard in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990), which involved review of a District Court's imposition of Rule 11 sanctions, and in *Pierce* v. *Underwood*, 487 U. S. 552 (1988), which involved review of a District Court's determination under the Equal Access to Justice Act, 28 U. S. C. § 2412(d), that the position of the United States was "substantially justified," thereby precluding an award of attorney's fees against the Government. There, as here, we noted that deference was owed to the "'judicial actor . . . better positioned than another to decide the issue in question.'" *Pierce*, *supra*, at 559–560 (quoting *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985)); *Cooter & Gell*, *supra*, at 403. Furthermore, we adopted deferential review to afford "the district court the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" 496 U. S., at 404 (quoting *Pierce*, *supra*, at 561–562). Like the questions involved in those cases, a district court's departure decision involves "the consideration of unique factors that are 'little susceptible . . . of useful generalization,'" 496 U. S., at 404, and as a consequence, *de novo* review is "unlikely to establish clear guidelines for lower courts," *id.*, at 405.

The Government seeks to avoid the factual nature of the departure inquiry by describing it at a higher level of generality linked closely to questions of law. The relevant question, however, is not, as the Government says, "whether a particular factor is within the 'heartland'" as a general proposition, Brief for United States 28, but whether the particu-

lar factor is within the heartland given all the facts of the case. For example, it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical. The answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters.

This does not mean that district courts do not confront questions of law in deciding whether to depart. In the present suit, for example, the Government argues that the District Court relied on factors that may not be considered in any case. The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. *Cooter & Gell*, *supra*, at 402. A district court by definition abuses its discretion when it makes an error of law. 496 U. S., at 405. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion. See *id.*, at 403 (court of appeals should "appl[y] a unitary abuse-of-discretion standard"). The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

IV

The principles we have explained require us to reverse the rulings of the Court of Appeals in significant part.

A

The District Court departed downward five levels because King's "wrongful conduct contributed significantly to provoking the offense behavior." 833 F. Supp., at 786. Victim misconduct was an encouraged basis for departure under the 1992 Guidelines and is so now. 1992 USSG § 5K2.10; 1995 USSG § 5K2.10.

Most Guidelines prescribe punishment for a single discrete statutory offense or a few similar statutory offenses with rather predictable fact patterns. Petitioners were convicted of violating 18 U. S. C. § 242, however, a statute unusual for its application in so many varied circumstances. It prohibits, among other things, subjecting any person under color of law "to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." A violation of § 242 can arise in a myriad of forms, and the Guideline applicable to the statute applies to any violation of § 242 regardless of the form it takes. 1992 USSG § 2H1.4. Section 2H1.4 takes account of the different kinds of conduct that might constitute a § 242 violation by instructing courts to use as a base offense level the greater of 10, or 6 plus the offense level applicable to any underlying offense. In this way, § 2H1.4 incorporates the base offense level of the underlying offense; as a consequence, the heartland of § 2H1.4 will vary depending on the defendant's conduct.

Here, the underlying offense was aggravated assault. After adjusting the offense level for use of a dangerous weapon and bodily injury, see 1992 USSG § 1B1.5(a) (a Guideline that incorporates another Guideline incorporates as well the other's specific offense characteristics), the District Court added six levels as required by § 2H1.4. Section 2H1.4 adds the six levels to account for the fact that the offense was committed "under actual or purported legal authority," commentary to § 2H1.4, and that "the harm involved both the underlying conduct and activity intended

to deprive a person of his civil rights," *ibid.* (incorporating introductory commentary to § 2H1.1).

The District Court's analysis of this departure factor showed a correct understanding in applying § 2H1.4 as a mechanical matter and in interpreting its heartland. After summarizing King's misconduct—his driving while intoxicated, fleeing from the police, refusing to obey the officers' commands, attempting to escape from police custody, etc.—the District Court concluded that a downward departure pursuant to § 5K2.10 was justified:

> "Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the defendants' conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger. Nevertheless, the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct." 833 F. Supp., at 787.

The court placed these facts within the context of the relevant Guideline range:

> "Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force.
>
> "The two situations are clearly different. Police officers are always armed with 'dangerous weapons' and may legitimately employ those weapons to administer reasonable force. Where an officer's initial use of force

> is provoked and lawful, the line between a legal arrest and an unlawful deprivation of civil rights within the aggravated assault Guideline is relatively thin. The stringent aggravated assault Guideline, along with its upward adjustments for use of a deadly weapon and bodily injury, contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for the differences between such 'heartland' offenses and the case at hand." *Ibid.*

The Court of Appeals rejected this analysis. It interpreted the District Court to have found that King had been the but-for cause of the crime, not that he had provoked it. According to the Court of Appeals, the District Court "ultimately focused not on provocation itself but rather on the volatility of the incident, and the close proximity between, on the one hand, the victim's misconduct and the officers' concomitant lawful use of force, and, on the other hand, the appellants' unlawful use or authorization of the use of force." 34 F. 3d, at 1459. The Court of Appeals thought these considerations did not justify departure for victim misconduct. It first quoted the test this Court formulated for excessive force cases under the Fourth Amendment:

> "'The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Ibid.* (quoting *Graham* v. *Connor*, 490 U. S. 386, 396–397 (1989)).

The Court of Appeals reasoned that "*before* a use of force can be found excessive, the *Graham* 'calculus,' embracing the very factor which the district court found to be unusual in this case—the 'dynamic arrest situation'—has been taken into consideration." 34 F. 3d, at 1459. Indeed, it noted the

jury not only had to take the *Graham* factors into account, but also, to establish criminal liability, had to conclude that the petitioners "*willfully* came down on the wrong side of the *Graham* standard." 34 F. 3d, at 1459 (emphasis in original). The Court of Appeals concluded that "the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice." *Ibid.*

The court misinterpreted both the District Court's opinion and the heartland of the applicable Guideline range. The District Court's observation that the incident would not have occurred at all "but for" King's misconduct does not alter the further ruling that King provoked petitioners' illegal use of force. At the outset of its analysis, the District Court stated: "[T]he Court finds, and considers as a mitigating circumstance, that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior." 833 F. Supp., at 786. It later discussed "Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct." *Id.*, at 787. Indeed, a finding that King's misconduct provoked lawful force but not the unlawful force that followed without interruption would be a startling interpretation and contrary to ordinary understandings of provocation. A response need not immediately follow an action in order to be provoked by it. The Commission recognized this when it noted that although victim misconduct would rarely be a basis for departure in a nonviolent offense, "an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation." 1992 USSG § 5K2.10. Furthermore, even if an immediate response were required by § 5K2.10, it occurred here: The excessive force followed within seconds of King's misconduct.

The Court of Appeals misinterpreted the heartland of § 2H1.4 by concentrating on whether King's misconduct

made this an unusual case of excessive force. If § 2H1.4 covered punishment only for excessive force cases, it might well be a close question whether victim misconduct of this kind would be sufficient to take the case out of the heartland. Section 2H1.4 is not so designed, however. It incorporates the Guideline for the underlying offense, here § 2A2.2 for aggravated assault, and thus creates a Guideline range and a heartland for aggravated assault committed under color of law. As the District Court was correct to point out, the same Guideline range applies both to a government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive. The District Court did not abuse its discretion in differentiating between the classes of cases, nor did it do so in concluding that unprovoked assaults constitute the relevant heartland. Victim misconduct is an encouraged ground for departure. A district court, without question, would have had discretion to conclude that victim misconduct could take an aggravated assault case outside the heartland of § 2A2.2. That petitioners' aggravated assaults were committed under color of law does not change the analysis. The Court of Appeals thought that it did because § 2H1.4 "explicitly enhances sentences for official misconduct *beyond* those for civilian misconduct." 34 F. 3d, at 1460. The statement is a non sequitur. Section 2H1.4 imposes a six-level increase regardless of whether the government official's aggravated assault is provoked or unprovoked. Aggravated assault committed under color of law always will be punished more severely than ordinary aggravated assault. The District Court did not compare civilian offenders with official offenders; it compared official offenders who are provoked with official offenders who are not. That was the correct inquiry. The punishment prescribed by § 2A2.2 contemplates unprovoked assaults, and as a consequence, the District Court did not abuse its discretion in departing downward for King's misconduct in provoking the wrong.

B

We turn now to the three-level departure. As an initial matter, the Government urges us to hold each of the factors relied upon by the District Court to be impermissible departure factors under all circumstances. A defendant's loss of career opportunities must always be an improper consideration, the Government argues, because "persons convicted of crimes suffer a wide range of consequences in addition to the sentence." Brief for United States 38. Susceptibility to prison abuse, continues the Government, likewise never should be considered because the "degree of vulnerability to assault is an entirely 'subjective' judgment, and the number of defendants who may qualify for that departure is 'virtually unlimited.'" *Id.*, at 39 (quoting 34 F. 3d, at 1455). And so on.

Those arguments, however persuasive as a matter of sentencing policy, should be directed to the Commission. Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. Rather, 18 U. S. C. § 3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." The Guidelines, however, "place essentially no limit on the number of potential factors that may warrant a departure." *Burns* v. *United States*, 501 U. S. 129, 136–137 (1991). The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." 1995 USSG ch. I, pt. A, intro. comment. 4(b). Thus, for the courts to conclude a factor must not be considered

under any circumstances would be to transgress the policy-making authority vested in the Commission.

An example is helpful. In *United States* v. *Lara*, 905 F. 2d 599 (1990), the Court of Appeals for the Second Circuit upheld a District Court's downward departure based on the defendant's "potential for victimization" in prison due to his diminutive size, immature appearance, and bisexual orientation. *Id.*, at 601. In what appeared to be a response to *Lara*, the Commission amended 1989 USSG § 5H1.4, to make [p]hysicial . . . appearance, including physique," a discouraged factor. 1995 USSG App. C, Amdt. 386 (effective Nov. 1, 1991). The Commission did not see fit, however, to prohibit consideration of physical appearance in all cases, nor did it address the broader category of susceptibility to abuse in prison. By urging us to hold susceptibility to abuse in prison to be an impermissible factor in all cases, the Government would have us reject the Commission's considered judgment in favor of our own.

The Government acknowledges as much but says its position is required by 18 U. S. C. § 3553(a)(2). The statute provides:

> "The court, in determining the particular sentence to be imposed, shall consider—
>
> . . . . .
>
> "(2) the need for the sentence imposed—
>
> "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> "(B) to afford adequate deterrence to criminal conduct;
>
> "(C) to protect the public from further crimes of the defendant; and
>
> "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

Echoing the Court of Appeals, the Government interprets § 3553(a)(2) to direct courts to test potential departure factors against its broad sentencing goals and to reject, as a categorical matter, factors that are inconsistent with them. The Government and the Court of Appeals read too much into § 3553(a)(2). The statute requires a court to consider the listed goals in determining "the particular sentence to be imposed." The wording suggests that the goals should be considered in determining which sentence to choose from a given Guideline range or from outside the range, if a departure is appropriate. The statute says nothing about requiring each potential departure factor to advance one of the specified goals. So long as the overall sentence is "sufficient, but not greater than necessary, to comply" with the above-listed goals, the statute is satisfied. § 3553(a).

Even if the text of the statute were ambiguous, we would reject the Government's interpretation. The Government's theory—that § 3553(a)(2) directs courts to decide for themselves, by reference to the broad, open-ended goals of the provision, whether a given factor ever can be an appropriate sentencing consideration—would impose widespread judicial control over sentencing policy. This in turn would nullify the Commission's treatment of particular departure factors and its determination that, with few exceptions, departure factors should not be ruled out on a categorical basis. The sparse text of § 3553(a)(2) cannot support this implausible result. Congress created the Commission to "establish sentencing policies and practices for the Federal criminal justice system," 28 U. S. C. § 991(b)(1), and Congress instructed the Commission, not the courts, to "review and revise" the Guidelines periodically, § 994(*o*). As a result, the Commission has assumed that its role is "over time [to] . . . refine the guidelines to specify more precisely when departures should and should not be permitted." 1992 USSG ch. I, pt. A, intro. comment. 4(b). Had Congress intended the courts to supervise the Commission's treatment of departure factors, we ex-

pect it would have said so in a clear way. It did not, and we will not assume this role.

We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline. We now turn to the four factors underlying the District Court's three-level departure.

1

The first question is whether the District Court abused its discretion in relying on the collateral employment consequences petitioners would face as a result of their convictions. The District Court stated:

> "Defendants Koon and Powell will be subjected to a multiplicity of adversarial proceedings. The LAPD Board of Rights will charge Koon and Powell with a felony conviction and, in a quasi-judicial proceeding, will strip them of their positions and tenure. Koon and Powell will be disqualified from other law enforcement careers. In combination, the additional proceedings, the loss of employment and tenure, prospective disqualification from the field of law enforcement, and the anguish and disgrace these deprivations entail, will constitute substantial punishment in addition to any court-imposed sentence. In short, because Koon and Powell are police officers, certain unique burdens flow from their convictions." 833 F. Supp., at 789 (footnotes omitted).

The Court of Appeals rejected the District Court's analysis, noting among other things the "ease with which this fac-

tor can be used to justify departures that are based, either consciously or unconsciously, on the defendant's socioeconomic status, a factor that is *never* a permissible basis for review." 34 F. 3d, at 1454. We agree with the Court of Appeals that a defendant's career may relate to his or her socioeconomic status, but the link is not so close as to justify categorical exclusion of the effect of conviction on a career. Although an impermissible factor need not be invoked by name to be rejected, socioeconomic status and job loss are not the semantic or practical equivalents of each other.

We nonetheless conclude that the District Court abused its discretion by considering petitioners' career loss because the factor, as it exists in these circumstances, cannot take the suit out of the heartland of 1992 USSG §2H1.4. As noted above, 18 U. S. C. §242 offenses may take a variety of forms, but they must involve willful violations of rights under color of law. Although cognizant of the deference owed to the District Court, we must conclude it is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field. Indeed, many public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment. See Cal. Govt. Code Ann. §19572(k) (West 1995) ("Conviction of a felony or conviction of a misdemeanor involving moral turpitude" constitutes cause for dismissal); §18935(f) (State Personnel Board may refuse to declare eligible for state employment one who has "been convicted of a felony, or convicted of a misdemeanor involving moral turpitude"); Ky. Rev. Stat. Ann. 18A.146(2) (Michie 1992); 4 Pa. Code §7.173 (1995). Public officials convicted of violating §242 have done more than engage in serious criminal conduct; they have done so under color of the law they have sworn to uphold. It is to be expected that a government official would be subject

to the career-related consequences petitioners faced after violating § 242, so we conclude these consequences were adequately considered by the Commission in formulating § 2H1.4.

2

We further agree with the Court of Appeals that the low likelihood of petitioners' recidivism was not an appropriate basis for departure. Petitioners were first-time offenders and so were classified in criminal history category I. The District Court found that "[w]ithin Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly unlikely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent 'to a degree' not contemplated by the Guidelines." 833 F. Supp., at 790, n. 20. The District Court failed to account for the Commission's specific treatment of this issue, however. After explaining that a district court may depart upward from the highest criminal offense category, the Commission stated:

> "However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." 1992 USSG § 4A1.3.

The District Court abused its discretion by considering appellants' low likelihood of recidivism. The Commission took that factor into account in formulating the criminal history category.

3

The two remaining factors are susceptibility to abuse in prison and successive prosecutions. The District Court did not abuse its discretion in considering these factors. The

Court of Appeals did not dispute, and neither do we, the District Court's finding that "[t]he extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse," 833 F. Supp., at 785–786. Petitioners' crimes, however brutal, were by definition the same for purposes of sentencing law as those of any other police officers convicted under 18 U. S. C. § 242 of using unreasonable force in arresting a suspect, sentenced under § 2H1.4, and receiving the upward adjustments petitioners received. Had the crimes been still more severe, petitioners would have been assigned a different base offense level or received additional upward adjustments. Yet, due in large part to the existence of the videotape and all the events that ensued, "widespread publicity and emotional outrage . . . have surrounded this case from the outset," 833 F. Supp., at 788, which led the District Court to find petitioners "particularly likely to be targets of abuse during their incarceration," *ibid.* The District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts.

As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. *Heath* v. *Alabama*, 474 U. S. 82 (1985). Nonetheless, the District Court did not abuse its discretion in determining that a "federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants." 833 F. Supp., at 790. The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court.

V

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the even-handedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.

* * *

The Court of Appeals identified the wrong standard of review. It erred as well in finding that victim misconduct did not justify the five-level departure and that susceptibility to prison abuse and the burdens of successive prosecutions could not be relied upon for the three-level departure. Those sentencing determinations were well within the sound discretion of the District Court. The District Court did abuse its discretion in relying on the other two factors forming the three-level departure: career loss and low recidivism risk. When a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors. *Williams*, 503 U. S., at 203. As the District Court here stated that none of the four factors standing alone would justify the three-level departure, it is not evident that

the court would have imposed the same sentence if it had relied only on susceptibility to abuse in prison and the hardship of successive prosecutions. The Court of Appeals should therefore remand the case to the District Court.

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

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

In my opinion the District Court did not abuse its discretion when it relied on the unusual collateral employment consequences faced by these petitioners as a result of their convictions. I therefore except Part IV–B–1 from my otherwise complete endorsement of the Court's opinion. I also note that I do not understand the opinion to foreclose the District Court from basing a downward departure on an aggregation of factors each of which might in itself be insufficient to justify a departure.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

I agree with the way today's opinion describes a district court's tasks in sentencing under the Guidelines, and the role of a court of appeals in reviewing sentences, but I part company from the Court in applying its standard on two specific points. I would affirm the Court of Appeals's rejection of the downward departures based on susceptibility to abuse in prison and on successive prosecution, for to do otherwise would be to attribute an element of irrationality to the Commission and to its "heartland" concept. Accordingly, I join the Court's opinion except Part IV–B–3.

As the majority notes, *ante*, at 106, "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." In

fact, Congress allowed district courts to depart from the Guidelines only if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U. S. C. § 3553(b); see also *ante*, at 92–93. While discussing departures, the Commission quotes this language from § 3553(b), before stating that "[w]hen a court finds an atypical case, . . . the court may consider whether a departure is warranted." United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, intro. comment. 4(b) (Nov. 1995) (1995 USSG). Thus, both Congress and the Commission envisioned that departures would require some unusual factual circumstance, but would be justified only if the factual difference "should" result in a different sentence. Departures, in other words, must be consistent with rational normative order.

As to the consideration of susceptibility to abuse in prison, the District Court departed downward because it believed that "the widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the [petitioners'] status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration." 833 F. Supp. 769, 788 (CD Cal. 1993). That is, the District Court concluded that petitioners would be subject to abuse not simply because they were former police officers, but in large part because of the degree of publicity and condemnation surrounding their crime.[1] But that reasoning overlooks the fact that the publicity stemmed from the remarkable brutality of petitioners' proven behavior, which it was their misfortune to have pre-

[1] Although it is not essential to my analysis, I note in passing that the unusual extent of outside publicity is probably irrelevant in the prison environment. Given any amount of outside publicity, prison inmates quickly learn about new arrivals, including former police officers, and the crimes of which they were convicted.

cisely documented on film. To allow a departure on this basis is to reason, in effect, that the more serious the crime, and the more widespread its consequent publicity and condemnation, the less one should be punished; the more egregious the act, the less culpable the offender. In the terminology of the Guidelines, such reasoning would take the heartland to be the domain of the less, not the more, deplorable of the acts that might come within the statute. This moral irrationality cannot be attributed to the heartland scheme, however, and rewarding the relatively severe offender could hardly have been in the contemplation of a Commission that discouraged downward departures for susceptibility to prison abuse even when the nonculpable reason is an unusual "[p]hysical . . . appearance, including physique." 1995 USSG §5H1.4; see also *ante*, at 107; 1995 USSG ch. 1, pt. A, intro. comment. 3 (discussing the principle of "'just deserts,'" which the Commission describes as a concept under which "punishment should be scaled to the offender's culpability and the resulting harms").[2]

The Court of Appeals appreciated the significance of the requisite moral calculus when it wrote that "[a]ny public outrage was the direct result of [petitioners'] criminal acts. It is incongruous and inappropriate to reduce [petitioners'] sentences specifically because individuals in society have condemned their acts as criminal and an abuse of the trust that society placed in them." 34 F. 3d 1416, 1456 (CA9 1994). The Court of Appeals should be affirmed on this point.

I believe that it was also an abuse of discretion for the District Court to depart downward because of the successive prosecutions.[3] In these cases, there were facial showings

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[2] The requirement of normative order does not, of course, say anything one way or the other about considering exceptionally unusual physical appearance as a basis to anticipate abuse.

[3] It is true, factually, that successive federal prosecutions after state proceedings occur very rarely even in criminal civil rights prosecutions, U. S. Commission on Civil Rights, Who is Guarding the Guardians?, 112, 116 (Oct. 1981) (noting that between 50 and 100 police misconduct cases

that the state court system had malfunctioned when the petitioners were acquitted (or, in the case of one charge, had received no verdict), and without something more one cannot accept the District Court's conclusion that there was no demonstration that a "clear miscarriage of justice" caused the result in the state trial. 833 F. Supp., at 790. This is so simply because the federal prosecutors, in proving their cases, proved conduct constituting the crimes for which petitioners had been prosecuted unsuccessfully in the state court. See *Powell* v. *Superior Court*, 232 Cal. App. 3d 785, 789, 283 Cal. Rptr. 777, 779 (1991) (noting that petitioners were charged, *inter alia*, with assault by force likely to produce great bodily injury, Cal. Penal Code Ann. § 245(a)(1) (West 1988), and being an officer unnecessarily assaulting or beating any person in violation of § 149); § 149 ("Every public officer who, under color of authority, without lawful necessity, assaults or beats any person" commits an offense); § 245(a)(1) ("Every person who commits an assault upon the person of another . . . by any means of force likely to produce great bodily injury" commits an offense); *ante*, at 87–88 (observing that petitioners were tried in state court for assault with a deadly weapon and excessive use of force by a police officer and tried in federal court for willfully using or willfully allowing others to use unreasonable force in arresting King); 833 F. Supp., at 790 (stating that the "same underlying conduct" was involved in both cases). While such a facial showing resulting from the identity of factual predicates for the state and federal prosecutions might in some cases be overcome (by demonstrating, say, that a crucial witness for

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are brought each year and that from March 1977 to September 1980 only seven successive prosecutions were authorized); *United States* v. *Davis*, 906 F. 2d 829, 832 (CA2 1990) ("In practice, successive prosecutions for the same conduct remain rarities"). Those figures do not, however, demonstrate that all convictions on successive federal prosecutions under 18 U. S. C. § 242 should for that reason be subject to discretion to depart downward, for they do not take account of the normative ordering, discussed below.

the State was unavailable in the state trial through no one's fault), there was no evidence to overcome it here.

As a consequence, reading the Guidelines to suggest that those who profit from state-court malfunctions should get the benefit of a downward departure would again attribute a normative irrationality to the heartland concept. The sense of irrationality here is, to be sure, different from what was presupposed by the District Court's analysis on the issue of susceptibility to abuse in prison, for the incongruity produced by downward departures here need not depend on the defendant's responsibility for the particular malfunction of the state system. But the fact remains that it would be a normatively obtuse sentencing scheme that would reward a defendant whose federal prosecution is justified solely because he has obtained the advantage of injustice produced by the failure of the state system.

This is not, of course, to say that a succession of state and federal prosecutions may never justify a downward departure. If a comparison of state and federal verdicts in relation to their factual predicates indicates no incongruity, a downward departure at federal sentencing could well be consistent with an application of a rational heartland concept. But these are not such cases.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

I join the Court's opinion with the exception of Part IV–B–3. I agree with JUSTICE SOUTER's conclusion in respect to that section. The record here does not support departures based upon either the simple fact of two prosecutions or the risk of mistreatment in prison.

In my view, the relevant Guideline, 1992 USSG §2H1.4, encompasses the possibility of a double prosecution. That Guideline applies to various civil rights statutes, which Congress enacted, in part, to provide a federal forum for the protection of constitutional rights where state law enforce-

ment efforts had proved inadequate. See, *e. g., Ngiraingas* v. *Sanchez,* 495 U. S. 182, 187–189 (1990); *Monroe* v. *Pape,* 365 U. S. 167, 171–180 (1961); *Screws* v. *United States,* 325 U. S. 91, 131–134 (1945) (Rutledge, J., concurring in result). Before promulgating the Guidelines, the Commission "examined the many hundreds of criminal statutes in the United States Code," 1995 USSG ch. 1, pt. A, intro. comment. 5, and it would likely have been aware of this well-known legislative purpose. The centrality of this purpose, the Commission's likely awareness of it, and other considerations that JUSTICE SOUTER mentions, *ante,* at 116–118, lead me to conclude on the basis of the statute and Guideline itself, 18 U. S. C. § 3553(b), that the Commission would have considered a "double prosecution" case as one ordinarily within, not outside, the "civil rights" Guideline's "heartland." For that reason, a simple double prosecution, without more, does not support a departure. See § 3553(b) (departures permitted only when circumstances were "not *adequately* taken into consideration" by the Commission) (emphasis added).

The departure on the basis of potential mistreatment in prison presents a closer question. Nonetheless, differences in prison treatment are fairly common—to the point where too frequent use of this factor as a basis for departure could undermine the uniformity that the Guidelines seek. For that reason, and others that JUSTICE SOUTER mentions, *ante,* at 115–116, I believe that the Guidelines themselves embody an awareness of potentially harsh (or lenient) treatment in prison, thereby permitting departure on that basis only in a truly unusual case. Even affording the District Court "due deference," § 3742(e), I cannot find in this record anything sufficiently unusual, compared, say, with other policemen imprisoned for civil rights violations, as to justify departure.

Syllabus

MELENDEZ *v.* UNITED STATES

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

No. 95–5661. Argued February 27, 1996—Decided June 17, 1996

After agreeing with others to buy cocaine, petitioner was charged with a conspiracy violative of 21 U. S. C. § 846, which carries a statutory minimum sentence of 10 years' imprisonment. He ultimately signed a plea agreement providing, *inter alia*, that in return for his cooperation with the Government's investigation and his guilty plea, the Government would move the sentencing court, pursuant to § 5K1.1 of the United States Sentencing Guidelines, to depart downward from the otherwise applicable Guideline sentencing range, which turned out to be 135 to 168 months' imprisonment. Although the agreement noted the applicability of the 10-year statutory minimum sentence, neither it nor the ensuing § 5K1.1 motion mentioned departure below that minimum. Pursuant to the motion, the District Court departed downward from the Guideline range in sentencing petitioner. It also ruled, however, that it had no authority to depart below the statutory minimum because the Government had not made a motion, pursuant to 18 U. S. C. § 3553(e), that it do so. It thus sentenced petitioner to 10 years, and the Third Circuit affirmed.

Held: A Government motion attesting to the defendant's substantial assistance in a criminal investigation and requesting that the district court depart below the minimum of the applicable Guideline sentencing range does not also authorize the court to depart below a lower statutory minimum sentence. Pp. 124–131.

(a) Guideline § 5K1.1 does not create a "unitary" motion system. Title 18 U. S. C. § 3553(e) requires a Government motion requesting or authorizing the district court to "impose a sentence below a level established by statute as minimum sentence" before the court may impose such a sentence. Nothing in § 3553(e) suggests that a district court has the power to impose such a sentence when the Government has not authorized it, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in § 3553(e) or 28 U. S. C. § 994(n) suggest that the Commission itself may dispense with § 3553(e)'s motion requirement or, alternatively, "deem" a motion requesting or authorizing different action—such as a departure below the Guidelines minimum—to be a motion authorizing departure below the statutory minimum. Section 5K1.1 cannot be read as attempting to exercise this nonexistent authority. That section states that "[u]pon motion of the

Syllabus

government . . . the court may depart from the guidelines," while its Application Note 1 declares that "[u]nder circumstances set forth in . . . § 3553(e) and . . . § 994(n) . . . substantial assistance . . . may justify a sentence below a statutorily required minimum sentence." One of the circumstances set forth in § 3553(e) is that the Government has authorized the court to impose such a sentence. The Government is correct that the relevant statutory provisions merely charge the Commission with constraining the district court's discretion in choosing a specific sentence once the Government has moved for a departure below the statutory minimum, not with "implementing" § 3553(e)'s motion requirement, and that § 5K1.1 does not improperly attempt to dispense with or modify that requirement. Pp. 124–130.

(b) For two reasons, the Court need not decide whether the Government is correct in reading § 994(n) to permit the Commission to construct a unitary motion system by providing that the district court may depart below the Guidelines range only when the Government is willing to authorize the court to depart below the statutory minimum, if the court finds that to be appropriate. First, even if the Commission had done so, that would not help petitioner, since the Government has not authorized a departure below the statutory minimum here. Second, the Commission has not adopted this type of unitary system. Pp. 130–131.

55 F. 3d 130, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which O'CONNOR and BREYER, JJ., joined as to Parts I and II. SOUTER, J., filed a concurring opinion, *post*, p. 131. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 132. BREYER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 132.

Patrick A. Mullin argued the cause for petitioner. With him on the briefs were *David Zlotnick* and *Peter Goldberger*.

Irving L. Gornstein argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.*

**Alan I. Horowitz*, *James R. Lovelace*, and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Chester M. Keller filed a brief for the Association of Criminal Defense Lawyers in New Jersey as *amicus curiae*.

JUSTICE THOMAS delivered the opinion of the Court.

The issue here is whether a Government motion attesting to the defendant's substantial assistance in a criminal investigation and requesting that the district court depart below the minimum of the applicable sentencing range under the Sentencing Guidelines also permits the district court to depart below any statutory minimum sentence. We hold that it does not.

I

Petitioner and several others entered into an agreement to buy cocaine from confidential informants of the United States Customs Service. As a result, petitioner was charged with conspiring to distribute and to possess with intent to distribute more than five kilograms of cocaine, see § 406, 84 Stat. 1265, as amended, 21 U. S. C. § 846, a crime that carries a statutory minimum sentence of 10 years' imprisonment, see § 841(b)(1)(A). Plea negotiations ensued, and petitioner ultimately signed a cooperating plea agreement. The agreement provided, in pertinent part, that in return for petitioner's cooperation with the Government's investigation and his guilty plea, the Government would "move the sentencing court, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range." App. 9. The agreement noted that the offense to which petitioner would plead guilty "carries a statutory mandatory minimum penalty of 10 years' imprisonment." *Id.*, at 6. The agreement did not require the Government to authorize the District Court to impose a sentence below the statutory minimum, nor did it specifically state that the Government would oppose departure below the statutory minimum.

Petitioner pleaded guilty to the charged conspiracy. The probation officer determined that the Guideline sentencing range applicable to petitioner's crime was 135 to 168 months' imprisonment. In a letter to the court, the Government described the assistance rendered by petitioner and moved the

court to impose "a sentence lower than what the [c]ourt ha[d] determined to be the otherwise applicable *[sic]* under the sentencing guidelines." *Id.*, at 13–14. The letter specifically noted that "[t]his motion is made pursuant to Section 5K1.1." *Id.*, at 13. The Government did not request a sentence below the statutory minimum, although, again, it did not state that the Government opposed such a departure. The District Court granted the Government's motion and departed downward from the sentencing range set by the Guidelines. However, because the Government had not also moved the District Court to depart below the statutory minimum pursuant to 18 U. S. C. § 3553(e), the court ruled that it had no authority to so depart; it thus imposed the 10-year minimum sentence required by statute.

On appeal, petitioner contended that the District Court had erred in concluding that it had no authority to depart below the statutory minimum. A § 5K1.1 motion, he argued, not only allows the court to depart downward from the sentencing level set by the Guidelines but also permits the court to depart below a lower statutory minimum. See United States Sentencing Commission, Guidelines Manual § 5K1.1, p. s. (Nov. 1995) (USSG). A divided panel of the Court of Appeals for the Third Circuit rejected that argument and affirmed the 10-year sentence. 55 F. 3d 130 (1995). A petition for rehearing was denied, with six judges dissenting.

As we noted in *Wade* v. *United States*, 504 U. S. 181, 185 (1992), the Courts of Appeals disagree as to whether a Government motion attesting to the defendant's substantial assistance and requesting that the district court depart below the minimum of the applicable sentencing range under the Guidelines also permits the district court to depart below any statutory minimum.[1]

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[1] Compare 55 F. 3d 130 (CA3 1995) and *United States* v. *Rodriguez-Morales*, 958 F. 2d 1441 (CA8), cert. denied, 506 U. S. 940 (1992), with *United States* v. *Ah-Kai*, 951 F. 2d 490 (CA2 1991), *United States* v. *Beckett*, 996 F. 2d 70 (CA5 1993), *United States* v. *Wills*, 35 F. 3d 1192 (CA7 1994), and *United States* v. *Keene*, 933 F. 2d 711 (CA9 1991).

We granted certiorari to resolve the conflict. 516 U. S. 963 (1995). We now hold that such a motion does not authorize a departure below a lower statutory minimum.

II

The question presented involves two subsections of federal statutes and a policy statement of the Guidelines. Title 18 U. S. C. § 3553(e) provides:

> "Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code."

Title 28 U. S. C. § 994(n), in turn, states:

> "The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

Finally, the text of § 5K1.1 of the Guidelines provides:

> "Substantial Assistance to Authorities (Policy Statement)
>
> "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

> "(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following: [List of five factors for the court's consideration, including] the government's evaluation of the assistance rendered."

Petitioner argues that § 5K1.1 creates what he calls a "unitary" motion system, in which a motion attesting to the substantial assistance of the defendant and requesting a departure below the Guidelines range also permits a district court to depart below the statutory minimum.[2] The Government views § 5K1.1 as establishing a binary motion system, which permits the Government to authorize a departure below the Guidelines range while withholding from the court the authority to depart below a lower statutory minimum. The parties argue, naturally, that their respective interpretations of the system actually adopted by the Sentencing Commission were permissible ones under § 3553(e) and § 994(n).[3]

We believe that § 3553(e) requires a Government motion requesting or authorizing the district court to "impose a sentence below a level established by statute as minimum

[2] Petitioner also argues for the first time in his reply brief that the plea agreement into which he entered was at least ambiguous with respect to whether it required the Government to move the District Court to depart below the statutory minimum—and thus that the agreement itself permitted the court to depart below the 10-year minimum. See Reply Brief for Petitioner 7–8. We do not view this issue as included within the question upon which we granted certiorari, see Pet. for Cert. 3 ("Did the sentencing court have the discretion to depart below the applicable statutory minimum once the United States moved for departure under USSG § 5K1, without the requirement of a second government departure application under 18 U. S. C. 3553(e)?"), and petitioner appears to concede that it is not, see Tr. of Oral Arg. 15. We therefore decline to address the argument.

[3] Although it is plain that under § 994(n), the Commission was at least authorized to create a system in which *no* Government motion of any kind need be filed before the district court may depart below the Guidelines minimum, neither party argues that the Commission has created such a system.

sentence" before the court may impose such a sentence. Petitioner and his *amici* repeatedly characterize the motion required by § 3553(e) as a "motion that substantial assistance has occurred," Brief for Petitioner 12, a "motion acknowledging the defendant's 'substantial assistance,' " *id.*, at 8, and the like. But the term "motion" generally means "[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant." Black's Law Dictionary 1013 (6th ed. 1990).[4] Papers simply "acknowledging" substantial assistance are not sufficient if they do not indicate desire for, or consent to, a sentence below the statutory minimum.[5]

Of course, the Government did more than simply "acknowledge" substantial assistance here: It moved the court to impose a sentence below the Guideline range. But we agree with the Government that nothing in § 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in § 3553(e) or § 994(n) suggest that the Commission itself may dispense with § 3553(e)'s motion requirement or, alternatively, "deem"

[4] See also Random House Dictionary of the English Language 1254 (2d ed. 1987) (defining "motion" in the legal sense as "an application made to a court or judge for an order, ruling, or the like"); *Wade* v. *United States*, 504 U. S. 181, 187 (1992) ("[Substantial assistance] is a necessary condition for [a departure, but] it is not a sufficient one. The Government's decision not to move may have been based not on a failure to acknowledge or appreciate [the defendant's] help, but simply on its rational assessment of the cost and benefit that would flow from moving").

[5] We do not mean to imply, of course, that specific language (such as that quoted in text) or, on the other hand, an express reference to § 3553(e) is necessarily required before a court may depart below the statutory minimum. Cf. Brief for Petitioner 5–6, 18, 32, 34 (characterizing the opposing argument in this fashion). But the Government must in some way indicate its desire or consent that the court depart below the statutory minimum before the court may do so.

a motion requesting or authorizing different action—such as a departure below the Guidelines minimum—to be a motion authorizing the district court to depart below the statutory minimum.

Moreover, we do not read § 5K1.1 as attempting to exercise this nonexistent authority. Section 5K1.1 says: "Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the guidelines," while its Application Note 1 says: "Under circumstances set forth in 18 U. S. C. § 3553(e) and 28 U. S. C. § 994(n) . . . substantial assistance . . . may justify a sentence below a statutorily required minimum sentence," § 5K1.1, comment., n. 1. One of the circumstances set forth in § 3553(e) is, as we have explained previously, that the Government has authorized the court to impose a sentence below the statutory minimum.

Petitioner and his *amici* argue that § 3553(e) requires a sentence below the statutory minimum to be imposed in "accordance" with the Guidelines; that § 994(n) specifically directs the Commission to draft a provision covering substantial assistance cases, including cases in which a sentence below a statutory minimum is warranted; and that if § 5K1.1 is not read as creating a unitary motion system, then the Commission has improperly failed to meet its obligation, because no other provision of the Guidelines implements § 3553(e) and § 994(n). They also argue (1) that the reference to § 3553(e) in § 5K1.1's Application Note 1 indicates that § 5K1.1 is a "conduit" established by the Commission for "implementation" of § 3553(e); (2) that Application Note 2's use of the broad term "sentencing reduction," rather than "departure from the guidelines range," supports petitioner's view that § 5K1.1 authorizes departures below a statutory minimum;[6] (3) that Application Note 3 makes sense only on

[6] Application Note 2 provides in relevant part: "The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility." USSG § 5K1.1, comment., n. 2.

the assumption that the district court retains "full discretionary power" over the extent of the sentencing reduction (*i. e.*, the authority to choose any sentence once the Government makes any motion confirming the defendant's substantial assistance);[7] (4) that the reference to § 5K1.1 alone (rather than to § 3553(e)) in USSG § 2D1.1's Application Note 7 further supports petitioner's claim that § 5K1.1 is a conduit for implementation of § 3553(e);[8] and (5) that if the factors described in § 5K1.1(a) limiting the district court's discretion do not apply to sentences imposed after the Government moves to depart below the statutory minimum, then the district court's discretion will be wholly unlimited in those circumstances.

In the Government's view, § 3553(e) already gives the district court authority to depart below the statutory minimum on motion to do so by the prosecutor. The Government urges us to read the last sentence of § 3553(e), and the inclusion of the phrase "including a sentence that is lower than that established by statute as a minimum sentence" in § 994(n), as merely requiring the Commission to constrain the district court's discretion in choosing a sentence after the Government moves to depart below the statutory minimum. The Government contends that the first paragraph of § 5K1.1 does not authorize departures below the statutory minimum, but that § 5K1.1(a) does apply to sentences imposed after the

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[7] Application Note 3 provides: "Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain." USSG § 5K1.1, comment., n. 3.

[8] Application Note 7 provides in pertinent part: "Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U. S. C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' See § 5K1.1 (Substantial Assistance to Authorities)." USSG § 2D1.1, comment., n. 7. Section 2D1.1 is a Guideline addressed to a variety of drug offenses.

Government moves to depart below the statutory minimum (as well as to sentences imposed after the Government moves to depart below the Guidelines range); § 5K1.1(a) thus implements the requirements of § 3553(e) and § 994(n) that relate to sentences below the statutory minimum, by requiring the district court to consider the factors listed in §§ 5K1.1(a)(1)–(5) in determining the appropriate extent of a departure below the statutory minimum. According to the Government, the difficulties and gaps referred to by petitioner vanish once § 5K1.1(a) is so construed.

We agree with the Government that the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum.[9] Congress did not charge the Commission with "implementing" § 3553(e)'s Government motion requirement, beyond adopting provisions constraining the district court's discretion regarding the particular sentence selected.

Although the various relevant Guidelines provisions invoked by the parties could certainly be clearer, we also believe that the Government's interpretation of the current provisions is the better one. Section 5K1.1(a) may guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range.[10] The Commission has not, however, im-

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[9] Notably, § 3553(e) states that the "sentence" shall be imposed in accordance with the Guidelines and policy statements, not that the "departure" shall occur, or shall be authorized, in accordance with the Guidelines and policy statements.

[10] Section § 5K1.1(a) may apply of its own force to sentences below the statutory minimum, see *ibid.* (providing that the district court shall determine "[t]he appropriate reduction" by applying a nonexhaustive list of factors), and both the reference to § 3553(e) in § 5K1.1's Application Note 1 and the reference to § 5K1.1 in § 2D1.1's Application Note 7 may reflect that fact. Or perhaps the phrase "[t]he appropriate reduction" in § 5K1.1(a) encompasses only departures below the Guidelines range, but

properly attempted to dispense with or modify the requirement for a departure below the statutory minimum spelled out in § 3553(e)—that of a Government motion requesting or authorizing a departure below the statutory minimum.

The Government has made no such motion here. Hence, the District Court correctly concluded that it lacked the authority to sentence petitioner to less than 10 years' imprisonment.

III

What is at stake in the long run is whether the Government can make a motion authorizing the district court to depart below the Guidelines range but withholding from the district court the power to depart below the statutory minimum. Although the Government contends correctly that the Commission does not have authority to "deem" a Government motion that does not authorize a departure below the statutory minimum to be one that does authorize such a departure, the Government apparently reads § 994(n) to permit the Commission to construct a unitary motion system *by adjusting the requirements for a departure below the Guidelines minimum*—that is, by providing that the district court may depart below the Guidelines range only when the Government is willing to authorize the court to depart below the statutory minimum, if the court finds that to be appropriate. See Tr. of Oral Arg. 26–31.

We need not decide whether the Commission could create this second type of unitary motion system, for two reasons. First, even if the Commission had done so, that would not help petitioner, since the Government has not authorized a departure below the statutory minimum here. Second, we agree with the Government that the Commission has not adopted this type of unitary motion system. Neither the

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the Application Notes are meant to suggest that the court should also consider the § 5K1.1(a) factors in the analogous circumstance of a departure below the statutory minimum.

text of § 5K1.1 nor its commentary expressly limits the authority of the court to depart below the Guidelines minimum to situations in which the Government has moved to depart below the statutory minimum. The text of § 5K1.1 says: "Upon motion of the government stating that the defendant has provided substantial assistance . . . , the court may depart from the guidelines." We do not read this sentence to say: "Upon motion of the government stating that the defendant has provided substantial assistance . . . and authorizing the court to depart below the statutory minimum, if any, the court may depart from the guidelines." Rather, we read it as permitting the district court to depart below the Guidelines range when the Government states that the defendant has provided substantial assistance and requests or authorizes the district court to depart below the Guidelines range. As we have noted, *supra*, at 127–130, the Application Notes to § 5K1.1 and § 2D1.1 do not compel any other reading.

The judgment is affirmed.

It is so ordered.

JUSTICE SOUTER, concurring.

I agree with the conclusion that 18 U. S. C. § 3553(e) requires a motion by the Government asking the district court to impose a sentence below the statutory minimum, but I part company with the Court on the characterization of the policy statement numbered § 5K1.1, United States Sentencing Commission, Guidelines Manual § 5K1.1, p. s. (Nov. 1995) (USSG). The text of this policy statement deals with departures from the Guidelines; the best reading of each sentence is that its referent is a Guideline departure, and that neither directly applies to reductions below mandatory minimums. The Application Notes (which are "the legal equivalent of a policy statement," USSG § 1B1.7) are where the Sentencing Commission has dealt with sentences below statutory minimums. In my view, the Sentencing Commission has discharged its responsibility under 28 U. S. C. § 994(n) by its

inclusion of the Application Notes, which effectively tell district courts that the policy statement applies as well to motions for reductions below mandatory minimums. Thus, my disagreement is over the suggestion that the two sentences of § 5K1.1 can be treated separately. I would simply say that the Application Notes indicate that § 5K1.1 applies to motions under § 3553(e), and leave it at that.

JUSTICE STEVENS, concurring in the judgment.

Petitioner has persuaded me that the Sentencing Commission intended § 5K1.1 to create a unitary motion system under which any request for a departure below the Guideline range based on substantial assistance would also authorize a departure below the statutory minimum. Such a system would be eminently reasonable, but, for two reasons, I am convinced that Congress did not intend to authorize it. First, I agree with the Court that the text of § 3553(e) does not authorize the court to impose a sentence below the statutory minimum unless the Government has made a motion requesting that relief. Second, notwithstanding my serious doubts concerning the wisdom of a congressional decision to impose statutory minimum sentences higher than those considered appropriate by the Commission, the very fact that Congress has done so indicates that it intended to confer the authority to dispense with the statutory minima on the prosecutor rather than the Commission.

Thus, I concur in the judgment because I agree with the Court's interpretation of § 3553(e).

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for, like the Court, I believe the Commission does not have the power to modify Congress' statutes. I disagree with Part III, however, because the Commission does have the power to write its own Guidelines and, in my view, the Commission has in

fact exercised that power to create what the Court calls a "unitary motion system."

To understand that system, one must keep in mind two facts. First, many "substantial assistance" departures involve departures only from Guideline sentences, not from statutory mandatory minimum sentences. When a defendant seeks a "substantial assistance" departure from the minimum Guideline sentence for robbery, fraud, money laundering, tax evasion, or most other offenses, the defendant need not worry about a statutorily required minimum sentence, for either no such minimum sentence applies, or that sentence is so far below the minimum Guideline sentence that there is no practical likelihood of a departure drastic enough to make it relevant. The Guidelines govern departures from these Guideline sentences, and they permit judges to depart downward for "substantial assistance" only if the Government makes a "motion . . . stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." United States Sentencing Commission, Guidelines Manual § 5K1.1, p. s. (Nov. 1995) (USSG). I call the policy statement that sets forth this rule the "Substantial Assistance Guideline."

Second, some criminal convictions implicate not only the Guidelines, but also the special statutes (applicable particularly to drug and weapon offenses) that set "mandatory minimum" sentences. See United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System, App. A, pp. A1–A8 (Aug. 1991) (Mandatory Minimum Penalties). The law does not normally permit a departure below such mandatory statutory minimums. But cf. 18 U. S. C. § 3553(f) (limitation on applicability of statutory minimums in certain cases); USSG § 5C1.2 (same). The law does permit such a departure, however, for one special reason, namely, "substantial assistance," but only if the Government makes a "motion . . . so as to reflect a defendant's

substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U. S. C. § 3553(e). I shall call the statute that states this rule the "Substantial Assistance Statute."

With these two basic facts in mind, one might ask what the Commission means by the term "substantial assistance" in its Substantial Assistance Guideline. In particular, do those words in that Guideline mean the same thing that those same words mean in the Substantial Assistance Statute? Or does the Commission intend those words in its Guideline to create a tougher, or perhaps a more lenient, standard where departures from Guideline minimums (rather than departures from statutory minimums) are at issue?

The answer to this interpretive question, in my view, is that the Commission means the term "substantial assistance" in its Substantial Assistance Guideline to create the same standard that the Substantial Assistance Statute creates using the same words. As so interpreted, the Guideline authorizes a sentencing judge to depart downward from a Guideline sentence for substantial assistance only if the Government files the same kind of motion that the Government would file to obtain a departure from a statutory minimum sentence, were such a sentence at issue.

My reasons for believing that the Commission intended to tie its Substantial Assistance Guideline to the Substantial Assistance Statute (thereby recognizing one kind of "substantial assistance," not two) are the following: First, as I have said, the language the Commission used to write its Substantial Assistance Guideline is virtually identical to the language that appears in the Substantial Assistance Statute. Compare USSG § 5K1.1, p. s., with 18 U. S. C. § 3553(e). Second, the Commission nowhere suggests that the key words "substantial assistance" mean something different in the two places (the Guideline and the Statute) where they appear, and I cannot imagine any reason why the Commission would

have wanted to create different standards through the use of identical words, thereby creating additional administrative complexity and risking unnecessary confusion. Third, the Commission's commentary refers to statutory and guideline departures indiscriminately. USSG § 2D1.1, comment., n. 7 (citing Substantial Assistance Guideline for proposition that statutory minimum may be "waived"); see also Mandatory Minimum Penalties, *supra*, at 59 (discussing unitary "substantial assistance motions").

The Court's reason for reaching the contrary conclusion is that the Commission did not specify that courts could not depart below a minimum Guideline sentence without a Government motion for departure below any applicable statutory minimum. That is, the Substantial Assistance Guideline does not say: "Upon motion of the government stating that the defendant has provided substantial assistance . . . *and authorizing the court to depart below the statutory minimum, if any,* the court may depart from the guidelines." *Ante*, at 131 (emphasis added; internal quotation marks omitted). But it is not surprising that the Commission neglected to add these words of crystal clarity to the Substantial Assistance Guideline, since that Guideline governs many cases that have nothing to do with mandatory minimum sentences. It makes sense, instead, for the Commission to have noted the interplay of "substantial assistance" and statutory minimums in its commentary to the Substantial Assistance Guideline, see USSG § 5K1.1, p. s., comment., n. 1, and in its section on drug offenses, for which statutory minimums are relatively common, see *id.*, § 2D1.1, comment., n. 7.

I recognize that the Court, through its interpretation of the Guideline, avoids having to decide "whether the Commission could create this . . . unitary motion system." *Ante*, at 130. But the legal question it avoids is not a difficult one. Congress delegated to the Commission broad authority to determine when sentencing courts may reward substantial assistance with a reduced sentence. See 28 U. S. C. § 994(n).

The Commission's exercise of delegated authority is normally lawful as long as it is reasonable. See, *e. g., United States* v. *Shabazz*, 933 F. 2d 1029, 1035 (CADC) (Thomas, J.) (citing *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)), cert. denied *sub nom. McNeil* v. *United States*, 502 U. S. 964 (1991). And a unitary system seems perfectly reasonable. Indeed, the Federal Rules of Criminal Procedure recognize an identical "unitary" system for postjudgment substantial assistance motions. See Fed. Rule Crim. Proc. 35(b) ("[O]n motion of the Government made within one year after the imposition of the sentence," court may reduce sentence "to reflect a defendant's subsequent, substantial assistance"; this may include reduction "to a level below that established by statute as a minimum sentence"). Thus in my view, the Commission had the power to create a "unitary motion system," and is free to maintain such a system, or to change it, in light of evolving criminal justice policies.

In this case, the lower courts accepted the Government's "departure" motion as sufficient to justify a departure below the 135-month Guideline minimum applicable to petitioner's crime, but not sufficient to justify a departure below the applicable 10-year statutory minimum. On a "unitary" view, this disposition could not be correct. Either the motion was sufficient to warrant a departure below the statutory minimum, or it was insufficient to warrant a departure below the Guideline minimum. I would remand this case to the lower courts for further consideration of this case-specific issue.

For these reasons, while agreeing with much of what the Court has written, I dissent from its disposition.

Per Curiam

LEAVITT, GOVERNOR OF UTAH, ET AL. *v.* JANE L. ET AL.

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

No. 95–1242. Decided June 17, 1996

Utah law permits abortions under only five enumerated circumstances with respect to pregnancies of 20 weeks or less, Utah Code Ann. § 76–7–302(2), and under only three of those circumstances with respect to pregnancies of more than 20 weeks, § 76–7–302(3). The law also provides that the legislature "would have passed [every aspect of the law] irrespective of the fact that any one or more provision . . . be declared unconstitutional." § 76–7–317. The Federal District Court held § 302 (2) unconstitutional, but found § 302(3) to be both constitutional and severable. However, the Tenth Circuit concluded that § 302(3) was not severable, reasoning that the Utah Legislature would not have wanted to regulate later-term abortions unless it could regulate earlier-term ones.

Held: The Tenth Circuit's severability decision is flatly contradicted by § 76–7–317 and, thus, is unsustainable. Contrary to that court's conclusion, Utah law does not require the subordination of severability clauses to the legislature's overarching substantive intentions. Utah cases support the proposition that, where a statute's provisions are interrelated, a court may not select the Act's valid portions and conjecture that they should stand independently of the invalid portions. However, such concerns are absent here. There is no need to resort to conjecture, for § 317 could not be clearer in its message that the legislature intended §§ 302(2) and (3) to be severable. In addition, the two subsections are not "interrelated" in any relevant sense—*i. e.*, in the sense of being so interdependent that the remainder of the statute cannot function effectively without the invalidated provision, or in the sense that the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other statutory provisions.

Certiorari granted; 61 F. 3d 1493, reversed and remanded.

PER CURIAM.

The State of Utah seeks review of a ruling by the Court of Appeals for the Tenth Circuit which declared invalid a provision of Utah law regulating abortions "[a]fter 20 weeks gestational age." Utah Code Ann. § 76–7–302(3) (1995).

The court made that declaration, not on the ground that the provision violates federal law, but rather on the ground that the provision was not severable from another provision of the same statute, purporting to regulate abortions up to 20 weeks' gestational age, which had been struck down as unconstitutional. The court's severability ruling was based on its view that the Utah Legislature would not have wanted to regulate the later-term abortions unless it could regulate the earlier-term abortions as well. Whatever the validity of such speculation as a general matter, in the present case it is flatly contradicted by a provision in the very part of the Utah Code at issue, explicitly stating that each statutory provision was to be regarded as having been enacted independently of the others. Because we regard the Court of Appeals' determination as to the Utah Legislature's intent to be irreconcilable with that body's own statement on the subject, we grant the petition for certiorari as to this aspect of the judgment of the Court of Appeals, and summarily reverse.

Utah law, as amended by legislation enacted in 1991, establishes two regimes of regulation for abortion, based on the term of the pregnancy. With respect to pregnancies 20 weeks old or less, § 302(2) permits abortions only under five enumerated circumstances, Utah Code Ann. § 76–7–302(2) (1995). With respect to pregnancies of more than 20 weeks, § 302(3) permits abortions under only three of the five circumstances specified in § 302(2). § 76–7–302(3).[1] In the

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[1] The two subsections state:

"(2) An abortion may be performed in this state only under the following circumstances:

"(a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;

"(b) the pregnancy is the result of rape or rape of a child . . . that was reported to a law enforcement agency prior to the abortion;

"(c) the pregnancy is the result of incest . . . and the incident was reported to a law enforcement agency prior to the abortion;

present suit for declaratory and injunctive relief, the District Court for the District of Utah held § 302(2) to be unconstitutional, but § 302(3) to be both constitutional and severable—*i. e.*, enforceable despite the invalidation of the other provision. *Jane L.* v. *Bangerter*, 809 F. Supp. 865, 870 (1992). Upon appeal by the plaintiffs with regard to the latter provision, the Court of Appeals for the Tenth Circuit held that it could not be enforced, regardless of its constitutionality, because it was not severable from the invalidated portion of the law. *Jane L.* v. *Bangerter*, 61 F. 3d 1493, 1499 (1995). The State argues that that conclusion is simply unsustainable in light of the Utah Legislature's express indication to the contrary, and we agree.

Severability is of course a matter of state law. In Utah, as the Court of Appeals acknowledged, the matter "is determined first and foremost by answering the following question: Would the legislature have passed the statute without the unconstitutional section?" *Id.*, at 1497 (citing *Stewart* v. *Utah Public Service Comm'n*, 885 P. 2d 759, 779 (Utah 1994)). A provision of the abortion part of the Utah Code, to which these two sections were added, answers that question. Section 317 provides:

> "If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be

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"(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

"(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

"(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e)." Utah Code Ann. § 76–7–302 (1995).

> severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. *The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.*" Utah Code Ann. § 76–7–317 (1995) (emphasis added).

In the face of this statement by the Utah Legislature of its own intent in enacting regulations of abortion, the Court of Appeals nonetheless concluded that §§ 302(2) and 302(3) were *not* severable because the Utah Legislature did not intend them to be so. The Court of Appeals' opinion not only did not regard the explicit language of § 317 as determinative—it did not even use it as the point of departure for addressing the severability question. It understood Utah law as instructing courts to "subordinate severability clauses, which evince the legislature's intent regarding the *structure* of the statute, to the legislature's overarching *substantive* intentions." 61 F. 3d, at 1499 (emphasis added). The court divined in the 1991 amendments a "substantive intent" to prohibit virtually all abortions, see *id.*, at 1497–1498, and went on to conclude that since, in its view, severing § 302(2) from § 302(3) would frustrate this overarching purpose, both provisions had to stand or fall together, see *id.*, at 1499. We believe that the Court of Appeals erred at both steps of this progression.

The dichotomy between "structural" and "substantive" intents is nowhere to be found in the Utah cases cited as authority by the Court of Appeals. Indeed, none of those cases even speaks in terms of "conflicts among legislative intentions," *id.*, at 1498. The cases *do* support the proposition that, "even where a savings clause exist[s], where the provisions of the statute are interrelated, it is not within the scope of th[e] court's function to select the valid portions of

the act and conjecture that they should stand independently of the portions which are invalid." *State* v. *Salt Lake City*, 445 P. 2d 691, 696 (Utah 1968). See also *Salt Lake City* v. *International Assn. of Firefighters*, 563 P. 2d 786, 791 (Utah 1977); *Carter* v. *Beaver County Service Area No. One*, 399 P. 2d 440, 441 (Utah 1965). But those concerns are absent from this case, for two reasons. First, because there is no need to resort to "conjecture": The legislature's abortion laws include not merely the standard "saving" clause, but a provision that could not be clearer in its message that the legislature "would have passed [every aspect of the law] irrespective of the fact that any one or more provision . . . be declared unconstitutional." § 76–7–317.[2] And second, because the two sections at issue here are *not* "interrelated" in any relevant sense—*i. e.*, in the sense of being so interdependent that the remainder of the statute cannot function effectively without the invalidated provision, or in the sense that the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute.[3] Nothing like that appears here. The Court of Appeals described § 302(3) as

[2] In none of the Utah cases relied upon by the Court of Appeals was there a legislative statement of this sort. In both *Salt Lake City* v. *International Assn. of Firefighters*, 563 P. 2d 786 (1977), and *Carter* v. *Beaver County Service Area No. One*, 399 P. 2d 440 (1965), the saving clauses at issue simply declared: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act shall not be affected thereby." See 1975 Utah Laws, ch. 102, § 10; 1961 Utah Laws, ch. 34, § 3. And in *State* v. *Salt Lake City*, 445 P. 2d 691, 696 (1968), the court treated the saving clause in the municipal ordinance under review as no different from the one discussed in *Carter*, upon which the court relied.

[3] Compare *International Assn. of Firefighters*, *supra*, at 791 ("The [invalidated] provisions . . . are *an integral part* of the act. . . . The concept of binding arbitration is *wholly interdependent* with the other provisions of the act"); *Carter*, *supra*, at 441–442 ("[T]he separability clause . . . is ineffective, because of the *dependency* of the remaining sections upon the provisions declared inoperative") (emphases added).

"modif[ying]" § 302(2), and concluded that, "[w]ith the nullification of the abortion ban in section 302(2), the statute was gutted, and section 302(3) was left purposeless without an abortion ban to modify." 61 F. 3d, at 1498. But as examination of the provisions makes apparent, see n. 1, *supra*, § 302(3) cannot possibly be said to "modify" § 302(2) in the sense of being an adjunct to it, as an adjective "modifies" a noun. Rather, it can be said to "modify" § 302(2) only in the sense of altering its disposition—permitting, for post-20-week abortions, some but not all of the justifications allowed (for earlier-term abortions) by § 302(2). It is impossible to see how this could lead to the conclusion that § 302(3) is left "purposeless" when § 302(2) is declared inoperative. Of course § 302(3) does incorporate by reference permissible justifications for abortion set forth in § 302(2), instead of repeating them verbatim, but this drafting device can hardly be thought to establish such "interdependence" that § 302(3) becomes "purposeless" when § 302(2) is unenforceable. To the contrary, § 302(3) sets out in straightforward and self-operative fashion the circumstances under which an abortion may be performed "[a]fter 20 weeks gestational age."

But even if the Court of Appeals were correct in treating § 317 like an ordinary saving clause; even if it were right in believing that there existed the "interrelationship" between §§ 302(2) and 302(3) that would permit an ordinary saving clause to be disregarded; and even if it had not invented the notion of "structural-substantive" dichotomy; the reasoning by which it concluded that the "substantive" intent of the Utah Legislature was to forgo all regulation of abortion unless it could obtain total regulation is flawed. The court reasoned that, because the intent of the 1991 amendments was "to prohibit all abortions, regardless of when they occur during the pregnancy, except in the few specified circumstances," 61 F. 3d, at 1497, and because §§ 302(2) and 302(3) "operated as a unified expression of [that] intent," *ibid.*, for

the court to separate § 302(2) from § 302(3) based on the unconstitutionality of the former would "clearly undermin[e] the legislative purpose to ban most abortions," *id.*, at 1498.[4]

This mode of analysis, if carried out in every case, would operate to defeat every claim of severability. Every legislature that adopts, in a single enactment, provision A plus provision B intends (A+B); and that enactment, which reads (A+B), is invariably a "unified expression of that intent," so that taking away A from (A+B), leaving only B, will invariably "clearly undermine the legislative purpose" to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the *severing* that will take away A from (A+B) and thus foil the legislature's intent; it is the *invalidation* of A (in this case, because of its unconstitutionality) which does so—an invalidation that occurs *whether or not* the two provisions are severed. The relevant question, in other words, is not whether the legislature would prefer (A+B) to B, because by reason of the invalidation of A that choice is no longer available. The relevant question is whether the legislature would prefer not to have B if it could not have A as well. Here, the Court of Appeals in effect said yes. It determined that a legislature bent

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[4] The Court of Appeals also adverted to Utah Code Ann. § 76–7–317.2 (1995), which it interpreted as "making an exception to the general severability clause specifically for section 302." *Jane L.* v. *Bangerter*, 61 F. 3d, at 1499. Section 317.2 does nothing of the sort. It provides, simply, that "[i]f Section 76–7–302 as amended by Senate Bill 23, 1991 Annual General Session, is ever held to be unconstitutional by the United States Supreme Court, Section 76–7–302, as enacted by Chapter 33, Laws of Utah 1974, is reenacted and immediately effective." This provision does not speak to severability, but to the consequence of invalidation, presumably total invalidation. (For if the invalidation of § 302(2) alone triggered § 317.2, then *all* of § 302 would be replaced by the pre-existing, 1974 version. But the Court of Appeals did not decree § 302(1) as inoperative, nor did respondents seek that result.) Respondents make no effort to defend the ruling below on the basis of § 317.2.

on banning almost all abortions would prefer, if it could not have that desire, to ban no abortions at all rather than merely some. This notion is, at the very least, questionable when considered in isolation. But when it is put forward in the face of a statutory text that explicitly states the opposite, it is plainly error.

* * *

We have summarily set aside unsupportable judgments in cases involving only individual claims, see, *e. g.*, *Board of Ed. of Rogers* v. *McCluskey*, 458 U. S. 966, 969–971 (1982); *National Bank of North America* v. *Associates of Obstetrics & Female Surgery, Inc.*, 425 U. S. 460, 460–461 (1976). Much more is that appropriate when what is at issue is the total invalidation of a statewide law, see, *e. g.*, *Idaho Dept. of Employment* v. *Smith*, 434 U. S. 100, 100–102 (1977). To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so, see *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438, 440–441 (1947); *Wichita Royalty Co.* v. *City Nat. Bank of Wichita Falls*, 306 U. S. 103, 107 (1939),[5] and undoubtedly should do so where the alternative is allowing

[5] The dissent says that our review in *Wichita Royalty Co.* "was plainly motivated by a concern to give effect to [the] new mandate" of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that federal courts apply state substantive law in diversity cases. *Post*, at 147. It remains the case, however, that "the *only* question for our decision" was whether the Court of Appeals was correct in its interpretation of state law. 306 U. S., at 107 (emphasis added). As for *Steele* v. *General Mills, Inc.*, 329 U. S. 433 (1947), there our review was prompted by concern that the judgment below "undermine[d] the transportation policy of Texas," *id.*, at 438. But unless we were wrong in *Steele* to regard this as "a question of such importance" as to justify review, *ibid.*, the Tenth Circuit's "undermin[ing] [of] the [abortion] policy of [Utah]" presents an issue equally worth our attention. If the dissent is correct that *Steele* was our last case of this sort, it indicates only that we have not since been faced with a federal court's equivalently clear misinterpretation of a state law of equivalent significance.

blatant federal-court nullification of state law. The dissent argues that "[t]he doctrine of judicial restraint" weighs against review, *post*, at 146, but it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts. The fact observed by the dissent, that the "underlying substantive issue in this case" is a controversial one, generating "a kind of 'hydraulic pressure' that motivates ad hoc decisionmaking," *ibid.*, provides a greater, not a lesser, justification for reversing state-law determinations that seem plainly wrong. In our view, these considerations combine to make this an "extraordinary cas[e]" worth our effort of summary review, *post*, at 147.

Finally, the dissent's appeal to the supposed greater expertise of courts of appeals regarding state law is particularly weak (if not indeed counterindicative) where a Court of Appeals panel consisting of judges from Oklahoma, Colorado, and Kansas has reversed the District Court of Utah on a point of Utah law. If, as we have said, the courts of appeals owe no deference to district court adjudications of state law, see *Salve Regina College* v. *Russell*, 499 U. S. 225, 239–240 (1991), surely there is no basis for regarding panels of circuit judges as "better qualified" than we to pass on such questions, see *post*, at 146. Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases, see *Salve Regina College*, *supra*, at 235, n. 3, not a belief that the courts of appeals have some natural advantage in this domain, cf. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500 (1985) ("[W]e surely have the authority to differ with the lower federal courts as to the meaning of a state statute"); *Cole* v. *Richardson*, 405 U. S. 676, 683–685 (1972). That general presumption is obviously inapplicable where the court of appeals' state-law ruling is plainly wrong, a conclusion that the dissent does not even contest in this case.

The opinion of the Tenth Circuit in this case is not sustainable. Accordingly, we grant the petition as to the severability question, summarily reverse the judgment, and remand the case to the Court of Appeals for further proceedings.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The severability issue discussed in the Court's *per curiam* opinion is purely a question of Utah law. It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon by a federal court of appeals. The justifications for that practice are well established: The courts of appeals are more familiar with and thus better qualified than we to interpret the laws of the States within their Circuits; the decision of a federal court (even this Court) on a question of state law is not binding on state tribunals; and a decision of a state-law issue by a court of appeals, whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of our certiorari jurisdiction.*

The underlying substantive issue in this case generates what Justice Holmes once described as a kind of "hydraulic pressure" that motivates ad hoc decisionmaking. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401 (1904) (dissenting opinion). Even if the court of appeals has rendered an incorrect decision, that is no reason for us to jettison the traditional guides to our practice of certiorari review. The doctrine of judicial restraint counsels the opposite course.

*The majority finds deference to the Court of Appeals "counter-indicative" because it reversed the District Court for the District of Utah on a point of Utah law. *Ante*, at 145. But courts of appeals owe district courts no deference on state-law questions; they review such matters *de novo*. See *Salve Regina College* v. *Russell*, 499 U. S. 225, 235–240 (1991) (rejecting reliance on the "local expertise" of the District Court). The geography of the Circuit, see *ante*, at 145, is utterly irrelevant.

The majority counters with a pair of cases that supposedly show the absence of a settled practice regarding review of state-law questions. One of those—*Wichita Royalty Co.* v. *City Nat. Bank of Wichita Falls*, 306 U. S. 103 (1939)—was a diversity case decided in the wake of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Just four weeks before we handed down *Erie*, the Court of Appeals had disclaimed its obligation to follow a controlling decision by the Texas Supreme Court (indeed, one rendered in an earlier stage of the same proceedings) on a matter of Texas commercial law. 306 U. S., at 106. The Court of Appeals then denied rehearing on the theory that the Texas court had changed its mind and now agreed with the former's view of the law. *Ibid.* Our decision to hear that case, which resulted in our rejection of the lower court's conclusion, was plainly motivated by a concern to give effect to *Erie*'s new mandate.

That leaves the single example of *Steele* v. *General Mills, Inc.*, 329 U. S. 433 (1947), in which this Court granted certiorari because the lower court's judgment "undermine[d] the transportation policy of Texas." *Id.*, at 438. Decided nearly 50 years ago and without successor, *Steele* is the exception that proves the rule.

However irregular such grants were in the past, they are now virtually unheard of. Indeed, in 1980 we codified our already longstanding practice by eliminating as a consideration for deciding whether to review a case the fact that "a court of appeals has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law." Compare this Court's Rule 19(1)(b) (1970) with this Court's Rule 17.1 (1980). That deletion—the *only* deletion of an entire category of cases—was intended to communicate our view that errors in the application of state law are not a sound reason for granting certiorari, except in the most extraordinary cases. Tellingly, the majority does not cite a single example during the past 16 years in which we

have departed from this reemphasized practice. This case should not be the first.

Accordingly, I respectfully dissent from the decision to grant the petition.

CALDERON, WARDEN *v.* MOORE

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

No. 95–1612. Decided June 17, 1996

Respondent Moore was convicted of first-degree murder in a California state court and sentenced to death. The Federal District Court granted habeas relief, thereby vacating the conviction and ordering petitioner warden to release Moore from custody after 60 days unless the State granted him a new trial. The State filed an appeal, but after its applications to stay the order were denied, it set Moore for retrial and simultaneously pursued its appeal. The Ninth Circuit dismissed the appeal as moot, observing that the State had granted Moore a new trial.

Held: The case is not moot. An appeal should be dismissed as moot when a court of appeals cannot grant any effectual relief whatever in favor of an appellant. *Mills* v. *Green*, 159 U. S. 651, 653. However, the availability of a partial remedy is sufficient to prevent mootness. Such a remedy is available to the State because a decision in its favor would release it from the burden of providing a new trial for Moore. Thus, the Ninth Circuit is not prevented from granting any effectual relief.

Certiorari granted; reversed and remanded.

PER CURIAM.

Respondent Charles Edward Moore, Jr., was convicted of first-degree murder in a California state court, and sentenced to death. The District Court granted habeas relief, concluding that the state court had denied Moore his right to self-representation under *Faretta* v. *California*, 422 U. S. 806 (1975). The District Court thus vacated the judgment of conviction and ordered the warden, petitioner here, to "release Moore from custody after the expiration of 60 days unless, within 60 days hereof, the State of California grants Moore the right to a new trial." App. A to Brief in Opposition A65.

The State filed a notice of appeal and sought a stay of the District Court's order pending appeal, but its various stay

applications were respectively denied by the District Court, the Ninth Circuit, 56 F. 3d 39 (1995), and by JUSTICE O'CONNOR, in her capacity as Circuit Justice for the Ninth Circuit. The State accordingly set Moore for retrial, and simultaneously pursued its appeal of the District Court's order on the merits to the Ninth Circuit. The Court of Appeals, observing that the "State of California has granted petitioner Charles Edward Moore, Jr., a new trial," dismissed the State's appeal as moot. App. A to Pet. for Cert.

It is true, of course, that mootness can arise at any stage of litigation, *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974); that federal courts may not "give opinions upon moot questions or abstract propositions," *Mills* v. *Green*, 159 U. S. 651, 653 (1895); and that an appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant "any effectual relief whatever" in favor of the appellant, *ibid.* The available remedy, however, does not need to be "fully satisfactory" to avoid mootness. *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 13 (1992). To the contrary, even the availability of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Ibid.*

In this case, to say the least, a "partial remedy" necessary to avoid mootness will be available to the State of California (represented here by petitioner). While the administrative machinery necessary for a new trial has been set in motion, that trial has not yet even begun, let alone reached a point where the court could no longer award any relief in the State's favor. Because a decision in the State's favor would release it from the burden of the new trial itself, the Court of Appeals is not prevented from granting "any effectual relief whatever" in the State's favor, *Mills*, *supra*, at 653, and the case is clearly not moot. We therefore grant respondent's motion to proceed *in forma pauperis*, grant petition for a writ of certiorari, reverse the judgment of the Court

of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

GRAY *v.* NETHERLAND, WARDEN

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

No. 95–6510. Argued April 15, 1996—Decided June 20, 1996

At the start of petitioner's Virginia trial for the capital murder of Richard McClelland, the prosecution acknowledged that, should the trial reach the penalty phase, it would introduce petitioner's admissions to other inmates that he had previously murdered Lisa Sorrell and her daughter. The day that petitioner was convicted of the McClelland murder, the prosecution disclosed that it would introduce additional evidence at sentencing linking petitioner to the Sorrell murders, including crime scene photographs and testimony from the Sorrell investigating detective and medical examiner. Counsel moved to exclude evidence pertaining to any felony for which petitioner had not been charged. Although counsel also complained that he was not prepared for the additional evidence, and that the defense was taken by surprise, he did not request a continuance. The court denied the motions to exclude, and, after a hearing, petitioner was sentenced to death. After exhausting his state remedies, he sought federal habeas relief, claiming, as relevant here, that inadequate notice prevented him from defending against the evidence introduced at the penalty phase, and that the Commonwealth failed to disclose exculpatory evidence regarding the Sorrell murders. The District Court initially denied relief, finding that petitioner had no constitutional right to notice of individual testimony that the Commonwealth planned to introduce at sentencing, and that the claim made under *Brady* v. *Maryland*, 373 U. S. 83, was procedurally barred under Virginia law. However, the court later amended its judgment, concluding that petitioner was denied due process when the Commonwealth failed to provide fair notice of what Sorrell murder evidence would be introduced. In reversing, the Fourth Circuit found that granting habeas relief would give petitioner the benefit of a new rule of federal constitutional law, in violation of *Teague* v. *Lane*, 489 U. S. 288. The grant of certiorari is limited to petitioner's notice-of-evidence and *Brady* claims.

Held:

1. Petitioner's *Brady* claim is procedurally defaulted. He never raised that claim in state court, and, because he knew of its grounds when he filed his first state petition, Virginia law precludes review of the defaulted claim in any future state habeas proceeding. This provides an independent and adequate state-law ground for the conviction

and sentence, and thus prevents federal habeas review of the defaulted claim, unless petitioner can demonstrate cause and prejudice for the default. *Teague* v. *Lane*, *supra*, at 298. Because he has made no such demonstration, his claim is not cognizable in a federal suit for the writ. Pp. 161–162.

2. The misrepresentation claim raised by petitioner in his brief here is remanded for the Court of Appeals to determine whether he in fact raised that issue below. Pp. 162–166.

(a) In his brief, petitioner relies on two separate due process challenges to the manner in which the prosecution introduced evidence about the Sorrell murders: a notice-of-evidence claim alleging that the Commonwealth failed to give adequate notice of the evidence it would use, and a misrepresentation claim alleging that the Commonwealth misled him about the evidence it intended to present. For purposes of exhausting state remedies, a habeas claim must include reference to a specific federal constitutional guarantee, as well as a statement of the facts entitling a petitioner to relief. *Picard* v. *Connor*, 404 U. S. 270. A petitioner does not satisfy the exhaustion requirement by presenting the state courts only with the facts necessary to state a claim for relief. Nor is it enough to make a general appeal to a constitutional guarantee as broad as due process to present the "substance" of such a claim to a state court. *Anderson* v. *Harless*, 459 U. S. 4. *Gardner* v. *Florida*, 430 U. S. 349—on which petitioner relies for his notice-of-evidence claim—and *In re Ruffalo*, 390 U. S. 544, *Raley* v. *Ohio*, 360 U. S. 423, and *Mooney* v. *Holohan*, 294 U. S. 103—on which he relies for his misrepresentation claim—arise in widely differing contexts. The two claims are separate. Pp. 162–165.

(b) If petitioner never raised the misrepresentation issue in state proceedings, federal habeas review would be barred unless he could demonstrate cause and prejudice for his failure to raise the claim in state proceedings. However, if it was addressed in the federal proceedings, the Commonwealth would have been obligated to raise procedural default as a defense or lose the right to assert the defense thereafter. If the Court of Appeals determines that the issue was raised, it should consider whether the Commonwealth has preserved any defenses and proceed to consider the claim and preserved defenses as appropriate. Pp. 165–166.

3. Petitioner's notice-of-evidence claim would require the adoption of a new constitutional rule. Pp. 166–170.

(a) Petitioner contends that he was deprived of adequate notice when he received only one day's notice of the additional evidence, but, rather than seeking a continuance, he sought to have all such evidence excluded. For him to prevail, he must establish that due process re-

Syllabus

quires that he receive more than a day's notice of the Commonwealth's evidence. He must also show that due process required a continuance whether or not he sought one, or that, if he chose not to seek a continuance, exclusion was the only appropriate remedy. Only the adoption of a new constitutional rule could establish these propositions. A defendant has the right to notice of the charges against which he must defend. *In re Ruffalo*, *supra*. However, he does not have a constitutional right to notice of the *evidence* which the state plans to use to prove the charges, and *Brady*, which addressed only exculpatory evidence, did not create one. *Weatherford* v. *Bursey*, 429 U. S. 545, 559. *Gardner* v. *Florida*, *supra*, distinguished. Even if notice were required, exclusion of evidence is not the sole remedy for a violation of such a right, since a continuance could minimize prejudice. *Taylor* v. *Illinois*, 484 U. S. 400, 413. Petitioner made no such request here, and in view of his insistence on exclusion, the trial court might well have felt that it would have been interfering with counsel's tactical decision to order a continuance on its own motion. Pp. 166–170.

(b) The new rule petitioner proposes does not fall within *Teague*'s second exception, which is for watershed rules of criminal procedure implicating a criminal proceeding's fundamental fairness and accuracy. Whatever one may think of the importance of petitioner's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* v. *Wainwright*, 372 U. S. 335, or other rules which may be thought to be within the exception. *Saffle* v. *Parks*, 494 U. S. 484, 495. P. 170.

58 F. 3d 59, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 171. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 171.

Mark Evan Olive, by appointment of the Court, 516 U. S. 1170, argued the cause for petitioner. With him on the briefs were *Donald R. Lee, Jr.*, *Paul G. Turner*, and *John H. Blume*.

John H. McLees, Jr., Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *James S. Gilmore III*, Attorney General, and *David E. Anderson*, Chief Deputy Attorney General.*

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, convicted of capital murder, complains that his right to due process of law under the Fourteenth Amendment was violated because he was not given adequate notice of some of the evidence the Commonwealth intended to use against him at the penalty hearing of his trial. We hold that this claim would necessitate a "new rule," and that therefore it does not provide a basis on which he may seek federal habeas relief.

I

A

Richard McClelland was the manager of a department store, Murphy's Mart, in Portsmouth, Virginia. On May 2, 1985, at approximately 9:30 p.m., petitioner and Melvin Tucker, a friend, both under the influence of cocaine, parked in the parking lot of the Murphy's Mart and watched McClelland and a store security guard inside. Shortly before midnight, McClelland and the guard came out of the store and left in separate automobiles. With Tucker in the passenger seat, petitioner followed McClelland, pulled in front of his car at a stop sign, threatened him with a .32-caliber revolver, ordered him into petitioner's car, and struck him. Petitioner and Tucker took McClelland's wallet and threatened to harm his family if he did not cooperate. *Gray* v. *Commonwealth*, 233 Va. 313, 340–341, 356 S. E. 2d 157, 172, cert. denied, 484 U. S. 873 (1987).

Petitioner drove the car back to the Murphy's Mart, where he forced McClelland at gunpoint to reopen the store. They filled three gym bags with money, totaling between $12,000 and $13,000. Petitioner drove McClelland and Tucker to a service station, bought gasoline for his car and for a gas can in the car's trunk, and proceeded to a remote side road. He took McClelland 15 to 20 feet behind the car and ordered him to lie down. While McClelland begged petitioner not to

hurt or shoot him, petitioner assured him he would not be harmed. Having thus assured McClelland, petitioner fired six pistol shots into the back of his head in rapid succession. 233 Va., at 341–342, 356 S. E. 2d, at 172–173.

Leaving McClelland's dead body on the side road, petitioner and Tucker returned to the intersection where they had seized him. Petitioner, telling Tucker he wanted to destroy McClelland's car as evidence, doused its interior with gasoline and lit it with a match. *Id.*, at 341–342, 356 S. E. 2d, at 173.

Petitioner and Tucker were later arrested and indicted in the Circuit Court of the city of Suffolk on several counts, including capital murder. Having evidence that petitioner had announced before the killing that "he was going to get" McClelland for having fired his wife from her job as a saleswoman at the Murphy's Mart, and that petitioner had told other witnesses after the killing that he had performed it, the prosecutor entered into a plea bargain with Tucker. In return for being tried for first-degree murder instead of capital murder, Tucker would testify at petitioner's trial about events leading up to the killing and would identify petitioner as the actual "trigger man." *Id.*, at 331, 356 S. E. 2d, at 167.

B

On Monday, December 2, 1985, petitioner's trial began. Petitioner's counsel moved that the trial court order the prosecution to disclose the evidence it planned to introduce in the penalty phase. The prosecutor acknowledged that "in the event [petitioner] is found guilty we do intend to introduce evidence of statements he has made to other people about other crimes he has committed of which he has not been convicted." 14 Record 8. In particular, the prosecution intended to show that petitioner had admitted to a notorious double murder in Chesapeake, a city adjacent to Suffolk. Lisa Sorrell and her 3-year-old daughter, Shanta, had been murdered five months before McClelland was killed.

The prosecutor told petitioner's counsel in court that the only evidence he would introduce would be statements by petitioner to Tucker or fellow inmates that he committed these murders. *Id.*, at 11.

On Thursday, December 5, 1985, the jury convicted petitioner on all counts. That evening, the prosecution informed petitioner's counsel that the Commonwealth would introduce evidence, beyond petitioner's own admissions, linking petitioner to the Sorrell murders. The additional evidence included photographs of the crime scene and testimony by the police detective who investigated the murders and by the state medical examiner who performed autopsies on the Sorrells' bodies. The testimony was meant to show that the manner in which Lisa and Shanta Sorrell had been killed resembled the manner in which McClelland was killed. The next morning, petitioner's counsel made two motions "to have excluded from evidence during [the] penalty trial any evidence pertaining to any . . . felony for which the defendant has not yet been charged." 18 *id.*, at 776. Counsel argued that the additional evidence exceeded the scope of unadjudicated-crime evidence admissible for sentencing under Virginia law, because "[i]n essence, what [the prosecutor is] doing is trying [the Sorrell] case in the minds of the jurors." *Id.*, at 724 (citing *Watkins* v. *Commonwealth*, 229 Va. 469, 331 S. E. 2d 422 (1985), cert. denied, 475 U. S. 1099 (1986)). Although counsel also complained that he was not "prepared for any of this [additional evidence], other than [that petitioner] may have made some incriminating statements," 18 Record 725, and that the "[d]efense was taken by surprise," *id.*, at 777, he never requested a continuance. The trial court denied the motions to exclude.

During the sentencing phase, Tucker testified that, shortly after the McClelland murder, petitioner pointed to a picture of Lisa Sorrell in a newspaper and told Tucker that he had "knocked off" Sorrell. Petitioner's counsel did not cross-examine Tucker. Officer Michael Slezak, who had investi-

gated the Sorrell murders, testified that he found Lisa's body in the front seat of a partially burned automobile and Shanta's body in the trunk. Dr. Faruk Presswalla, the medical examiner who had performed autopsies on the bodies, testified that Lisa was killed by six bullets to the head, shot from a .32-caliber gun. *Gray*, *supra*, at 345, 356 S. E. 2d, at 175. Petitioner's counsel did not cross-examine Dr. Presswalla, and only cross-examined Officer Slezak to suggest that McClelland's murder may have been a "copycat" murder, committed by a different perpetrator. 18 Record 793, 802.[1]

The jury fixed petitioner's sentence for McClelland's murder at death. The trial court entered judgment on the verdicts for all the charges against petitioner and sentenced him to death. The Virginia Supreme Court affirmed, 233 Va. 313, 356 S. E. 2d 157, and we denied certiorari, *Gray* v. *Virginia*, 484 U. S. 873 (1987). The Suffolk Circuit Court dismissed petitioner's state petition for a writ of habeas corpus. The Virginia Supreme Court affirmed the dismissal, and we denied certiorari. *Gray* v. *Thompson*, 500 U. S. 949 (1991).

C

Petitioner then sought a writ of habeas corpus from the United States District Court for the Eastern District of Virginia. With respect to the Sorrell murders, he argued, *inter alia*, that he had "never been convicted of any of these crimes nor was he awaiting trial for these crimes," that the Commonwealth "did not disclose its intentions to use the

[1] The prosecutor introduced this testimony as evidence of petitioner's future dangerousness. The prosecutor also introduced into evidence petitioner's criminal record, which included 13 felony convictions, at least 9 of which were for crimes of violence, including armed robbery and malicious wounding. Petitioner's record revealed that he had locked a restaurant's employees in a food freezer while robbing the restaurant, and threatened the lives of two persons other than McClelland. *Gray* v. *Commonwealth*, 233 Va. 313, 353, 356 S. E. 2d 157, 179, cert. denied, 484 U. S. 873 (1987).

Sorrell murders as evidence against [him] until such a late date that it was impossible for [his] defense counsel reasonably to prepare or defend against such evidence at trial," and that Tucker "'sold' his testimony to the Commonwealth for . . . less than a life sentence." 1 Joint Appendix in No. 94–4009 (CA4), pp. 32–33 (hereinafter J. A.).

The Commonwealth moved to dismiss the petition. To clarify its arguments against petitioner's Sorrell murder claim, it characterized petitioner's allegations as seven separate subclaims. The first subclaim asserted that petitioner was given "inadequate notice of the evidence which the Commonwealth intended to introduce to permit him to defend against it," and the third, relying on *Brady* v. *Maryland*, 373 U. S. 83 (1963), asserted that "[t]he Commonwealth failed to disclose evidence tending to prove that someone else had committed the Sorrell murders."[2] Respondent's Brief in Support of Motion to Dismiss in No. 3:91CV693 (ED Va.), p. 2. According to the Commonwealth, the notice-of-evidence subclaim was meritless and could not be the basis for relief in federal habeas corpus proceedings because it sought the retroactive application of a new rule of constitutional law. *Id.*, at 18–19, 19–20. The Commonwealth alleged that the *Brady* subclaim had not been presented to the state courts on direct appeal or in state habeas corpus proceedings, and was thus procedurally barred under Va. Code Ann. § 8.01–654(B)(2) (1992). Respondent's Brief in Support of Motion to Dismiss, *supra*, at 19.

Initially, the District Court dismissed the habeas petition. The court adopted the Commonwealth's characterization of petitioner's Sorrell claim. See 1 J. A. 193. The court held that petitioner was not entitled to relief on the notice-of-evidence subclaim, because he "has no constitutional right to notice of individual items of testimony which the Com-

[2] The other five subclaims are not relevant to our review.

monwealth intends to introduce at the penalty phase." *Id.*, at 194. The court declined to review the *Brady* subclaim because it was procedurally barred. 1 J. A. 194.

Later, on petitioner's motion, the District Court amended its judgment to find within petitioner's Sorrell claim a specific due process claim about the admissibility of the Sorrell murder evidence. *Id.*, at 252. (In amending this judgment, the court announced that it remained unchanged as to the remaining claims, which it had dismissed. *Id.*, at 251.) After holding an evidentiary hearing on the Sorrell claim, the District Court ordered that petitioner be granted a writ of habeas corpus. The court characterized the claim as an allegation that petitioner "was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase." App. 348. Citing *Gardner* v. *Florida*, 430 U. S. 349, 357–359 (1977), the court determined that there was a constitutional defect in petitioner's penalty phase hearing: "Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla." App. 349. This defect "violated [petitioner's] right to fair notice and rendered the hearing clearly unreliable," because petitioner's attorneys had less than one day's notice of the additional evidence to be used against their client. *Id.*, at 349–350.

The Commonwealth appealed, arguing to the Fourth Circuit that to grant petitioner habeas relief would give him the benefit of a new rule of federal constitutional law, in violation of *Teague* v. *Lane*, 489 U. S. 288 (1989). The Fourth Circuit reversed the judgment granting the writ, rejected petitioner's cross-appeals from the dismissal of several other claims, and remanded with directions that the habeas corpus petition be dismissed. *Gray* v. *Thompson*, 58 F. 3d 59, 67 (1995). The court distinguished *Gardner*, on which the District Court had relied, because petitioner, unlike Gardner, "was

not sentenced on the basis of any secret information." 58 F. 3d, at 64. The court thus concluded that petitioner's notice-of-evidence claim "was not compelled by existing precedent at the time his conviction became final," and thus could not be considered in federal habeas proceedings under *Teague*. 58 F. 3d, at 64.

The Commonwealth scheduled petitioner's execution for December 14, 1995. Petitioner applied for a stay of execution and petitioned for a writ of certiorari from this Court. We granted his stay application on December 13, 1995. 516 U. S. 1034. On January 5, 1996, we granted certiorari, limited to the questions whether petitioner's notice-of-evidence claim stated a new rule and whether the Commonwealth violated petitioner's due process rights under *Brady* by withholding evidence exculpating him from responsibility for the Sorrell murders. 516 U. S. 1037; see Pet. for Cert. i.

II

We first address petitioner's *Brady* claim. The District Court determined that "[t]his claim was not presented to the Supreme Court of Virginia on direct appeal nor in state habeas corpus proceedings," and that "the factual basis of the claim was available to [petitioner] at the time he litigated his state habeas corpus petition," and dismissed the claim on this basis. 1 J. A. 194. Petitioner does not contest these determinations in this Court.

Petitioner's failure to raise his *Brady* claim in state court implicates the requirements in habeas of exhaustion and procedural default. Title 28 U. S. C. § 2254(b) bars the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Because "[t]his requirement . . . refers only to remedies still available at the time of the federal petition," *Engle* v. *Isaac*, 456 U. S. 107, 126, n. 28 (1982), it is satisfied "if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law," *Castille* v. *Peoples*, 489 U. S.

346, 351 (1989). However, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default. *Teague* v. *Lane*, *supra*, at 298; *Isaac*, *supra*, at 126, n. 28, 129; *Wainwright* v. *Sykes*, 433 U. S. 72, 90–91 (1977).

In Virginia, "[n]o writ [of habeas corpus ad subjiciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01–654(B)(2) (1992). Because petitioner knew of the grounds of his *Brady* claim when he filed his first petition, § 8.01–654(B)(2) precludes review of petitioner's claim in any future state habeas proceeding. Because petitioner makes no attempt to demonstrate cause or prejudice for his default in state habeas proceedings, his claim is not cognizable in a federal suit for the writ.

III

A

Petitioner makes a separate due process challenge to the manner in which the prosecution introduced evidence about the Sorrell murders. We perceive two separate claims in this challenge. As we will explain in greater detail below, petitioner raises a "notice-of-evidence" claim, which alleges that the Commonwealth deprived petitioner of due process by failing to give him adequate notice of the evidence the Commonwealth would introduce in the sentencing phase of his trial. He raises a separate "misrepresentation" claim, which alleges that the Commonwealth violated due process by misleading petitioner about the evidence it intended to use at sentencing.

In *Picard* v. *Connor*, 404 U. S. 270 (1971), we held that, for purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal

constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief. We considered whether a habeas petitioner was entitled to relief on the basis of a claim, which was not raised in the state courts or in his federal habeas petition, that the indictment procedure by which he was brought to trial violated equal protection. *Id.*, at 271. In announcing that "the substance of a federal habeas corpus claim must first be presented to the state courts," *id.*, at 278, we rejected the contention that the petitioner satisfied the exhaustion requirement of 28 U. S. C. § 2254(b) by presenting the state courts only with the facts necessary to state a claim for relief. "The [state court] dealt with the arguments [the habeas petitioner] offered; we cannot fault that court for failing also to consider *sua sponte* whether the indictment procedure denied [the petitioner] equal protection of the laws." *Id.*, at 277.

We have also indicated that it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the "substance" of such a claim to a state court. In *Anderson* v. *Harless*, 459 U. S. 4 (1982), the habeas petitioner was granted relief on the ground that it violated due process for a jury instruction to obviate the requirement that the prosecutor prove all the elements of the crime beyond a reasonable doubt. *Id.*, at 7 (citing *Sandstrom* v. *Montana*, 442 U. S. 510 (1979)). The only manner in which the habeas petitioner had cited federal authority was by referring to a state-court decision in which "the defendant . . . asserted a broad federal due process right to jury instructions that properly explain state law." 459 U. S., at 7 (internal quotation marks omitted). Our review of the record satisfied us that the *Sandstrom* claim "was never presented to, or considered by, the [state] courts," but we found it especially significant that the "broad federal due process right" that the habeas petition might have been read to incorporate did not include "the more particular analysis developed in cases such as *Sandstrom*." 459 U. S., at 7.

The due process challenge in petitioner's brief relies on two "particular analys[es]" of due process. *Ibid.* Relying on cases like *Gardner* v. *Florida*, 430 U. S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), petitioner argues that he should have been given "'such notice of the issues involved in the [sentencing] hearing as [would have] reasonably enable[d] him to prepare his case,'" Brief for Petitioner 32 (quoting B. Schwartz, Administrative Law 283 (2d ed. 1984)), and that he was denied "a fair opportunity to be heard on determinative sentencing issues," Brief for Petitioner 33. This right stems from the defendant's "legitimate interest in the character of the procedure which leads to the imposition of sentence" of death, *Gardner*, 430 U. S., at 358, which justifies giving him an "opportunity to deny" potentially determinative sentencing information, *id.*, at 362.

"Yet another way in which the state may unconstitutionally . . . deprive [a defendant] of a meaningful opportunity to address the issues, is simply by misinforming him." Brief for Petitioner 34. Petitioner cites *In re Ruffalo*, 390 U. S. 544 (1968), *Raley* v. *Ohio*, 360 U. S. 423 (1959), and *Mooney* v. *Holohan*, 294 U. S. 103 (1935), for this proposition. *Ruffalo* was a disbarment proceeding in which this Court held that the disbarred attorney had not been given notice of the charges against him by the Ohio committee which administered bar discipline. 390 U. S., at 550. In *Raley*, the chairman and members of a state investigating commission assured witnesses that the privilege against self-incrimination was available to them, but when the witnesses were convicted for contempt the Supreme Court of Ohio held that a state immunity statute rendered the Fifth Amendment privilege unavailable. 360 U. S., at 430–434. And in *Mooney* v. *Holohan*, the defendant alleged that the prosecution knowingly used perjured testimony at his trial. 294 U. S., at 110.

Gardner, *Ruffalo*, *Raley*, and *Mooney* arise in widely differing contexts. *Gardner* forbids the use of secret testimony in the penalty proceeding of a capital case which the

defendant has had no opportunity to consider or rebut. *Ruffalo* deals with a defendant's right to notice of the charges against him. Whether or not *Ruffalo* might have supported petitioner's notice-of-evidence claim, see *infra*, at 169–170, it does not support the misrepresentation claim for which petitioner cites it. *Mooney* forbade the prosecution to engage in "a deliberate deception of court and jury." 294 U. S., at 112. *Raley*, though involving no deliberate deception, held that defendants who detrimentally relied on the assurance of a committee chairman could not be punished for having done so. *Mooney*, of course, would lend support to petitioner's claim if it could be shown that the prosecutor deliberately misled him, not just that he changed his mind over the course of the trial. The two claims are separate.

B

The Commonwealth argues that the misrepresentation claim "was never argued before in any court." Brief for Respondent 39. If petitioner never presented this claim on direct appeal or in state habeas proceedings, federal habeas review of the claim would be barred unless petitioner could demonstrate cause and prejudice for his failure to raise the claim in state proceedings. *Supra*, at 161–162. If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it. *Yee* v. *Escondido*, 503 U. S. 519, 533 (1992).

There is some ambiguity as to whether the misrepresentation claim was raised or addressed in the District Court or the Court of Appeals. On the one hand, the District Court ordered relief primarily on the basis of *Gardner*, *i. e.*, lack of notice. *Supra*, at 160. On the other hand, some of the District Court findings advert to a deliberate decision by the prosecutor to mislead petitioner's counsel for tactical advantage. See, *e. g.*, App. 348, 350. The ambiguity in the federal record complicates the state-court procedural default issue, because procedural default is an affirmative defense for the

Commonwealth. If the misrepresentation claim was addressed at some stage of federal proceedings, the Commonwealth would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter. See *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980); see also *Schiro* v. *Farley*, 510 U. S. 222, 227–228 (1994).

We remand for the Court of Appeals to determine whether petitioner in fact raised what in his briefs on the merits to this Court he asserts has been his "fundamental complaint throughout this litigation . . . : the Commonwealth's affirmative misrepresentation regarding its presentation of the Sorrell murders . . . deprived Petitioner of a fair sentencing proceeding." Reply Brief for Petitioner 4–5. If the misrepresentation claim was raised, the Court of Appeals should consider whether the Commonwealth has preserved any defenses to it and proceed to consider the claim and preserved defenses as appropriate.

C

We turn to the notice-of-evidence claim, and consider whether the Court of Appeals correctly concluded that this claim sought the retroactive application of a new rule of federal constitutional law. We have concluded that the writ's purpose may be fulfilled with the least intrusion necessary on States' interest of the finality of criminal proceedings by applying constitutional standards contemporaneous with the habeas petitioner's conviction to review his petition. See *Teague*, 489 U. S., at 309–310 (opinion of O'Connor, J.). Thus, habeas relief is appropriate only if "a state court considering [the petitioner'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." *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990).

At the latest, petitioner knew at the start of trial that the prosecutor intended to introduce evidence tending to show that he committed the Sorrell murders. He knew then that the Commonwealth would call Tucker to the stand to

repeat his statement that petitioner had admitted to committing the murders.[3] See App. 340; 14 Record 8–9. He nonetheless contends that he was deprived of adequate notice of the *other* witnesses, the police officer and the medical examiner who had investigated the Sorrell murders, whom he was advised that the prosecutor would call only on the evening before the sentencing hearing. App. 342; 18 Record 777. But petitioner did not attempt to cure this inadequacy of notice by requesting more time to respond to this evidence. He instead moved "to have excluded from evidence during this penalty trial any evidence pertaining to any other—any felony for which the defendant has not yet been charged."[4] *Id.*, at 776.

On these facts, for petitioner to prevail on his notice-of-evidence claim, he must establish that due process requires that he receive more than a day's notice of the Commonwealth's evidence. He must also establish that due process required a continuance whether or not he sought one, or that, if he chose not to seek a continuance, exclusion was the only appropriate remedy for the inadequate notice. We conclude that only the adoption of a new constitutional rule could establish these propositions.

A defendant's right to notice of the charges against which he must defend is well established. *In re Ruffalo*, 390 U. S.

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[3] When petitioner did object later, at the start of the penalty phase, to the admission of all the Sorrell murder evidence, counsel conceded that he would have been prepared to refute such evidence if it had consisted only of testimony by Tucker or petitioner's fellow inmates that petitioner had admitted to killing the Sorrells. See 18 Record 722, 780.

[4] The District Court described petitioner's counsel as having made a "plea for additional time to prepare." App. 343. The Court of Appeals found this plea insufficient to have legal effect in court: "If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded." *Gray* v. *Thompson*, 58 F. 3d 59, 64 (CA4 1995). We agree with the Court of Appeals.

544 (1968); *Cole* v. *Arkansas*, 333 U. S. 196 (1948). But a defendant's claim that he has a right to notice of the *evidence* that the state plans to use to prove the charges stands on quite a different footing. We have said that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." *Wardius* v. *Oregon*, 412 U. S. 470, 474 (1973). In *Weatherford* v. *Bursey*, 429 U. S. 545 (1977), we considered the due process claim of a defendant who had been convicted with the aid of surprise testimony of an accomplice who was an undercover agent. Although the prosecutor had not intended to introduce the agent's testimony, he changed his mind the day of trial. *Id.*, at 549. To keep his cover, the agent had told the defendant and his counsel that he would not testify against the defendant. *Id.*, at 560. We rejected the defendant's claim, explaining that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady*," which addressed only exculpatory evidence, "did not create one," *id.*, at 559. To put it mildly, these cases do not compel a court to order the prosecutor to disclose his evidence; their import, in fact, is strongly against the validity of petitioner's claim.

Petitioner relies principally on *Gardner* v. *Florida*, 430 U. S. 349 (1977), for the proposition that a defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Id.*, at 362 (opinion of STEVENS, J.). In *Gardner*, the trial court sentenced the defendant to death relying in part on evidence assembled in a presentence investigation by the state parole commission; the "investigation report contained a confidential portion which was not disclosed to defense counsel." *Id.*, at 353. Gardner literally had no opportunity to even see the confidential information, let alone contest it. Petitioner in the present case, on the other hand, had the opportunity to hear the testimony of Officer Slezak and Dr. Presswalla in open court, and to cross-examine them. His claim to notice is

much more akin to the one rejected in *Weatherford*, *supra*, than to the one upheld in *Gardner*.

Even were our cases otherwise on the notice issue, we have acknowledged that exclusion of evidence is not the sole remedy for a violation of a conceded right to notice of an alibi witness. In *Taylor* v. *Illinois*, 484 U. S. 400 (1988), we said that in this situation "a less drastic sanction is always available. Prejudice . . . could be minimized by granting a continuance." *Id.*, at 413. Here, counsel did not request a continuance; he argued only for exclusion. Counsel argued that the evidence should be excluded not only because he was not prepared to contest the evidence, but also because it exceeded the standard in Virginia, *Watkins* v. *Commonwealth*, 229 Va. 469, 331 S. E. 2d 422 (1985), for relevance of unsolved-crime evidence to sentencing. See 18 Record 723. In view of petitioner's insistence on exclusion of the evidence, the trial court might well have felt that it would have been interfering with a tactical decision of counsel to order a continuance on its own motion.

The dissent argues that petitioner seeks the benefit of a well-established rule, that "a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing." *Post*, at 180. Because we disagree with the dissent's assertion that petitioner moved for a continuance, we disagree with its characterization of the constitutional rule underlying his claim for relief. Compare *supra*, at 166–167, and n. 4, with *post*, at 184–185, n. 11. The dissent glosses over the similarities between this case and *Weatherford*, which "'*dictate[s]*,'" *post*, at 180, the disposition of petitioner's claim—adversely to petitioner—more clearly than any precedent cited by the dissent. But even without *Weatherford* and petitioner's failure to move for a continuance, we would still think the new-rule doctrine "would be meaningless if applied at this level of generality." *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). We therefore hold that petitioner's notice-of-

evidence claim would require the adoption of a new constitutional rule.

D

Petitioner argues that relief should be granted nonetheless, because the new rule he proposes falls within one of *Teague*'s two exceptions. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe." *Parks*, 494 U. S., at 494 (citing *Teague*, 489 U. S., at 311). This exception is not at issue here. "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Parks*, *supra*, at 495 (citing *Teague*, *supra*, at 311; *Butler* v. *McKellar*, 494 U. S. 407, 416 (1990)). Petitioner argues that his notice-of-evidence new rule is "mandated by long-recognized principles of fundamental fairness critical to accuracy in capital sentencing determinations." Brief for Petitioner 47.

We observed in *Saffle* v. *Parks* that the paradigmatic example of a watershed rule of criminal procedure is the requirement that counsel be provided in all criminal trials for serious offenses. 494 U. S., at 495 (citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)). "Whatever one may think of the importance of [petitioner's] proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Parks*, *supra*, at 495. The rule in *Teague* therefore applies, and petitioner may not obtain habeas relief on his notice-of-evidence claim.

IV

We hold that petitioner's *Brady* claim is procedurally defaulted and that his notice-of-evidence claim seeks retroactive application of a new rule. Neither claim states a ground upon which relief may be granted in federal habeas corpus proceedings. However, we vacate the judgment of

the Court of Appeals and remand the case for consideration of petitioner's misrepresentation claim in proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

JUSTICE GINSBURG has cogently explained why well-settled law requires the reversal of the judgment of the Court of Appeals. I join her opinion with this additional observation. The evidence tending to support the proposition that petitioner committed the Sorrell murders was not even sufficient to support the filing of charges against him. Whatever limits due process places upon the introduction of evidence of unadjudicated conduct in capital cases, they surely were exceeded here. Given the "vital importance" that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," the sentencing proceeding would have been fundamentally unfair even if the prosecutors had given defense counsel fair notice of their intent to offer this evidence. See *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (opinion of STEVENS, J.).

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Basic to due process in criminal proceedings is the right to a full, fair, potentially effective opportunity to defend against the State's charges. Petitioner Gray was not accorded that fundamental right at the penalty phase of his trial for capital murder. I therefore conclude that no "new rule" is implicated in his petition for habeas corpus, and dissent from the Court's decision, which denies Gray the resentencing proceeding he seeks.

I

Petitioner Coleman Gray's murder trial began on Monday, December 2, 1985, in the city of Suffolk, Virginia. He was

charged with killing Richard McClelland during the commission of a robbery, a capital offense. Va. Code Ann. § 18.2–31(4) (Supp. 1995). Under Virginia law, the trial would proceed in two stages: During the guilt phase, the jury would determine whether Gray was guilty of capital murder; and during the penalty phase, the jury would decide whether Gray should be sentenced to death or life imprisonment. See Va. Code Ann. § 19.2–264.4(A) (1995).

At an in-chambers conference before the guilt phase began, Gray's lawyers requested a court order directing the prosecutor to disclose the evidence he would introduce during the penalty phase if Gray were convicted.[1] Defense counsel wanted to know, in particular, whether the prosecutor planned to introduce evidence relating to the murders of Lisa Sorrell and her 3-year-old daughter, Shanta. Defense counsel informed the trial court of the basis for the request:

> ". . . Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. . . . [W]e have good reason to believe that [the prosecutor] is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered [the Sorrells] which were very violent and well-known crimes throughout this entire area.
>
> "If that comes in we are going to want to know it in advance so we can be prepared on our argument. . . . It's absolute dynamite." 3 Joint Appendix in No. 94–4009 (CA4), pp. 1328–1329 (hereinafter J. A.).

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[1] This request was made pursuant to *Peterson* v. *Commonwealth*, 225 Va. 289, 302 S. E. 2d 520 (1983), which instructed that, under Virginia law, the "preferred practice" in capital trials "is to make known to [the defendant] before trial the evidence that is to be adduced at the penalty stage if he is found guilty." *Id.*, at 298, 302 S. E. 2d, at 526.

The Sorrell murders "were one of the most highly publicized crimes in the history of the Tidewater, Virginia area." App. 341. In December 1984, five days after they were reported missing, Lisa and Shanta Sorrell were found dead in a partially burned car in Chesapeake, Virginia, a city that shares borders with Suffolk. Lisa's body was slumped in the front passenger seat of the car; she had been shot in the head six times. Shanta had been removed from her car seat and locked in the trunk, where she died after inhaling smoke produced by the fire in the car's passenger compartment. Neither Gray nor anyone else has ever been charged with commission of the Sorrell murders.[2]

In response to defense counsel's disclosure request, the prosecutor told Gray's lawyers and the court that he would introduce "statements" Gray had made to other inmates in which Gray allegedly admitted killing the Sorrells. The following exchange then took place between defense counsel Moore and prosecutor Ferguson:

> "MR. MOORE: Is it going to be evidence or just his statement?
>
> "MR. FERGUSON: Statements that your client made.
>
> "MR. MOORE: *Nothing other than statements?*
>
> "MR. FERGUSON: To other people, *that's correct.* Statements made by your client that he did these things." 3 J. A. 1331 (emphasis added).

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[2] That Gray had not been convicted of killing the Sorrells would not, under Virginia law, bar admission of evidence relating to those crimes during the penalty phase of his trial. One of Virginia's two aggravating circumstances requires the jury to determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2–264.2 (1995). The Virginia Supreme Court has held that "evidence of prior unadjudicated criminal conduct . . . may be used in the penalty phase to prove the defendant's propensity to commit criminal acts of violence in the future." *Watkins* v. *Commonwealth*, 229 Va. 469, 488, 331 S. E. 2d 422, 436 (1985).

After the in-chambers conference ended, the guilt phase of the trial began. Three days later, at 4 o'clock on Thursday afternoon, December 5, the jury returned a verdict finding Gray guilty of the capital murder of McClelland. Proceedings were adjourned for the day, with the penalty phase to begin at 9:30 the next morning.

That evening, the prosecutor informed defense counsel that, in addition to Gray's statements, he planned to introduce further evidence relating to the Sorrell murders. That further evidence included: (1) the testimony of Detective Slezak, the police officer who investigated the Sorrell murders, regarding his observations at the crime scene shortly after the bodies of Lisa and Shanta were discovered; (2) graphic photographs of the crime scene, depicting the interior of the partially burned car, Lisa's body in the front seat, and Shanta's body in the trunk; (3) the testimony of Doctor Presswalla, the state medical examiner who conducted the autopsies of the victims, regarding the causes of their deaths; (4) graphic photographs of the victims at the time of the autopsies, including a photograph depicting the back of Lisa's head, shaved to reveal six gunshot wounds; and (5) Doctor Presswalla's autopsy reports. See App. 29–37, 40–47.

This additional evidence, advanced by the prosecutor on the eve of the penalty phase, suggested that the Sorrell murders were carried out in a manner "strikingly similar" to the murder of McClelland. *Gray* v. *Commonwealth*, 233 Va. 313, 347, 356 S. E. 2d 157, 176 (1987). Like Lisa Sorrell, McClelland had been shot six times in the head; his car, too, had been partially burned. As defense counsel later explained, "the similarities between the McClelland murder and the Sorrell murder would be obvious to anyone sitting in a jury box." App. 141.

On Friday morning, December 6, before trial proceedings resumed, defense counsel informed the court of Thursday evening's developments. Gray's lawyers told the court they had learned for the first time the previous evening that the

prosecutor planned to introduce evidence relating to the Sorrell murders other than Gray's alleged statements. Counsel stated that while they were prepared to rebut the statements, they were "not prepared to rebut [the additional evidence] . . . because of the shortness of notice." 4 J. A. 2065. "We are not prepared to try the Sorrell murder today," counsel told the court. "We have not been given sufficient notice." *Ibid.*

Gray's lawyers argued that the case relied on by the prosecutor, *Watkins* v. *Commonwealth*, 229 Va. 469, 331 S. E. 2d 422 (1985), was distinguishable. There, counsel explained, separate murder charges were outstanding against the defendant, and "[t]he lawyers who were representing [Watkins] in the first murder trial were already representing him with respect to the second murders. They were aware of all the charges, were aware of the evidence that was available to the Commonwealth in the second murder charge and were in a position to confront the evidence . . . that would come in [during] the penalty trial." 4 J. A. 2065–2066. In contrast to the situation in *Watkins*, counsel pointed out, "[w]e are not prepared for any of this, other than [Gray] may have made some incriminating statements." 4 J. A. 2067. The trial court nonetheless ruled that the Sorrell murders evidence was "admissible at this stage of the trial." *Id.*, at 2068.

The penalty phase of the trial then commenced. The prosecutor, in keeping with his representations before the guilt phase began, called Melvin Tucker to the stand. Tucker was Gray's accomplice in the McClelland murder; he, along with Gray, had initially been charged with capital murder. After plea negotiations, however, the prosecutor agreed to reduce the charge against Tucker to first-degree murder, a noncapital offense, in exchange for Tucker's testimony against Gray. App. 339, and n. 3. Tucker testified during the guilt phase that Gray had been the "trigger man" in McClelland's murder.

Tucker testified at the penalty phase that, shortly after the McClelland robbery, he and Gray "were searching through the newspaper for some information" on the crime. *Id.*, at 22. According to Tucker, Gray stated that he had "knocked off" Lisa Sorrell, and pointed to a picture of Lisa Sorrell in the newspaper. *Id.*, at 22–23.[3] Gray's lawyers declined to cross-examine Tucker after his penalty phase testimony; in their view, Tucker's motive to lie had already been adequately exposed during the guilt phase. See *id.*, at 157 (testimony of defense counsel Moore) ("Melvin Tucker had been . . . extensively . . . cross-examined during the guilt phase . . . . The same jurors who were sitting there during the guilt trial were there during the penalty phase and they had been told and drawn a pretty accurate picture as to why Melvin Tucker would strike a deal and tell anybody anything they wanted to hear. To save his life. That didn't need to be brought up again.").

The prosecutor then called Detective Slezak. Defense counsel renewed their objection, outside the presence of the jury, to admission of any evidence relating to the Sorrell murders other than Gray's statements. Counsel reiterated that they had "had no notice of this," and had been "taken by surprise." *Id.*, at 25. What the prosecutor "is going to do today," they emphasized, "is not what he said he was going to do at the beginning of trial." *Id.*, at 27. The court adhered to its earlier ruling that the evidence was admissible.

With nothing more than Tucker's testimony linking Gray to the Sorrell murders, the trial court then allowed the prosecutor to introduce the testimony of Detective Slezak and Doctor Presswalla, as well as crime scene and autopsy

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[3] As the District Court suggested, in one respect this version of events is implausible. The McClelland murder occurred in May 1985, some six months after the Sorrells had been killed. No newspaper from May 1985 containing a photograph of Lisa Sorrell was ever introduced into evidence. See App. 343.

photographs and the victims' autopsy reports. See *ante,* at 157–158. During the defense case, Gray took the stand, admitted complicity in the McClelland murder but denied being the "triggerman," and denied any involvement in the Sorrell murders. App. 346–347. After closing arguments, in which the prosecutor highlighted the similarities between the Sorrell and McClelland murders, and urged that Gray's commission of the Sorrell murders demonstrated his "future dangerous[ness]," see *id.,* at 51–53, the jury fixed Gray's punishment at death.

Gray unsuccessfully argued on direct appeal to the Virginia Supreme Court and in state habeas proceedings that admission of the additional Sorrell murders evidence violated his right to a fair trial under the Fourteenth Amendment. Gray then filed a federal habeas petition in the United States District Court for the Eastern District of Virginia. Gray argued, among other things, that admission of the Sorrell murders evidence violated his Fourteenth Amendment rights. 1 J. A. 35. Specifically, he asserted:

> "The Commonwealth did not disclose its intentions to use the Sorrell murders as evidence against Gray until such a late date that it was impossible for Gray's defense counsel reasonably to prepare or defend against such evidence at trial. Because of the late notice, . . . Gray could not adequately prepare to defend his innocence regarding the Sorrell murders." *Id.,* at 33.

The District Court concluded that other claims pressed by Gray in his federal habeas petition were either procedurally barred or meritless. The court found, however, that the Sorrell evidence claim "was consistently raised in the State courts and is not procedurally defaulted." *Id.,* at 253.

After conducting an evidentiary hearing, the District Court granted Gray a writ of habeas corpus. Relying primarily on *Gardner* v. *Florida,* 430 U. S. 349 (1977), the court held that Gray's due process rights were violated "because

the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase," App. 348; consequently, Gray became vulnerable to a death sentence on the basis of information he had scant opportunity to deny or explain, see *id.*, at 349–351. Recalling the prosecutor's Monday morning affirmations that he would introduce only Gray's "statements," the District Court noted that Gray's lawyers were "clearly and justifiably . . . shocked" when the prosecutor reported, Thursday evening, his intention to introduce, the next day, further evidence on the Sorrell murders. *Id.*, at 350. "The only Sorrell murder evidence which [Gray's lawyers] were prepared to challenge," the District Court recounted, "was the evidence [the prosecutor] indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders." *Id.*, at 346. The prosecutor's surprise move had disarmed Gray's counsel, the District Court recognized, leaving them without capacity to cross-examine Detective Slezak and Doctor Presswalla effectively, with the result that the Sorrell murders evidence "carrie[d] no assurance of reliability." *Id.*, at 351.

"The consequences of this surprise," the District Court found, "could not have been more devastating." *Id.*, at 350. Most critically, the prosecutor's "statements only" assurance led defense counsel to forgo investigation of the details of the Sorrell murders, including a review of the evidence collected by the Chesapeake police department during its investigation of the crimes. See *ibid.* Had Gray's lawyers conducted such a review, they could have shown that none of the forensic evidence collected by the Chesapeake police directly linked Gray to the Sorrell murders.[4] Moreover, the evidence the Chesapeake police did obtain "strongly sug-

[4] The District Court noted, in this regard, that an investigator engaged by Gray's federal habeas counsel had run a driving test indicating that "Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated." *Id.*, at 345, n. 5.

gested that Timothy Sorrell"—Lisa's husband and Shanta's father—"actually committed the notorious murders." *Id.*, at 350–351.

Indeed, for a substantial period of time following the Sorrell murders, Timothy Sorrell was the prime suspect in the case.[5] Police suspicion focused on Mr. Sorrell the night Lisa and Shanta were found dead. When Detective Slezak and another officer informed Mr. Sorrell of the grim discovery, his statements and demeanor made the officers "highly suspicious." *Id.*, at 186.[6]

Police subsequently learned that Timothy Sorrell had an apparent motive for the murders. Two weeks before Lisa and Shanta were killed, the Sorrells obtained a life insurance policy, which designated Timothy and Shanta as beneficiaries in the event of Lisa's death. *Id.*, at 344.[7] Lisa's parents later filed a lawsuit to stop Mr. Sorrell from obtaining the proceeds of the insurance policy, alleging that he was responsible for Lisa's death. *Ibid.* In addition, police uncovered evidence suggesting that Mr. Sorrell was involved in a stolen merchandise ring at his place of employment, the Naval Supply Center, and that Lisa "was very angry and unhappy about her husband's apparent criminal activities." *Id.*, at 345.[8] Based on this information, Detective Slezak asked the

[5] Police designated Mr. Sorrell as the sole suspect on evidence they sent to crime labs for analysis. *Id.*, at 344.

[6] Asked to describe what about Mr. Sorrell's demeanor made him suspicious, Slezak testified: "I don't know how to describe it other than to say that it was not what you would expect to find in a situation like that. He just seemed defensive." *Id.*, at 186.

[7] By contrast, police never established Gray's supposed motive for killing the Sorrells. Lisa was found with her jewelry (a necklace and gold earrings) undisturbed, as well as cash and a postal money order for $280, *id.*, at 316, suggesting that robbery was not the perpetrator's motive, *id.*, at 317.

[8] Despite defense counsel's pretrial request for all exculpatory evidence pursuant to *Brady* v. *Maryland*, 373 U. S. 83 (1963), the prosecutor never disclosed the evidence incriminating Timothy Sorrell. Gray presented a *Brady* claim in his federal habeas petition, but the District Court noted

local Commonwealth's Attorney "to determine whether it was appropriate to prosecute Timothy Sorrell." *Ibid.*[9]

Assessing the prejudicial potency of the Sorrell murders evidence admitted at the penalty phase of Gray's trial, the District Court concluded that the due process violation was not harmless. *Id.*, at 353. The District Court therefore vacated Gray's death sentence, and remanded the case to the state trial court for resentencing.

The Court of Appeals for the Fourth Circuit reversed. *Gray* v. *Thompson*, 58 F. 3d 59 (1995). It held that federal habeas relief was barred because Gray's due process claim depended on a "new rule" of constitutional law which, under *Teague* v. *Lane*, 489 U. S. 288 (1989), could not be applied on collateral review. The Court of Appeals accordingly remanded the case, directing the District Court to dismiss Gray's habeas petition.

II

A case announces a "new rule" under *Teague* "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.*, at 301 (plurality opinion). Gray's conviction became final in 1987, when we denied certiorari to review the Virginia Supreme Court's decision on direct appeal. See *Gray* v. *Virginia*, 484 U. S. 873 (1987). As explained below, precedent decided well before 1987 "dictates" the conclusion that Gray was not accorded due process at the penalty phase of his trial.

Gray's claim is encompassing, but it is fundamental. Under the Due Process Clause, he contends, a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing. See Brief for Petitioner 45; Reply Brief for Petitioner 5.

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that the claim had not been raised in state court, and therefore held it procedurally barred. 1 J. A. 194.

[9] After Gray's trial, the local prosecutor reportedly stated in an affidavit that Mr. Sorrell was no longer a suspect. See 2 *id.*, at 927 (news report in The Virginian-Pilot, Jan. 7, 1986, p. D1).

The District Court concluded that Gray was stripped of any meaningful opportunity to explain or deny the Sorrell murders evidence, for his lawyers were unfairly "ambushed"—clearly surprised and devastatingly disarmed by the prosecutor's decision, announced on the eve of the penalty trial, to introduce extensive evidence other than Gray's statements. App. 349–351. Gray's counsel reasonably relied on the prosecutor's unequivocal "statements only" pledge, see *id.*, at 342, made at the outset of trial; based on the prosecutor's assurances, defense counsel spent no resources tracking down information in police records on the Sorrell murders. The prosecutor's switch, altogether unanticipated by defense counsel, left them with no chance to uncover, through their own investigation, information that could have defused the prosecutor's case, in short, without time to prepare an effective defense. *Id.*, at 351.

The Fourth Circuit recast Gray's claim, transforming it into an assertion of a broad constitutional right to discovery in capital cases. See 58 F. 3d, at 64–65. This Court also restates and reshapes Gray's claim. The Court first slices Gray's whole claim into pieces; it then deals discretely with each segment it "perceive[s]," *ante*, at 162: a "misrepresentation" claim, *ante*, at 166; and a supposed "notice-of-evidence" claim, *ante*, at 166–170. Gray, himself, however, has "never claimed a constitutional right to advance discovery of the Commonwealth's evidence." Brief for Petitioner 46, n. 37, and accompanying text. His own claim is more basic and should not succumb to artificial endeavors to divide and conquer it.

There is nothing "new" in a rule that capital defendants must be afforded a meaningful opportunity to defend against the State's penalty phase evidence. As this Court affirmed more than a century ago: "Common justice requires that no man shall be condemned in his person or property without . . . an opportunity to make his defence." *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864). See also *Windsor* v. *McVeigh*, 93

U. S. 274, 277 (1876). A *pro forma* opportunity will not do.[10] Due process demands an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965); see *In re Oliver*, 333 U. S. 257, 275 (1948) (defendant must be afforded "a reasonable opportunity to meet [the charges against him] by way of defense or explanation"); *Morgan* v. *United States*, 304 U. S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). Absent a full, fair, potentially effective opportunity to defend against the State's charges, the right to a hearing would be "but a barren one." *Ibid.;* see *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 315 (1950) ("process which is a mere gesture is not due process").

In *Gardner* v. *Florida*, 430 U. S. 349 (1977), the principal decision relied on by the District Court, we confirmed that the sentencing phase of a capital trial "must satisfy the requirements of the Due Process Clause." *Id.*, at 358 (plurality opinion). *Gardner* presented the question whether a defendant was denied due process when the trial judge sentenced him to death relying in part on a presentence report, including a confidential portion not disclosed to defense counsel. Counsel's deprivation of an "opportunity . . . to challenge the accuracy or materiality" of the undisclosed information, *id.*, at 356, the *Gardner* plurality reasoned, left a manifest risk that "some of the information accepted in confidence may [have been] erroneous, or . . . misinterpreted,"

[10] Cf. *In re Gault*, 387 U. S. 1, 33 (1967) (notice to parents the night before a juvenile delinquency hearing was constitutionally inadequate; due process requires that notice "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"); *Powell* v. *Alabama*, 287 U. S. 45, 58 (1932) (defense counsel appointed the morning of trial could not satisfy the constitutional requirement because counsel lacked opportunity to investigate the case; Court observed that "[t]o decide otherwise, would simply be to ignore actualities").

id., at 359. As a basis for a death sentence, *Gardner* teaches, information unexposed to adversary testing does not qualify as reliable. See *ibid.* The *Gardner* Court vacated the defendant's sentence, concluding that he "was denied due process of law when the death [penalty] was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.*, at 362.

Urging that *Gardner* fails to "dictate" a decision for Gray here, the Commonwealth relies on the Fourth Circuit's reasoning to this effect: *Gardner* was a case about "secrecy"; Gray's case is about "surprise." See 58 F. 3d, at 65. Therefore, Gray seeks an extension, not an application, of *Gardner*, see Brief for Respondent 30, in *Teague* parlance, a "new rule," Brief for Respondent 31. It would be an impermissible "leap," the Fourth Circuit maintained, to equate to a failure to disclose, a disclosure in fact made, "but allegedly so late as to be unfair." 58 F. 3d, at 65.

Teague is not the straitjacket the Commonwealth misunderstands it to be. *Teague* requires federal courts to decide a habeas petitioner's constitutional claims according to the "law prevailing at the time [his] conviction became final." 489 U. S., at 306 (plurality opinion) (internal quotation marks omitted). But *Teague* does *not* bar federal habeas courts from applying, in "a myriad of factual contexts," law that is settled—here, the right to a meaningful chance to defend against or explain charges pressed by the State. See *Wright* v. *West*, 505 U. S. 277, 309 (1992) (KENNEDY, J., concurring in judgment) ("Where the beginning point is a rule of this 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.").

The District Court did not "forg[e] a new rule," *ibid.*, by holding, on the facts of this case, that Gray was denied a meaningful opportunity to challenge the Sorrell murders evidence. Ordinarily, it is incumbent upon defense counsel,

after receiving adequate notice of the triable issues, to pursue whatever investigation is needed to rebut relevant evidence the State may introduce. Here, however, in keeping with the practice approved by Virginia's highest court, see *supra,* at 172, and n. 1, the prosecutor expressly delineated the scope and character of the evidence he would introduce with respect to the Sorrell murders: nothing other than statements Gray himself allegedly made, see *supra,* at 173. Gray's lawyers reasonably relied on the prosecutor's "statements only" assurance by forgoing inquiry into the details of the Sorrell crimes. Resource-consuming investigation, they responsibly determined, was unnecessary to cast doubt on the veracity of inmate "snitch" testimony, the only evidence the prosecutor initially said he would offer.

Gray's lawyers were undeniably caught short by the prosecutor's startling announcement, the night before the penalty phase was to begin, that he would in effect put on a "mini-trial" of the Sorrell murders. At that point, Gray's lawyers could not possibly conduct the investigation and preparation necessary to counter the prosecutor's newly announced evidence. Thus, at the penalty trial, defense counsel were reduced nearly to the role of spectators. Lacking proof, later uncovered, that "strongly suggested" Timothy Sorrell, not Gray, was the actual killer, App. 350–351, Gray's lawyers could mount only a feeble cross-examination of Detective Slezak; counsel simply inquired of the detective whether highly publicized crimes could prompt "copycat" crimes, see *id.*, at 37–40. Gray's lawyers had no questions at all for Doctor Presswalla, the medical examiner who testified about the Sorrell autopsies. *Id.*, at 47.[11]

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[11] The Court attaches weight to the failure of Gray's lawyers to ask explicitly for deferral of the penalty phase. See *ante,* at 167, 169. It is uncontested that defense counsel made no formal motion for a continuance. But as the District Court described the morning-of-trial episode, counsel "plea[ded] for additional time to prepare." App. 343. And as earlier noted, see *supra,* at 174–175, counsel was explicit about the dilemma con-

In sum, the record shows, beyond genuine debate, that Gray was not afforded a "meaningful" opportunity to defend against the additional Sorrell murders evidence. The fatal infection present in *Gardner* infects this case as well: Defense counsel were effectively deprived of an opportunity to challenge the "accuracy or materiality" of information relied on in imposing the death sentence. *Gardner*, 430 U. S., at 356. Unexposed to adversary testing, the Sorrell murders evidence "carrie[d] no assurance of reliability." App. 351. The "debate between adversaries," valued in our system of justice for its contribution "to the truth-seeking function of trials," *Gardner*, 430 U. S., at 360, was precluded here by the prosecutor's eve-of-sentencing shift, and the trial court's tolerance of it. To hold otherwise "would simply be to ignore actualities." *Powell* v. *Alabama*, 287 U. S. 45, 58 (1932).[12]

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fronting the defense: "We are not prepared to try the Sorrell murder today." 4 J. A. 2065. The Court's suggestion that "this plea [was] insufficient to have legal effect in court," *ante*, at 167, n. 4, is puzzling. Neither the Court, the Fourth Circuit, nor the Commonwealth has cited any Virginia authority for this proposition. Cf. *Smith* v. *Estelle*, 602 F. 2d 694, 701, n. 8 (CA5 1979) ("the state points us to no rule of Texas law saying that moving for a continuance is the only way to object to surprise"), aff'd on other grounds, 451 U. S. 454 (1981). Given the potency of the evidence in question, it is difficult to comprehend the Court's speculation that defense counsel, for "tactical" reasons, may have wanted only exclusion and not more time. Compare *ante*, at 169, with Tr. of Oral Arg. 11 (counsel for petitioner urged that if a trial judge is asked, "please stop this from happening . . . , it violates my [client's] right to a fair trial," the existence of that right should not turn on whether counsel next says, "please exclude this evidence, as opposed to please give me more time").

[12] *Weatherford* v. *Bursey*, 429 U. S. 545 (1977), featured by the Court, see *ante*, at 168, 169–170, hardly controls this case. There, the State's *witness*, and not the prosecutor, misled defense counsel. 429 U. S., at 560. Furthermore, *Weatherford* did not involve the penalty phase of a capital trial, a stage at which reliability concerns are most vital. Finally, the defendant in *Weatherford* did not object at trial to the surprise witness, and did not later show how he was prejudiced by the surprise. *Id.*, at 561.

* * *

For the reasons stated, I conclude that the District Court's decision vacating Gray's death sentence did not rest on a "new rule" of constitutional law. I would therefore reverse the judgment of the Court of Appeals, and respectfully dissent from this Court's decision.

Syllabus

LANE *v.* PENA, SECRETARY OF TRANSPORTATION, ET AL.

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

No. 95–365. Argued April 15, 1996—Decided June 20, 1996

Respondents terminated petitioner Lane's enrollment at the United States Merchant Marine Academy on the ground that his recently diagnosed diabetes mellitus rendered him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program or as a Naval Reserve Officer. Alleging that his separation from the Academy violated § 504(a) of the Rehabilitation Act of 1973—which prohibits, among other things, discrimination on the basis of disability "under any program or activity conducted by any Executive agency"—Lane brought this suit seeking reinstatement to the Academy, compensatory damages, and other remedies. The District Court ordered him reinstated, but ultimately ruled that he must be denied compensatory damages because Congress has not waived the Federal Government's sovereign immunity against monetary damages awards for § 504(a) violations. The Court of Appeals summarily affirmed.

Held: Congress has not waived the Government's sovereign immunity against monetary damages awards for § 504(a) violations. Pp. 191–200.

(a) The requisite "unequivocal expression" of congressional intent to grant such a waiver, see, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95, is lacking in the text of § 505(a)(2), which decrees that the remedies available for violations of Title VI of the Civil Rights Act of 1964—including monetary damages awards, see, *e. g.*, *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 70—apply also to § 504(a) violations "by any . . . Federal provider of [financial] assistance." This provision makes no mention whatsoever of "program[s] or activit[ies] conducted by any Executive agency," the plainly more far-reaching language Congress employed in § 504(a) itself. The lack of the necessary clarity of expression in § 505(a)(2) is underscored by the precision with which Congress has waived the Government's sovereign immunity in §§ 501 and 505(a)(1) of the Act and in the Civil Rights Act of 1991. Lane's contention that the larger statutory scheme indicates congressional intent to "level the playing field" by subjecting the Government to the same remedies as any and all other § 504(a) defendants is rejected. *Franklin*, *supra*, at 69–71, distinguished. Pp. 191–197.

Syllabus

(b) The "equalization" provision of § 1003 of the Rehabilitation Act Amendments of 1986—which, after waiving the States' Eleventh Amendment immunity from federal-court suit for violations of § 504 and other civil rights statutes, specifies that legal and equitable remedies are available in such a suit "to the same extent as . . . in the suit against any public or private entity other than a State"—does not reveal congressional intent to equalize the remedies available against all defendants for § 504(a) violations, such that federal agencies, like private entities, must be subject to monetary damages. Although Lane's argument to this effect is not without force, it is ultimately defeated by the existence of at least two other conceivable, if not entirely satisfactory, interpretations of the equalization provision: (1) that "public . . . entit[ies]" refers to the nonfederal public entities receiving federal financial assistance that are covered by each of the referenced federal statutes; and (2) that "public or private entit[ies]" is meant only to subject the States to the scope of remedies available against *either* public or private § 504 defendants, whatever the lesser (or perhaps the greater) of those remedies might be. Pp. 197–200.

Affirmed.

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

Walter A. Smith, Jr., argued the cause for petitioner. With him on the briefs were *Daniel B. Kohrman*, *Audrey J. Anderson*, *Arthur B. Spitzer*, and *Steven R. Shapiro*.

Beth S. Brinkmann argued the cause for respondents. With her on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Bender*, *Barbara C. Biddle*, and *Christine N. Kohl*.*

**Linda D. Kilb*, *Arlene B. Mayerson*, and *Patricia Shiu* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging reversal.

Michael A. Greene and *Jerry W. Lee* filed a brief for the American Diabetes Association as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 504(a) of the Rehabilitation Act of 1973, 87 Stat. 355, 29 U. S. C. § 791 *et seq.* (Act or Rehabilitation Act), prohibits, among other things, discrimination on the basis of disability "under any program or activity conducted by any Executive agency." 29 U. S. C. § 794(a) (1988 ed., Supp. V). The question presented in this case is whether Congress has waived the Federal Government's sovereign immunity against awards of monetary damages for violations of this provision.

I

The United States Merchant Marine Academy is a federal service academy that trains students to serve as commercial merchant marine officers and as commissioned officers in the United States Armed Forces. The Academy is administered by the Maritime Administration, an organization within the Department of Transportation. Petitioner James Griffin Lane entered the Academy as a first-year student in July 1991 after meeting the Academy's requirements for appointment, including passing a physical examination conducted by the Department of Defense. During his first year at the Academy, however, Lane was diagnosed by a private physician as having diabetes mellitus. Lane reported the diagnosis to the Academy's Chief Medical Officer. The Academy's Physical Examination Review Board conducted a hearing in September 1992 to determine Lane's "medical suitability" to continue at the Academy, following which the Board reported to the Superintendent of the Academy that Lane suffered from insulin-dependent diabetes.

In December 1992, Lane was separated from the Academy on the ground that his diabetes was a "disqualifying condition," rendering him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program or as a Naval Reserve Officer. After unsuccessfully challenging his separation before the Maritime Administrator, Lane brought

suit in Federal District Court against the Secretary of the Department of Transportation and other defendants, alleging that his separation from the Academy violated § 504(a) of the Rehabilitation Act, 29 U. S. C. § 794(a). He sought reinstatement to the Academy, compensatory damages, attorney's fees, and costs.

The District Court granted summary judgment in favor of Lane, concluding that his separation from the Academy solely on the basis of his diabetes violated the Act. The court ordered Lane reinstated to the Academy, and the Government did not dispute the propriety of this injunctive relief. The Government did, however, dispute the propriety of a compensatory damages award, claiming that the United States was protected against a damages suit by the doctrine of sovereign immunity. The District Court disagreed; it ruled that Lane was entitled to a compensatory damages award against the Government for its violation of § 504(a), but deferred resolution of the specific amount of damages due. 867 F. Supp. 1050 (DC 1994).

Shortly thereafter, however, the Court of Appeals for the District of Columbia Circuit ruled in *Dorsey* v. *United States Dept. of Labor*, 41 F. 3d 1551 (1994), that the Act did not waive the Federal Government's sovereign immunity against monetary damages for violations of § 504(a). The court denied compensatory damages based on the absence, in any statutory text, of an "unequivocal expression" of congressional intent to waive the Government's immunity as to monetary damages, and this Court's instruction that waivers of sovereign immunity may not be implied, see, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990).

In light of *Dorsey*, the District Court vacated its prior order to the extent that it awarded damages to Lane and held that Lane was not entitled to a compensatory damages award against the Federal Government. App. to Pet. for Cert. 5a–6a. Lane appealed. The Court of Appeals for the District of Columbia Circuit first rejected Lane's request for initial en banc review to reconsider *Dorsey*, then granted the

Government's motion for summary affirmance. App. to Pet. for Cert. 1a. We granted certiorari, 516 U. S. 1036 (1996), to resolve the disagreement in the Courts of Appeals on the important question whether Congress has waived the Federal Government's immunity against monetary damages awards for violations of § 504(a) of the Rehabilitation Act. Compare, *e. g.*, *Dorsey*, *supra*, at 1554–1555, with *J. L.* v. *Social Security Admin.*, 971 F. 2d 260 (CA9 1992), and *Doe* v. *Attorney General*, 941 F. 2d 780 (CA9 1991).

II

Section 504(a) of the Act provides that

> "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U. S. C. § 794(a).

Section 505(a)(2) of the Act describes the remedies available for a violation of § 504(a): "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [§ 504]." § 794a(a)(2). Because Title VI provides for monetary damages awards, see *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 70 (1992) (noting that "a clear majority" of the Court confirmed in *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983), that damages are available under Title VI for intentional violations thereof), Lane reads §§ 504(a) and 505(a)(2) together to establish a waiver of the Federal Government's sovereign immunity against monetary damages awards for violations of § 504(a) committed by Executive agencies.

While Lane's analysis has superficial appeal, it overlooks one critical requirement firmly grounded in our precedents: A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, *e. g.*, *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33–34, 37 (1992), and will not be implied, *Irwin* v. *Department of Veterans Affairs*, *supra*, at 95. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. See, *e. g.*, *United States* v. *Williams*, 514 U. S. 527, 531 (1995) (when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will "constru[e] ambiguities in favor of immunity"); *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986); *Lehman* v. *Nakshian*, 453 U. S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"). To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims. *Nordic Village*, 503 U. S., at 34. A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Id.*, at 37.

The clarity of expression necessary to establish a waiver of the Government's sovereign immunity against monetary damages for violations of § 504 is lacking in the text of the relevant provisions. The language of § 505(a)(2), the remedies provision, is telling. In that section, Congress decreed that the remedies available for violations of Title VI would be similarly available for violations of § 504(a) "by any recipient of Federal assistance or Federal provider of such assistance." 29 U. S. C. § 794a(a)(2). This provision makes no mention whatsoever of "program[s] or activit[ies] conducted by any Executive agency," the plainly more far-reaching

language Congress employed in § 504(a) itself. Whatever might be said about the somewhat curious structure of the liability and remedy provisions, it cannot be disputed that a reference to "Federal provider[s]" of financial assistance in § 505(a)(2) does not, without more, establish that Congress has waived the Federal Government's immunity against monetary damages awards beyond the narrow category of § 504(a) violations committed by federal funding agencies acting as such—that is, by "Federal provider[s]."

The lack of clarity in § 505(a)(2)'s "Federal provider" provision is underscored by the precision with which Congress has waived the Federal Government's sovereign immunity from compensatory damages claims for violations of § 501 of the Rehabilitation Act, 29 U. S. C. § 791, which prohibits discrimination on the basis of disability in employment decisions by the Federal Government. In § 505(a)(1), Congress expressly waived the Federal Government's sovereign immunity against certain remedies for violations of § 501:

> "The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [which allows monetary damages] . . . shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint." 29 U. S. C. § 794a(a)(1).

Section 505(a)(1)'s broad language—"any complaint under section 501"—suggests by comparison with § 505(a)(2) that Congress did not intend to treat all § 504(a) defendants alike with regard to remedies. Had Congress wished to make Title VI remedies available broadly for *all* § 504(a) violations, it could easily have used language in § 505(a)(2) that is as sweeping as the "any complaint" language contained in § 505(a)(1).

But our analysis need not end there. In the Civil Rights Act of 1991, Congress made perfectly plain that compensatory damages would be available for certain violations of § 501 by the Federal Government (as well as other § 501 defendants), subject to express limitations:

> "In an action brought by a complaining party under the powers, remedies, and procedures set forth in . . . section 794a(a)(1) of title 29 [which applies to violations of § 501 by the Federal Government] . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section . . . from the respondent." Rev. Stat. § 1977A, as added, 105 Stat. 1072, 42 U. S. C. § 1981a(a)(2).

The Act's attorney's fee provision makes a similar point. Section 505(b) provides that, "[i]n any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U. S. C. § 794a(b). This provision likewise illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies for violations of the Act. The clarity of these provisions is in sharp contrast to the waiver Lane seeks to tease out of §§ 504 and 505(a)(2) of the Act.

Lane insists nonetheless that § 505(a)(2) compels a result in his favor, arguing that the Department of Transportation is a "Federal provider" within the meaning of § 505(a)(2) and thus is liable for a compensatory damages award regardless

of our resolution of the broader sovereign immunity question. Reply Brief for Petitioner 8–9. We disagree. The Department of Transportation, whatever its other activities, is not a "Federal provider" of financial assistance *with respect to the Merchant Marine Academy*, which the Department itself administers through the Maritime Administration. At oral argument, Lane's counsel effectively conceded as much. See Tr. of Oral Arg. 7 (acknowledging that the Department of Transportation is not a federal provider with respect to the Academy "because of this Court's decision in [*Department of Transp.* v. *Paralyzed Veterans of America*, 477 U. S. 597, 612 (1986)], which indicates that funds that are actually provided to an entity that the Federal Government manages itself, which is what DOT does here . . . for the Merchant Marine Academy," do not render the agency a "Federal provider"). Lane argues that § 505(a)(2)'s reference to "Federal provider[s]" is not limited by the text of the provision itself to the *funding activities* of those providers, but instead reaches "any act" of an agency that serves as a "Federal provider" in any context. Reply Brief for Petitioner 9, and n. 11. In light of our established practice of construing waivers of sovereign immunity narrowly in favor of the sovereign, however, we decline Lane's invitation to read the statutory language so broadly.

Lane next encourages us to look not only at the language of the liability and remedies provisions but at the larger statutory scheme, from which he would discern congressional intent to "level the playing field" by subjecting the Federal Government to the same remedies as any and all other § 504(a) defendants. A statutory scheme that would subject the Federal Government to awards of injunctive relief, attorney's fees, and monetary damages when it acts as a "Federal provider," but would not subject it to monetary damages awards when, and only when, a federal Executive agency itself commits a violation of § 504(a), Lane posits, is so illogi-

cal as to foreclose the conclusion that Congress intended to create such a scheme.

The statutory scheme on which Lane hinges his argument is admittedly somewhat bewildering. But the lack of perfect correlation in the various provisions does not indicate, as Lane suggests, that the reading proposed by the Government is entirely irrational. It is plain that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards. The Administrative Procedure Act (APA) illustrates this nicely. Under the provisions of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," is expressly authorized to bring "[a]n action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U. S. C. § 702 (emphasis added).

In any event, Lane's "equal treatment" argument largely misses the crucial point that, when it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties. Petitioner's reliance on *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), then, is misplaced. In *Franklin*, we held only that the implied private right of action under Title IX of the Education Amendments of 1972 supports a claim for monetary damages. "[A]bsent clear direction to the contrary by Congress," we stated, "the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.*, at 70–71. *Franklin*, however, involved an action against nonfederal defendants under Title IX. Although the Government does not contest the propriety of the injunctive relief Lane obtained, the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to ac-

tions against the Government to enforce § 504(a). As the Government puts it, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." Brief for Respondents 28.

And Lane's "equal treatment" argument falters as well on a point previously discussed: Section 505(a)(2) itself indicates congressional intent to treat federal Executive agencies *differently* from other § 504(a) defendants for purposes of remedies. See *supra*, at 192–193. The existence of the § 505(a)(2) remedies provision brings this case outside the "general rule" we discussed in *Franklin:* This is not a case in which "a right of action exists to enforce a federal right and Congress is silent on the question of remedies." 503 U. S., at 69. Title IX, the statute at issue in *Franklin,* made no mention of available remedies. *Id.*, at 71. The Rehabilitation Act, by sharp contrast, contains a provision labeled "Remedies and attorney fees," § 505. Congress has thus spoken to the question of remedies in § 505(a)(2), the only "remedies" provision directly addressed to § 504 violations, and has done so in a way that suggests that it did not in fact intend to waive the Federal Government's sovereign immunity against monetary damages awards for Executive agencies' violations of § 504(a). Given the existence of a statutory provision that is directed precisely to the remedies available for violations of § 504, it would be a curious application of our sovereign immunity jurisprudence to conclude, as the dissent appears to do, see *post,* at 209–210, that the lack of clear reference to Executive agencies in any express remedies provision indicates congressional intent to subject the Federal Government to monetary damages.

III

Even if §§ 504(a) and 505(a)(2) together do not establish the requisite unequivocal waiver of immunity, Lane insists, the "equalization" provision contained in § 1003 of the Reha-

bilitation Act Amendments of 1986, 100 Stat. 1845, 42 U. S. C. § 2000d–7, reveals congressional intent to equalize the remedies available against all defendants for § 504(a) violations. Section 1003 was enacted in response to our decision in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), where we held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act, and that the States accordingly were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504." *Id.*, at 235. By enacting § 1003, Congress sought to provide the sort of unequivocal waiver that our precedents demand. That section provides:

> "(1) A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> "(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U. S. C. § 2000d–7(a).

The "public entities" to which § 1003 refers, Lane concludes, must include the federal Executive agencies named in § 504(a), and those agencies must be subject to the same remedies under § 504(a), including monetary damages, as are private entities.

Although Lane's argument is not without some force, § 1003 ultimately cannot bear the weight Lane would assign

it. The equalization provision is susceptible of at least two interpretations other than the across-the-board leveling of liability and remedies that Lane proposes. Under the first such interpretation, as proposed by the Government, the "public . . . entit[ies]" to which the statute refers are "the non-federal public entities receiving federal financial assistance that are covered by" each of the statutes to which § 1003(a)(1) refers: The Rehabilitation Act, Title VI, Title IX, and the Age Discrimination Act of 1975. Brief for Respondents 22. The Government's suggestion is a plausible one: that § 1003(a)(2) refers to municipal hospitals, local school districts, and the like, which are unquestionably subject to *each* of the Acts listed in § 1003(a)(1). Section 504 alone among the listed Acts, however, extends its coverage to "program[s] or activit[ies] conducted by any Executive agency."

Section 1003 is also open to a second interpretation, one similar to the "leveling" interpretation suggested by petitioner: By reference to "public or private entit[ies]," Congress meant only to subject the States to the scope of remedies available against *either* public or private § 504 defendants, whatever the lesser (or perhaps the greater) of those remedies might be. Lane's reading of the statute—one that would suggest that *all* § 504(a) defendants, including the States, are subject to precisely the same remedies for violations of that provision—would effectively read out of the statute the very language on which he seeks to rely. That is, if the same remedies are available against all governmental and nongovernmental defendants under § 504(a), the "public or private" language is entirely superfluous. Congress could have achieved the result Lane suggests simply by subjecting States to the same remedies available against "every other entity," without further elaboration. The fact that § 1003(a)(2) itself separately mentions public and private entities suggests that there is a distinction to be made in

terms of the remedies available against the two classes of defendants.

Although neither of these conceivable readings of § 1003(a)(2) is entirely satisfactory, their existence points up a fact fatal to Lane's argument: Section 1003(a) is not so free from ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act. Given the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in § 1003, it would be ironic indeed to conclude that that same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards by means of an admittedly ambiguous reference to "public . . . entit[ies]" in the remedies provision attached to the unambiguous waiver of the States' sovereign immunity.

For the reasons stated, the judgment of the Court of Appeals for the District of Columbia Circuit is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

The Court relies on an amalgam of judge-made rules to defeat the clear intent of Congress to authorize an award of damages against a federal Executive agency that violates § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794. To reach this unfortunate result, the majority ignores the Act's purpose, text, and legislative history, relying instead on an interpretation of the structure of §§ 504 and 505 that the Court admits is "curious," *ante*, at 193, and "somewhat bewildering," *ante*, at 196.

The relevant facts are undisputed. The Department of Transportation violated § 504 by separating petitioner Lane

from the Merchant Marine Academy because he has diabetes. Lane was injured by that violation, and he is therefore entitled to maintain an action against the agency under § 504. The parties and the Court agree that damages are an appropriate form of relief for most violations of § 504, including wrongful conduct by private recipients of federal funding, by state actors, and by federal agencies acting in a funding capacity. The only issue in the case is whether Congress carved out a special immunity from damages liability for federal agencies acting in a nonfunding capacity, as the Department of Transportation was acting in this instance. I think it plain that Congress did not.

I

Congress passed the Rehabilitation Act to "develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living" for the disabled. 29 U. S. C. § 701, as amended by Pub. L. 95–602, Title I, § 122(a)(1), 92 Stat. 2984. As originally enacted in 1973, § 504 of the Act provided:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Pub. L. 93–112, 87 Stat. 394.

Although the Court pays scant attention to the principle, we have previously held that congressional intent with respect to a statutory provision must be interpreted in the light of the contemporary legal context. *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 71 (1992). A review of the relevant authorities convinces me that § 504 created a private cause of action with a damages remedy.

The text of § 504 was modeled on the language of § 601 of Title VI of the Civil Rights Act of 1964, which prohibits

discrimination by any recipient of federal funds on the basis of race, color, or national origin.[1] Following passage of Title VI, federal courts unanimously held that § 601 created a private cause of action. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696 (1979). Although we have never expressly ruled on the question, our opinion in *Cannon* implicitly ratified that judgment. *Id.*, at 703.

Our explicit holding in *Cannon* was that Title IX of the Education Amendments of 1972, which was also patterned on Title VI, created a private cause of action.[2] This conclusion stemmed, in part, from our understanding that Congress meant Title IX to be interpreted and applied in the same manner as Title VI. *Id.*, at 696. We presumed, consistent with well-established principles of statutory interpretation, that Congress was aware of the relevant legal context when it passed Title IX. *Id.*, at 696–697. We also noted that between the enactment of Title VI in 1964 and the enactment of Title IX in 1972 we had consistently found implied remedies in less clear statutory text. *Id.*, at 698.

Congress passed § 504 in 1973, just one year after enacting Title IX. Relying on analysis like that set forth in *Cannon*, the Courts of Appeals have uniformly held that Congress intended § 504 to provide a private right of action for victims of prohibited discrimination.[3]

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[1] The precise language of § 601 is as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

[2] Section 901 of Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 86 Stat. 373, as amended, 20 U. S. C. § 1681(a).

[3] See, *e. g.*, *Kampmeier* v. *Nyquist*, 553 F. 2d 296, 299 (CA2 1977); *NAACP* v. *Medical Center, Inc.*, 599 F. 2d 1247, 1258–1259 (CA3 1979); *Pandazides* v. *Virginia Bd. of Ed.*, 13 F. 3d 823 (CA4 1994); *Camenisch* v. *University of Texas*, 616 F. 2d 127, 130–131 (CA5 1980), vacated on other

In my opinion the Courts of Appeals are undoubtedly correct.[4]

Our decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), makes it equally clear that all traditional forms of relief, including damages, are available in a private action to enforce § 504. In *Franklin* we held that a plaintiff could seek monetary damages against a school system accused of violating her rights under Title IX. We canvassed the long history of the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). See *Franklin*, 503 U. S., at 65–71. Applying this rule to the implied cause of action in Title IX, we rejected the government's contention that "whatever the traditional presumption may have been when the Court decided *Bell* v. *Hood*, it has disappeared in succeeding decades." *Id.*, at 68. From *Franklin* it follows ineluctably that the original version of § 504—enacted, it bears repeating, one year after Title IX—authorized a damages remedy for persons aggrieved by violations of the provision's discrimination ban.

II

Against this background, Congress passed legislation in 1978 to extend § 504's prohibition against discrimination on

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grounds, 451 U. S. 390 (1981); *Jennings* v. *Alexander*, 715 F. 2d 1036, 1040–1041 (CA6 1983), rev'd on other grounds *sub nom. Alexander* v. *Choate*, 469 U. S. 287 (1985); *Lloyd* v. *Regional Transp. Auth.*, 548 F. 2d 1277, 1284–1287 (CA7 1977); *Miener* v. *Missouri*, 673 F. 2d 969, 973–974 (CA8), cert. denied, 459 U. S. 909 (1982); *Kling* v. *County of Los Angeles*, 633 F. 2d 876, 878 (CA9 1980), rev'd on other grounds, 474 U. S. 936 (1985); *Pushkin* v. *Regents of the Univ. of Colo.*, 658 F. 2d 1372, 1376–1380 (CA10 1981); *Jones* v. *Metropolitan Atlanta Rapid Transit Auth.*, 681 F. 2d 1376, 1377, n. 1 (CA11 1982), cert. denied, 465 U. S. 1099 (1984).

[4] See Conference Report on the Rehabilitation Act Amendments of 1974, S. Rep. No. 93–1270, p. 27 (1974) (hereinafter Conference Report on 1974 Amendments) (noting that § 504 was intended to "permit a judicial remedy through a private action").

the basis of handicap to cover the actions of federal Executive agencies. The amendment was part of a lengthy piece of legislation intended to strengthen the protections embodied in the original Act. See Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95–602, 92 Stat. 2955 (statement of purpose). The legislation evidenced Congress' continued commitment to the broad goals of the earlier Act by, for example, adding provisions aimed at improving accountability and enforcement, see, *e. g.*, Pub. L. 95–602, Title I, §§ 122(a)(10), 106, 109(4), 29 U. S. C. §§ 711–715, 751, 761b; expanding federal support for research programs, see, *e. g.*, Pub. L. 95–602, Title I, §§ 109(4), 104(c)(1), 29 U. S. C. §§ 761a, 762a; augmenting funding for projects such as job training and the removal of physical barriers in public places, see, *e. g.*, Pub. L. 95–602, Title I, §§ 116(2), 120(a), 29 U. S. C. § 777 *et seq.*, § 794b; and creating local rehabilitation centers across the Nation, see Pub. L. 95–602, Title I, § 115(a), 29 U. S. C. § 775. Together, the amendments represented a substantial financial investment in the future of the disabled in this country.

As part of this general expansion of the original Act, Congress amended § 504 to forbid discrimination against the handicapped "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."[5] 29 U. S. C. § 794(a). The question we ad-

[5] Section 504 was amended: "by striking out the period at the end thereof and inserting in lieu thereof 'or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.'" 92 Stat. 2982.

dress here is whether this unambiguous extension of § 504 to federal agencies was meant to waive the Government's sovereign immunity to damages liability. The answer is surely "yes." Section 504 as originally enacted was understood to create a private right of action for aggrieved individuals and to authorize a damages remedy. Congress, acting in 1978, had no reason to expect the courts to require a clearer statement respecting the remedies available against a federal defendant than those available against any other § 504 defendant. And the text of the amendment—which simply inserted the phrase extending coverage to federal agencies into the existing sentence prohibiting discrimination by federal grantees—gives no indication whatsoever that Congress intended to create a different remedial scheme for the agencies.

The Court rejects this conclusion, however, because it reads another part of the 1978 amendment, § 505(a)(2), as a limitation on the remedies available against Executive agencies under § 504. In my judgment, the Court errs by misinterpreting the language and structure of § 505 and ignoring its legislative history.

Congress' intent to strengthen the Act's protections is clearly evident in § 505. The inclusion of an attorney's fees provision in § 505(b) fortified the Act's enforcement mechanisms. This assistance to plaintiffs was necessary, according to the Senate Report accompanying the amendments, because "the rights extended to handicapped individuals under title V . . . are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance . . . ." S. Rep. No. 95–890, p. 19 (1978).[6]

The remedies provision, § 505(a), was also meant to ensure compliance with the 1973 Act, not to restrict remedies that Congress had made available under § 504, as the majority

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[6] Section 505 originated in the Senate.

would have it. The section's legislative history demonstrates Congress' intent.

Between the enactment of § 504 in 1973 and the passage of § 505(a)(2) in 1978,[7] the Department of Health, Education, and Welfare promulgated model regulations for federal agencies to use in implementing the antidiscrimination principle announced in § 504. See 43 Fed. Reg. 2132 (1978).[8] Because of the common understanding that § 504 was patterned on § 601 of Title VI, 42 U. S. C. § 2000d, and intended to be enforced in the same manner,[9] the Department simply directed the agencies to follow the procedures they used to enforce Title VI. See 43 Fed. Reg. 2137, § 85.5 (1978). This directive resulted in uniform enforcement mechanisms for allegations of discrimination by federal grantees on the basis of handicap, race, color, or national origin.[10] Moreover, it avoided needless duplication of effort. Section 601 is accompanied by additional provisions explaining Congress' in-

[7] The full text of § 505(a)(2) reads as follows: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act." 29 U. S. C. § 794a(a)(2).

[8] The Department acted pursuant to a directive from President Ford. See Exec. Order No. 11914, "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," issued on April 28, 1976; 41 Fed. Reg. 17871. Congress had encouraged the President to take this step. See Conference Report on 1974 Amendments, at 28 ("The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort . . . . The conferees . . . urge . . . delegation of responsibility to the Secretary [through an Executive Order]").

[9] See *id.*, at 27 (the "language of section 504, in following [Title VI and Title IX], . . . envisions the implementation of a compliance program which is similar to those Acts").

[10] Congress plainly intended this result. See *ibid.* ("This approach to implementation of section 504 . . . would . . . provide for administrative due process").

tentions with respect to implementation of the provision's mandate. See 42 U. S. C. § 2000d–1 *et seq.* As originally enacted, § 504 stood alone. It therefore made sense to allow federal agencies to take advantage of the details included in Title VI and the regulations promulgated to enforce § 601.

In enacting § 505(a)(2), Congress explicitly recognized and approved the application of Title VI's enforcement procedures to § 504. Thus, despite the Court's narrow focus on the incorporation of the remedies provided by Title VI, § 505(a)(2) provides that the "remedies, *procedures, and rights*" set forth in Title VI are available to an individual aggrieved by the conduct of a federal grant recipient. 29 U. S. C. § 794a(a)(2) (emphasis added). As the Senate Report explained:

> "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." S. Rep. No. 95–890, at 19.

Viewed in this context, the reference in § 505(a)(2) to "Federal provider[s]" that the Court finds so puzzling is easily understood: The compliance mechanisms defined in Title VI include remedies, procedures, and rights applicable to the providers of federal financial assistance as well as to the recipients of such assistance. See 29 U. S. C. § 2000d–1 *et seq.;* see, *e. g.,* 34 CFR §§ 100.6–100.10 (1995) and Part 101 (Department of Education regulations implementing Title VI); 45 CFR §§ 80.6–80.10 (1995) and Part 81 (same for Department of Health and Human Services); *id.,* §§ 611.6–611.10 (same for National Science Foundation).

Section 505(a)(1), the analogous provision for violations of § 501's prohibition on handicap discrimination in federal

employment, has a similar history.[11] The provision was intended to "aid in attaining" the goals of § 501 "by providing for individuals aggrieved on the basis of their handicap the same rights, procedures, and remedies provided [to] individuals aggrieved on the basis of race, creed, color, or national origin." S. Rep. No. 95–890, at 18–19. Like § 504, § 501 is not accompanied by any provisions concerning implementation. Section 505(a)(1) directs the executive to look to Title VII for appropriate "remedies, *procedures, and rights.*" 29 U. S. C. § 794a(a)(1) (emphasis added).

Unlike § 501 and the clause of § 504 relating to recipients of federal financial assistance, the prohibition on handicap discrimination in programs or activities conducted by federal Executive agencies had no simple statutory analogue. The Court opines that if "Congress [had] wished to make Title VI remedies available broadly for *all* § 504(a) violations, it could easily have used language in § 505(a)(2) that is as sweeping as the 'any complaint' language contained in § 505(a)(1)." *Ante*, at 193. I agree. Congress did not so intend, however, because, in the words of the United States, "[i]t would have been odd for Congress to have provided that Title VI remedies applied in Section 504 cases involving discrimination by executive agencies because Title VI [unlike § 504] does not prohibit discrimination in programs or activi-

[11] Section 505(a)(1) provides: "The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U. S. C. § 2000e–16), including the application of sections 706(f) through 706(k) (42 U. S. C. § 2000e–5(f) through (k)), shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U. S. C. § 794a(a)(1).

ties conducted by executive agencies," Brief for Respondents 16, n. 8.

The oddity extends beyond the nomenclature used to describe § 504 defendants. There are at least two substantive differences between federal Executive agencies and federal grantees as defendants under the provision. First, Title VI provides remedies that are appropriate against recipients of federal financial assistance, such as the withdrawal of funding for continuing violations, see 42 U. S. C. § 2000d–1, but that make no sense if applied against an agency defendant. Second, some violations that an agency might commit concern discrimination more closely analogous to statutory provisions outside of Title VI. Thus, the standard enforcement procedures adopted for alleged violations of § 504 involving *employment* discrimination by federal agencies require the agency to follow *§ 501* enforcement procedures. See, *e. g.*, 7 CFR § 15e.170(b) (1995) (Department of Agriculture regulations implementing § 504's mandate to federal agencies); 15 CFR § 8c.70 (1995) (same for Department of Commerce); 45 CFR § 85.61 (1995) (same for Department of Health and Human Services).

Viewed in its historical context, § 505(a)(2) simply has no application to violations of § 504 committed by federal agencies acting in a nonfunding capacity. Section 505(a)(2) delineates the remedies, procedures, and rights available to persons aggrieved by the conduct of federal grantees and federal funding agencies. It is silent on the remedies, procedures and rights available for transgressions of § 504 by federal Executive agencies acting in a nonfunding capacity. The relief to which petitioner is entitled is rooted in § 504 itself.

In my opinion, § 504 is amply sufficient to meet petitioner's needs. By failing to dictate explicitly the remedies available against federal agencies, Congress left in place the remedies that accompany § 504's implied cause of action. As Congress understood in both 1973 and 1978, these remedies

include monetary damages.[12] Thus, as of 1978, the Rehabilitation Act provided the relief sought by petitioner in this case.

Under the Court's current jurisprudence, however, § 504 apparently must be read in a vacuum. Since the advent of *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), the Court not only requires the traditional clear statement of a waiver of sovereign immunity but steadfastly refuses to consider the legislative history of a statute, no matter how opaque the statutory language or crystalline the history.[13] I shall not review my objections to that holding here. See *id.*, at 39–46 (dissenting opinion). Suffice it to say that Congress had no reason to suspect in 1978 that 14 years later this Court would adopt (and apply retroactively) a radically new and unforgiving approach to waivers of sovereign immunity.

III

Not surprisingly, given its lack of fidelity to the statutory text and history, the Court's reasoning leads to two implausible conclusions. To credit the Court's analysis, one must believe that Congress intended a damages remedy against a federal Executive agency acting indirectly in the provision

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[12] Aware that procedures were also needed, Congress added language in § 504 directing federal agencies to promulgate appropriate procedures. 29 U. S. C. § 794(a) ("The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978").

[13] The Court distinguishes *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), on the ground that *Franklin* involved a nonfederal defendant whereas this case concerns a federal defendant. *Ante*, at 196–197. This argument cannot be reconciled with the reasoning of our opinion. *Franklin* relied on cases in which pecuniary awards against the United States had been upheld. See 503 U. S., at 67 (citing *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838), and *Dooley* v. *United States*, 182 U. S. 222 (1901)). That being so, there is no basis for restricting application of the rule to the facts of that case.

of funding to nonfederal entities, but not against an agency acting directly in the conduct of its own programs and activities.[14] Surely such an unexpected result would have merited comment in a committee report or on the floor of the House or Senate. Yet there is not a scintilla of evidence in the purpose or legislative history of the Rehabilitation Act or its amendments supporting this interpretation of the statute.

In addition, the majority's holding necessarily presumes that Congress intended to impose harsher remedies on the States (which come under the § 504 provision prohibiting handicap discrimination by federal grantees) than on federal agencies for comparable misconduct. Given the special respect owed to the States—a respect that provided the *ratio decidendi* for our decision in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985)—this suggestion is wholly unconvincing. And once again, the legislative history of the Rehabilitation Act contains no mention of such an intent and no hint of a policy justification for this distinction.

The Court's strict approach to statutory waivers of sovereign immunity leads it to concentrate so carefully on textual details that it has lost sight of the primary purpose of judicial construction of Acts of Congress. We appropriately rely on canons of construction as tie breakers to help us discern Congress' intent when its message is not entirely clear. The presumption against waivers of sovereign immunity serves that neutral purpose in doubtful cases. A rule that refuses to honor such a waiver because it could have been expressed with even greater clarity, or a rule that refuses to accept guidance from relevant and reliable legislative history, does not facilitate—indeed, actually obstructs—the neutral performance of the Court's task of carrying out the will of Congress.

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[14] Even under the majority's interpretation, "Federal provider" must refer exclusively to Executive agencies. Otherwise § 505(a)(2) would create remedies against entities that may not be held liable under § 504.

The prompt congressional reaction to our decision in *Atascadero* illustrates the lack of wisdom of the Court's rigid approach to waivers of sovereign immunity.[15] It was true in that case, as it is in this, that Congress could have drafted a clearer statement of its intent. Our task, however, is not to educate busy legislators in the niceties and details of scholarly draftsmanship, but rather to do our best to determine what message they intended to convey. When judge-made rules require Congress to use its valuable time enacting and reenacting provisions whose original intent was clear to all but the most skeptical and hostile reader, those rules should be discarded.

I respectfully dissent.

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[15] The Court decided *Atascadero* in 1985. Congress passed legislation to override the decision in 1986. See Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U. S. C. § 2000d–7; see also *ante*, at 198. In recent years Congress has enacted numerous pieces of legislation designed to override statutory opinions of this Court. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 250–251 (1994) (listing eight decisions legislatively overruled by the Civil Rights Act of 1991). Additional examples are cited in Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L. J. 331, App. I (1991).

Syllabus

UNITED STATES *v.* REORGANIZED CF&I FABRICATORS OF UTAH, INC., ET AL.

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

No. 95–325. Argued March 25, 1996—Decided June 20, 1996

The Employee Retirement Income Security Act of 1974 obligated CF&I Steel Corporation and its subsidiaries (CF&I) to make certain annual funding contributions to pension plans they sponsored. The required contribution for the 1989 plan year totaled some $12.4 million, but CF&I failed to make the payment and petitioned the Bankruptcy Court for Chapter 11 reorganization. The Government filed, *inter alia*, a proof of claim for tax liability arising under § 4971(a) of the Internal Revenue Code, 26 U. S. C. § 4971(a), which imposes a 10 percent "tax" (of $1.24 million here) on any "accumulated funding deficiency" of plans such as CF&I's. The court allowed the claim but rejected the Government's argument that the claim was entitled to seventh priority as an "excise tax" under § 507(a)(7)(E) of the Bankruptcy Code, 11 U. S. C. § 507(a)(7)(E), finding instead that § 4971 created a penalty that was not in compensation for pecuniary loss. The Bankruptcy Court also subordinated the § 4971 claim to those of all other general unsecured creditors, on the supposed authority of the Bankruptcy Code's provision for equitable subordination, 11 U. S. C. § 510(c), and later approved a reorganization plan for CF&I giving lowest priority (and no money) to claims for noncompensatory penalties. The District Court and the Tenth Circuit affirmed.

Held:

1. The "tax" under § 4971(a) was not entitled to seventh priority as an "excise tax" under § 507(a)(7)(E), but instead is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim. Pp. 218–226.

(a) Here and there in the Bankruptcy Code Congress has referred to the Internal Revenue Code or other federal statutes to define or explain particular terms. It is significant that Congress included no such reference in § 507(a)(7)(E), even though the Bankruptcy Code provides no definition of "excise," "tax," or "excise tax." This absence of any explicit connection between §§ 507(a)(7)(E) and 4971 is all the more revealing in light of this Court's history of interpretive practice in determining whether a "tax" so called in the statute creating it is also a "tax" for the purposes of the bankruptcy laws. Pp. 219–220.

(b) That history reveals that characterizations in the Internal Revenue Code are not dispositive in the bankruptcy context. In every case in which the Court considered whether a particular exaction called a "tax" in the statute creating it was a tax for bankruptcy purposes, the Court looked behind the label and rested its answer directly on the operation of the provision. See, *e. g.*, *United States* v. *New York*, 315 U. S. 510, 514–517. Congress has given no statutory indication that it intended a different interpretive method for reading terms used in the Bankruptcy Act of 1978, see *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501, and the Bankruptcy Code's specific references to the Internal Revenue Code indicates that no general cross-identity was intended. The Government suggests that the plain texts of §§ 4971 and 507(a)(7)(E) resolve this case, but this approach is inconsistent with this Court's cases, which refused to rely on statutory terminology, and is unavailing on its own terms, because the Government disavows any suggestion that the use of the words "Excise Taxes" in the title of the chapter covering § 4971 or the word "tax" in § 4971(a) is dispositive as to whether § 4971(a) is a tax for purposes of § 507(a)(7)(E). The Government also seeks to rely on a statement from the legislative history that all taxes "generally considered or expressly treated as excises are covered by" § 507(a)(7)(E), but § 4971 does not call its exaction an excise tax, and the suggestion that taxes treated as excises are "excise tax[es]" begs the question whether the exaction is a tax to begin with. There is no basis, therefore, for avoiding the functional examination that the Court ordinarily employs. Pp. 220–224.

(c) The Court's cases in this area look to whether the purpose of an exaction is support of the government or punishment for an unlawful act. If the concept of a penalty means anything, it means punishment for an unlawful act or omission, and that is what this exaction is. The § 4971 exaction is imposed for violating a separate federal statute requiring the funding of pension plans, and thus has an obviously penal character. Pp. 224–225.

(d) The legislative history reflects the statute's punitive character. Pp. 225–226.

2. The subordination of the Government's § 4971 claim to those of the other general unsecured creditors pursuant to § 510(c) was error. Categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c). Pp. 226–229.

53 F. 3d 1155, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Part III, the opinion of the Court with respect to Parts I, II–A, II–B,

and II–C, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined, and the opinion of the Court with respect to Part II–D, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 229.

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*, *Gary D. Gray*, and *Kenneth W. Rosenberg.*

Steven J. McCardell argued the cause for respondents. With him on the brief were *Stephen M. Tumblin* and *Frank Cummings.**

JUSTICE SOUTER delivered the opinion of the Court.†

This case presents two questions affecting the priority of an unsecured claim in bankruptcy to collect an exaction under 26 U. S. C. § 4971(a), requiring a payment to the Internal Revenue Service equal to 10 percent of any accumulated funding deficiency of certain pension plans: first, whether the exaction is an "excise tax" for purposes of 11 U. S. C. § 507(a)(7)(E) (1988 ed.),[1] which at the time relevant here gave seventh priority to a claim for such a tax; and, second, whether principles of equitable subordination support a cate-

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**James J. Keightley*, *William G. Beyer*, *James J. Armbruster*, *Kenneth J. Cooper*, and *Charles G. Cole* filed a brief for the Pension Benefit Guaranty Corporation as *amicus curiae* urging reversal.

Richard M. Seltzer, *Bernard Kleiman*, *Carl B. Frankel*, *Paul Whitehead*, and *Karin Feldman* filed a brief for the United Steelworkers of America, AFL–CIO, as *amicus curiae* urging affirmance.

†JUSTICE SCALIA joins all but Part II–D of this opinion.

[1] Section 304(c) of the Bankruptcy Reform Act of 1994, 108 Stat. 4132, added a new seventh priority and moved the provision relevant here from seventh (§ 507(a)(7)) to eighth priority (§ 507(a)(8)), without altering any of the language germane to this case. The parties agree that this change from seventh to eighth priority does not affect this case because it arose under the pre-1994 Bankruptcy Code, and we accordingly refer to the provision in question as § 507(a)(7), to reflect its codification at the time in question.

gorical rule placing § 4971 claims at a lower priority than unsecured claims generally. We hold that § 4971(a) does not create an excise tax within the meaning of § 507(a)(7)(E), but that categorical subordination of the Government's claim to those of other unsecured creditors was error.

I

The CF&I Steel Corporation and its nine subsidiaries (CF&I) sponsored two pension plans, with the consequence that CF&I was obligated by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 935, 29 U. S. C. § 1001 *et seq.*, to make certain annual minimum funding contributions to the plans based on the value of the benefits earned by its employees. See § 1082; 26 U. S. C. § 412. The annual payments were due each September 15th for the preceding plan year, see 26 CFR § 11.412(c)–12(b) (1995), and on September 15, 1990, CF&I was required to pay a total of some $12.4 million for the year ending December 31, 1989. The day passed without any such payment, and on November 7, 1990, CF&I petitioned the United States Bankruptcy Court for the District of Utah for relief under Chapter 11 of the Bankruptcy Code, in an attempt at financial reorganization prompted in large part by the company's inability to fund the pension plans. *In re CF&I Fabricators of Utah, Inc.*, 148 B. R. 332, 334 (Bkrtcy. Ct. CD Utah 1992).

In 1991, the IRS filed several proofs of claim for tax liabilities, one of which arose under 26 U. S. C. § 4971(a), imposing a 10 percent "tax" (of $1.24 million here) on any "accumulated funding deficiency" of certain pension plans.[2] The

[2] The Government also filed a claim under § 4971(b), which imposes an exaction of 100 percent of the accumulated funding deficiency if the deficiency is not corrected before the notice of deficiency under § 4971(a) is mailed or the exaction under § 4971(a) is assessed. For the plan year ending December 31, 1989, the claimed tax liability under § 4971(b) was thus $12.4 million. In addition, the Government filed a claim for an accumulated funding deficiency for the plan year ending December 31, 1990, in the approximate amount of $25.6 million ($12.4 million for 1989 plus an

Government sought priority for the claim, either as an "excise tax" within the meaning of 11 U. S. C. § 507(a)(7)(E) (1988 ed.), or as a tax penalty in compensation for pecuniary loss under § 507(a)(7)(G). CF&I disputed each alternative, and by separate adversary complaint asked the Bankruptcy Court to subordinate the § 4971 claim to those of general unsecured creditors.

The Bankruptcy Court allowed the Government's claim under § 4971(a) but denied it any priority under § 507(a)(7), finding the liability neither an "excise tax" under § 507(a)(7)(E) nor a tax penalty in compensation for actual pecuniary loss under § 507(a)(7)(G). Instead, the court read § 4971 as creating a noncompensatory penalty, 148 B. R., at 340, and by subsequent order subordinated the claim to those of all other general unsecured creditors, on the supposed authority of the Bankruptcy Code's provision for equitable subordination, 11 U. S. C. § 510(c).

The Government appealed to the District Court for the District of Utah, pressing its excise tax theory and objecting to equitable subordination as improper in the absence of Government misconduct. While that appeal was pending, CF&I presented the Bankruptcy Court with a reorganization plan that put the § 4971 claim in what the plan called Class 13, a special category giving lowest priority (and no money) to claims for nonpecuniary loss penalties; but it also provided that, if the court found subordination behind general unsecured claims to be inappropriate, the § 4971 claim would be ranked with them in what the reorganization plan

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additional deficiency of $13.2 million for 1990); the liability claimed under § 4971(a) for 1990 was therefore $2.56 million, and under § 4971(b) the full $25.6 million. The Bankruptcy Court disallowed all of these additional claims (for reasons not pertinent here), see *In re CF&I Fabricators of Utah, Inc.*, 148 B. R. 332, 341 (Bkrtcy. Ct. CD Utah 1992), and the Government has not sought review of its ruling. Thus, though the Government filed four § 4971 claims in the Bankruptcy Court, we focus on the one at issue here, the § 4971(a) claim for the deficiency in the 1989 plan year.

called Class 12 (which would receive some funds). Appellees' App. in No. 94–4034 et al. (CA10), pp. 96–101, 137–141, 197–200. The United States objected, but the Bankruptcy Court affirmed the plan. The Government appealed this order as well, and the District Court affirmed both the denial of excise tax treatment and the subsequent subordination to general unsecured claims. App. to Pet. for Cert. A–11. The Tenth Circuit likewise affirmed. 53 F. 3d 1155 (1995).

We granted certiorari, 516 U. S. 1005 (1995), to resolve a conflict among the Circuits over whether § 4971(a) claims are excise taxes within the meaning of § 507(a)(7)(E), and whether such claims are categorically subject to equitable subordination under § 510(c).[3] We affirm on the first question but on the second vacate the judgment and remand.

II

The provisions for priorities among a bankrupt debtor's claimants are found in 11 U. S. C. § 507, subsection (a)(7) of which read, in relevant part, that seventh priority would be accorded to

> "allowed unsecured claims of governmental units, only to the extent that such claims are for—
>
> . . . . . .
>
> "(E) an excise tax on—
>
> "(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> "(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition."

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[3] Compare *In re Mansfield Tire & Rubber Co.*, 942 F. 2d 1055 (CA6 1991), cert. denied *sub nom. Krugliak* v. *United States*, 502 U. S. 1092 (1992), with *In re Cassidy*, 983 F. 2d 161 (CA10 1992); *In re C–T of Va., Inc.*, 977 F. 2d 137 (CA4 1992).

What the Government here claims to be an excise tax obligation arose under 26 U. S. C. § 4971(a), which provides that

> "[f]or each taxable year of an employer who maintains a [pension] plan . . . there is hereby imposed a tax of 10 percent (5 percent in the case of a multiemployer plan) on the amount of the accumulated funding deficiency under the plan, determined as of the end of the plan year ending with or within such taxable year."

No one denies that Congress could have included a provision in the Bankruptcy Code calling a § 4971 exaction an excise tax (thereby affording it the priority claimed by the Government); the only question is whether the exaction ought to be treated as a tax (and, if so, an excise) without some such dispositive direction.

A

Here and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes. Some bankruptcy provisions deal specifically with subjects as identified by terms defined outside the Bankruptcy Code; 11 U. S. C. § 523(a)(13), for example, addresses "restitution issued under title 18, United States Code," and § 507(a)(1) refers to "any fees and charges assessed against the estate under chapter 123 of title 28." Other bankruptcy provisions directly adopt definitions contained in other statutes; thus §§ 761(5), (7), and (8) adopt the Commodity Exchange Act's definitions of "commodity option," "contract market," "contract of sale," and so on. Not surprisingly, there are places where the Bankruptcy Code makes referential use of the Internal Revenue Code, as 11 U. S. C. § 101(41)(C)(i) does in referring to "an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code," and as § 346(g)(1)(C) does in providing for recognition of a gain or loss "to the

same extent that such transfer results in the recognition of gain or loss under section 371 of the Internal Revenue Code."

It is significant, therefore, that Congress included no such reference in § 507(a)(7)(E), even though the Bankruptcy Code itself provides no definition of "excise," "tax," or "excise tax." This absence of any explicit connector between §§ 507(a)(7)(E) and 4971 is all the more revealing in light of the following history of interpretive practice in determining whether a "tax" so called in the statute creating it is also a "tax" (as distinct from a debt or penalty) for the purpose of setting the priority of a claim under the bankruptcy laws.

B

Although § 507(a)(7), giving seventh priority to several different kinds of taxes, was enacted as part of the Bankruptcy Act of 1978, 92 Stat. 2590 (1978 Act), a priority provision for taxes was nothing new. Section 64(a) of the Bankruptcy Act of 1898 (1898 Act), which governed (as frequently amended) until 1978, gave priority to "taxes legally due and owing by the bankrupt to the United States [or a] State, county, district, or municipality." 30 Stat. 544, 563.[4] On a number of occasions, this Court considered whether a particular exaction, whether or not called a "tax" in the statute creating it, was a tax for purposes of § 64(a), and in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question.

The earliest such cases involved state taxes and are exemplified by *City of New York* v. *Feiring*, 313 U. S. 283 (1941). In considering whether a New York sales tax was a "tax" entitled to priority under § 64(a), the Court placed no weight on the "tax" label in the New York law, and looked to the

[4] This provision was modified slightly between 1898 and 1978, most notably in 1938, when it was moved to § 64(a)(4) (and given fourth priority) and amended to apply to "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof." 52 Stat. 874.

state statute only "to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64." *Id.*, at 285. See also *New Jersey* v. *Anderson*, 203 U. S. 483, 492 (1906); *New York* v. *Jersawit*, 263 U. S. 493, 495–496 (1924). The Court later followed the same course when a federal statute created the exaction. In *United States* v. *New York*, 315 U. S. 510 (1942), the Court considered whether "'tax[es]'" so called in two federal statutes, *id.*, at 512, n. 2, were entitled to priority as "taxes" under § 64(a). In each instance the decision turned on the actual effects of the exactions, *id.*, at 514–517, with the Court citing *Feiring* and *Anderson* as authority for its enquiry. 315 U. S., at 514–516. See also *United States* v. *Childs*, 266 U. S. 304, 309–310 (1924); *United States* v. *Sotelo*, 436 U. S. 268, 275 (1978) ("We . . . cannot agree with the Court of Appeals that the 'penalty' language of Internal Revenue Code § 6672 is dispositive of the status of respondent's debt under Bankruptcy Act § 17(a)(1)(e)").[5]

Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication, see *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986), whereas the most obvious statutory indicator is very much to the contrary: in the specific instances noted before, it would have been redundant for Congress to refer

[5] As the Court stated in a different context: "Although the statute . . . terms the money demanded as 'a further sum,' and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, . . . and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act." *Helwig* v. *United States*, 188 U. S. 605, 612–613 (1903).

specifically to Internal Revenue Code definitions of given terms if such cross-identity were to be assumed or presumed, as a matter of interpretive course.

While the Government does not directly challenge the continuing vitality of the cases in the *Feiring* line, it seeks to sidestep them by arguing, first, that similarities between the plain texts of §§ 4971 and 507(a)(7)(E) resolve this case. This approach, however, is inconsistent with *New York* and *Sotelo,* in each of which the Court refused to rely on the terminology used in the relevant tax and bankruptcy provisions.[6] The argument is also unavailing on its own terms, for even if we were to accept the proposition that comparable use of similar terms is dispositive, the Government's plain text argument still would fail.

The word "excise" appears nowhere in § 4971 (whereas, by contrast, 26 U. S. C. § 4401 explicitly states that it imposes "an excise tax"). And although there is one reference to "excise taxes" that applies to § 4971 in the heading of the subtitle covering that section ("Subtitle D—Miscellaneous Excise Taxes"), the Government disclaims any reliance on that caption. Tr. of Oral Arg. 14, 17–20; see also 26 U. S. C. § 7806(b) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title"). Furthermore, though § 4971(a) does explicitly refer to its exaction as a "tax," the Government disavows any suggestion that this language is dispositive as to whether § 4971(a) is a tax for purposes of § 507(a)(7)(E); while

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[6] JUSTICE THOMAS's suggestion that no case "has denied bankruptcy priority to a congressionally enacted tax," *post,* at 230, is true, but not on point. *United States* v. *New York*, 315 U. S., at 514–517, employed the *Feiring-Anderson* analysis to the exactions at issue there; the Court did not rely on the label that Congress gave. See also *United States* v. *Sotelo*, 436 U. S., at 275; *United States* v. *Childs*, 266 U. S. 304, 309–310 (1924). The Court's conclusion that the exactions functioned as taxes does not change the fact that it employed a functional analysis.

§ 4971(b) "impos[es] a tax equal to 100 percent of [the] accumulated funding deficiency to the extent not corrected," the Government says that this explicit language does not answer the question whether § 4971(b) is, in fact, a tax under § 507(a)(7)(E). Reply Brief for United States 13–14; Tr. of Oral Arg. 19–24. The Government's positions, then, undermine its suggestion that the statutes' texts standing together demonstrate that § 4971(a) imposes an excise tax.

The Government's second effort to avoid a *New York* and *Sotelo* interpretive enquiry relies on a statement from the legislative history of the 1978 Act, that "[a]ll Federal, State or local taxes generally considered or expressly treated as excises are covered by" § 507(a)(7)(E). 124 Cong. Rec. 32416 (1978) (remarks of Rep. Edwards); *id.*, at 34016 (remarks of Sen. DeConcini). But even taking this statement as authoritative, it would provide little support for the Government's position. Although the statement may mean that all exactions called[7] "excise taxes" should be covered by § 507(a)(7)(E),[8] § 4971 does not call its exaction an excise tax. And although the section occurs in a subtitle with a heading of "Miscellaneous Excise Taxes," the Government has disclaimed reliance on the subtitle heading as authority for its position in this case, recognizing the provision of 26 U. S. C. § 7806(b) that no inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code. See *supra*, at 222 and this page; Tr. of Oral Arg. 19. If, on the other hand, the statement in the legisla-

[7] Assuming that an exaction would not be "generally considered" an excise tax unless it would be reasonable to consider it such, the possible application of this first prong of the legislators' statement of intent is answered by the analysis of § 4971, below.

[8] It should be noted, though, that such an interpretation may prove too much: the Government suggests that this statement from the legislative history does not affect the rule of construction that courts will look behind the denomination of state and local taxes, Reply Brief for United States 6, n. 4, but it is difficult to read that sentence as applying one rule for federal taxes and another for state and local ones.

tive history is read more literally, its apparent upshot is that, among those exactions that are taxes, the ones that are expressly treated as excises are "excise tax[es]" within the meaning of § 507(a)(7)(E). But that proposition fails, of course, to answer the question whether the exaction is a tax to begin with.

In sum, we conclude that the 1978 Act reveals no congressional intent to reject generally the interpretive principle that characterizations in the Internal Revenue Code are not dispositive in the bankruptcy context, and no specific provision that would relieve us from making a functional examination of § 4971(a). We proceed to that examination.

C

Anderson and *New York* applied the same test in determining whether an exaction was a tax under § 64(a), or a penalty or debt: "a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *Anderson*, 203 U. S., at 492; *New York*, 315 U. S., at 515; accord, *Feiring*, 313 U. S., at 285 ("§ 64 extends to those pecuniary burdens laid upon individuals or their property . . . for the purpose of defraying the expenses of government or of undertakings authorized by it"). Or, as the Court noted in a somewhat different context, "[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." *United States* v. *La Franca*, 282 U. S. 568, 572 (1931).

We take *La Franca*'s statement of the distinction to be sufficient for the decision of this case; if the concept of penalty means anything, it means punishment for an unlawful act or omission, and a punishment for an unlawful omission is what this exaction is. Title 29 U. S. C. § 1082 requires a pension plan sponsor to fund potential plan liability according to a complex statutory formula, see also 26 U. S. C. § 412, and 26 U. S. C. § 4971(a) requires employers who maintain a

pension plan to pay the Government 10 percent of any accumulated funding deficiency. If the employer fails to correct the deficiency before the earlier of a notice of deficiency under § 4971(a) or an assessment of the § 4971(a) exaction, the employer is obligated to pay an additional "tax" of 100 percent of the accumulated funding deficiency. § 4971(b).[9] The obviously penal character of these exactions is underscored by other provisions, including one giving the Pension Benefit Guaranty Corporation (PBGC) an entirely independent claim against the employer for "the total amount of the unfunded benefit liabilities," 29 U. S. C. § 1362(b)(1)(A) (a claim which in this case the PBGC has asserted and which is still pending, see *Pension Benefit Guaranty Corporation* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 179 B. R. 704 (ND Utah 1994)); see also §§ 1306–1307. We are, indeed, unable to find any provision in the statutory scheme that would cast the "tax" at issue here in anything but this punitive light.

D

The legislative history reflects the statute's punitive character:

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[9] The Government contends that § 4971(b) is more similar to a penalty than § 4971(a) is, because the Secretary of the Treasury can waive liability under the former but not the latter. The suggestion is that the Secretary can waive the imposition of the 100 percent tax, under ERISA § 3002(b), 88 Stat. 997, or can eliminate a violation by reducing the employer's funding requirement, see 26 U. S. C. § 412(d); see also 29 U. S. C. § 1083(a). But §§ 412(d) and 1083(a) provide for waiver of the minimum funding requirements, so their application would avoid a violation of either §§ 4971(a) or (b); there simply would be no "accumulated funding deficiency" for purposes of either §§ 4971(a) or (b). Thus the Government is incorrect in suggesting that the Secretary has the ability to waive the exaction under § 4971(b) but not under § 4971(a).

More fundamentally, even if the Secretary could waive only § 4971(b), it is not clear why this would make any difference, as the exaction would still serve to reinforce a federal prohibition.

> "The bill also provides new and more effective penalties where employers fail to meet the funding standards. In the past, an attempt has been made to enforce the relatively weak funding standards existing under present law by providing for immediate vesting of the employees' rights, to the extent funded, under plans which do not meet these standards. This procedure, however, has proved to be defective since it does not directly penalize those responsible for the underfunding. For this reason, the bill places the obligation for funding and the penalty for underfunding on the person on whom it belongs—namely, the employer." H. R. Rep. No. 93–807, p. 28 (1974).

Accord, S. Rep. No. 93–383, p. 24 (1973). The Committee Reports also stated that, "[s]ince the employer remains liable for the contributions necessary to meet the funding standards even after the payment of the excise taxes, it is anticipated that few, if any, employers will willfully violate these standards." H. R. Rep. No. 93–807, *supra,* at 28; S. Rep. No. 93–383, *supra,* at 24–25.

Given the patently punitive function of § 4971, we conclude that § 4971 must be treated as imposing a penalty, not authorizing a tax. Accordingly, we hold that the "tax" under § 4971(a) was not entitled to seventh priority as an "excise tax" under § 507(a)(7)(E), but instead is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim.

III

Hence, the next question: whether the Court of Appeals improperly subordinated the Government's § 4971 claim to those of the other general unsecured creditors. Though we have rejected the argument that the § 4971 claim is for an "excise tax" within the meaning of § 507(a)(7)(E), both parties agree that the § 4971 claim is allowable on a nonpriority

unsecured basis.[10] CF&I's reorganization plan did not lump all unsecured claims in one nonpriority class, however, but instead created four classes of unsecured creditors, only the first two of which would receive funds: Class 11 comprised small claims ($1,500 or less) grouped together for administrative convenience, see 11 U. S. C. § 1122(b); Class 12 comprised general unsecured claims (except for those assigned to other classes); Class 13 covered the § 4971 claim and some other (much smaller) subordinated penalty claims; and Class 14, claims between the CF&I Steel Corporation and its subsidiaries (all of which were bankrupt), the net value of which was zero. The plan provided, nonetheless, that if a court determined that a Class 13 claim should not be subordinated, or that the Class 13 claims should not be separately classified, the claim or claims would be placed in Class 12. Appellees' App. in No. 94–4034 et al., at 95–101, 137–141, 196–200.

When the Government challenged the proposal to subordinate its claim, the Bankruptcy Court confirmed the reorganization plan, App. to Pet. for Cert. A–31, and ordered that the § 4971 claim be "subordinated to the claims of all other general unsecured creditors of [CF&I] pursuant to 11 U. S. C. § 510(c)." *Id.*, at A–21. The District Court subsequently ruled that the § 4971 claim "should be equitably subordinated to the claims of the general creditors under Section 510(c)." *Id.*, at A–18. In the Tenth Circuit, the Government again contested subordination under § 510(c), which CF&I defended, even as it sought to sustain the Bankruptcy Court's result with two new, alternative arguments: first, that 11 U. S. C. § 1122(a), restricting a given class to substantially similar claims, prohibited placement of the § 4971 claim in Class 12, because of its dissimilarity to other

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[10] Cf. § 57(j) of the 1898 Act, 30 Stat. 561 ("Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose").

unsecured claims; and second, that, because 11 U. S. C. § 1129(a)(7) authorizes creditors with impaired claims (*i. e.*, those getting less than full payment under the plan, like those in Class 12 here) to reject a plan that would give them less than they would get from a Chapter 7 liquidation, courts must have the power to assign a claim the same priority it would have in a Chapter 7 liquidation (in which a noncompensatory prepetition penalty claim would be subordinated, 11 U. S. C. § 726(a)(4)). The Court of Appeals addressed neither of these arguments, however, relying instead on the broad construction given § 510(c) in *In re Virtual Network Servs. Corp.*, 902 F. 2d 1246 (CA7 1990) (subordinating a claim otherwise entitled to priority under § 507(a)(7) to those of general unsecured creditors), and holding specifically that "section 510(c)(1) does not require a finding of claimant misconduct to subordinate nonpecuniary loss tax penalty claims." 53 F. 3d, at 1159. The Court of Appeals took note of the Bankruptcy Court's finding that "[d]eclining to subordinate the IRS's penalty claim would harm innocent creditors rather than punish the debtor" and concluded that "the bankruptcy court correctly addressed the equities in this case." *Ibid.*

Nothing in the opinion of the Court of Appeals (or, for that matter, in the rulings of the Bankruptcy Court and the District Court) addresses the arguments that the Bankruptcy Court's result was sustainable without reliance on § 510(c). The court never suggested that either § 1122(a) or the Chapter 7 liquidation provisions were relevant. We thus necessarily review the subordination on the assumption that the Court of Appeals placed no reliance on the possibility that the Bankruptcy Code might permit the subordination on any basis except equitable subordination under § 510(c).

So understood, the subordination was error. In *United States* v. *Noland*, 517 U. S. 535 (1996), we reversed a judgment said to rely on § 510(c) when the subordination turned

on nothing other than the very characteristic that entitled the Government's claim to priority under §§ 507(a)(1) and 503(b)(1)(C). We held that the subordination fell beyond the scope of a court's authority under the doctrine of equitable subordination, because categorical subordination at the same level of generality assumed by Congress in establishing relative priorities among creditors was tantamount to a legislative act and therefore was outside the scope of any leeway under § 510(c) for judicial development of the equitable subordination doctrine. See *id.*, at 543. Of course it is true that *Noland* passed on the subordination from a higher priority class to the residual category of general unsecured creditors at the end of the line, whereas here the subordination was imposed upon a disfavored subgroup within the residual category. But the principle of *Noland* has nothing to do with transfer between classes, as distinct from ranking within one of them. The principle is simply that categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c). The order in this case was as much a violation of that principle as *Noland*'s order was.

Without passing on the merits of CF&I's arguments that the § 4971 claim is not similar to the other unsecured claims and that courts dealing with Chapter 11 plans should be guided by Chapter 7 provisions, we vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with the majority that the Bankruptcy Court improperly relied on 11 U. S. C. § 510(c) to subordinate the United States' claims, and I join Part III of the Court's opinion. I cannot agree, however, with the majority's determi-

nation that assessments under 26 U. S. C. § 4971(a) are not "excise taxes" within the meaning of 11 U. S. C. § 507(a)(7)(E) (1988 ed.). I would hold that every congressionally enacted tax that is generally considered an excise tax is entitled to bankruptcy priority under § 507(a)(7)(E).

Section 507(a)(7)(E) creates a bankruptcy priority for excise taxes. Congress, in enacting § 4971, purported to enact a tax, see 26 U. S. C. § 4971(a) ("[T]here is hereby imposed a tax . . ."), and the tax it enacted is properly considered an excise tax. See *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 161 (1993) (stating, in dicta, that § 4971 imposes an excise tax). It is true that *New Jersey* v. *Anderson*, 203 U. S. 483 (1906), and its progeny held that whether a state assessment is entitled to bankruptcy priority as a tax is a federal question. See *id.*, at 492; *City of New York* v. *Feiring*, 313 U. S. 283, 285 (1941). It is not appropriate, however, for federal courts to perform a similar inquiry into valid taxes passed by Congress, and the majority cites no case in which this Court has denied bankruptcy priority to a congressionally enacted tax. I respectfully dissent.

Syllabus

BROWN ET AL. *v.* PRO FOOTBALL, INC., DBA WASHINGTON REDSKINS, ET AL.

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

No. 95–388. Argued March 27, 1996—Decided June 20, 1996

After their collective-bargaining agreement expired, the National Football League (NFL), a group of football clubs, and the NFL Players Association, a labor union, began to negotiate a new contract. The NFL presented a plan that would permit each club to establish a "developmental squad" of substitute players, each of whom would be paid the same $1,000 weekly salary. The union disagreed, insisting that individual squad members should be free to negotiate their own salaries. When negotiations reached an impasse, the NFL unilaterally implemented the plan. A number of squad players brought this antitrust suit, claiming that the employers' agreement to pay them $1,000 per week restrained trade in violation of the Sherman Act. The District Court entered judgment for the players on a jury treble-damages award, but the Court of Appeals reversed, holding that the owners were immune from antitrust liability under the federal labor laws.

Held: Federal labor laws shield from antitrust attack an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer. Pp. 235–250.

(a) This Court has previously found in the labor laws an implicit, "nonstatutory" antitrust exemption that applies where needed to make the collective-bargaining process work. See, *e. g., Connell Constr. Co.* v. *Plumbers,* 421 U. S. 616, 622. The practice here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining—is unobjectionable as a matter of labor law and policy, and, indeed, plays a significant role in the multiemployer collective-bargaining process that itself comprises an important part of the Nation's industrial relations system. Subjecting it to antitrust law would threaten to introduce instability and uncertainty into the collective-bargaining process, for antitrust often forbids or discourages the kinds of joint discussions and behavior that collective bargaining invites or requires. Moreover, if antitrust courts tried to evaluate particular kinds of employer understandings, there would be created a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert body, the

Syllabus

National Labor Relations Board, to which the labor laws give primary responsibility for policing collective bargaining. Thus, the implicit exemption applies in this case. Pp. 235–242.

(b) Petitioners' claim that the exemption applies only to labor-management *agreements* is rejected, since it is based on inapposite authority, and an exemption limited by petitioners' labor-management-consent principle could not work. Pp. 243–244.

(c) Also rejected is the Government's argument that the exemption should terminate at the point of impasse. Its rationale, that employers are thereafter free as a matter of labor law to negotiate individual arrangements on an interim basis with the union, is not completely accurate. More importantly, the simple "impasse" line would not solve the basic problem that labor law permits employers, after impasse, to engage in considerable joint behavior, while uniform employer conduct—at least when accompanied by discussion—invites antitrust attack. Pp. 244–247.

(d) Petitioners' alternative rule, which would exempt from antitrust's reach postimpasse agreements about bargaining "tactics," but not those about substantive "terms," is unsatisfactory because it would require antitrust courts, insulated from the bargaining process, to delve into the amorphous subject of employers' subjective motives in order to determine whether the exemption applied. Pp. 247–248.

(e) Petitioners' arguments relating to general "backdrop" statutes and the "special" nature of professional sports are also rejected. Pp. 248–250.

(f) The antitrust exemption applies to the employer conduct at issue here, which took place during and immediately after a collective-bargaining negotiation; grew out of, and was a directly related to, the lawful operation of the bargaining process; involved a matter that the parties were required to negotiate collectively; and concerned only the parties to the collective-bargaining relationship. The Court's holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an employer agreement could be sufficiently distant in time and in circumstances from the bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. The Court need not decide in this case whether, or where, to draw the line, particularly since it does not have the detailed views of the Board on the matter. P. 250.

50 F. 3d 1041, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 252.

Kenneth W. Starr argued the cause for petitioners. With him on the briefs were *Paul T. Cappuccio*, *Steven G. Bradbury*, *Joseph A. Yablonski*, and *Daniel B. Edelman.*

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Bingaman*, *Deputy Assistant Attorney General Klein*, *Paul R. Q. Wolfson*, *Robert J. Nicholson*, *Robert J. Wiggers*, and *David C. Shonka.*

Gregg H. Levy argued the cause for respondents. With him on the brief were *Herbert Dym*, *Sonya D. Winner*, and *Robert A. Long, Jr.**

JUSTICE BREYER delivered the opinion of the Court.

The question in this case arises at the intersection of the Nation's labor and antitrust laws. A group of professional

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*Briefs of *amici curiae* urging reversal were filed for the National Hockey League Players Association et al. by *Simon P. Gourdine*, *Laurence Gold*, *Virginia A. Seitz*, *James W. Quinn*, and *Jeffrey L. Kessler;* and for the Screen Actors Guild, Inc., et al. by *David Alter.*

Briefs of *amici curiae* urging affirmance were filed for the Alliance of Motion Picture and Television Producers by *Richard M. Cooper;* for the American Trucking Associations by *Mark I. Levy* and *Daniel R. Barney;* for the Associated General Contractors of America, Inc., by *Charles E. Murphy*, *John G. Roberts, Jr.*, and *Michael E. Kennedy;* for the Bituminous Coal Operators' Association, Inc., by *Charles P. O'Connor*, *Peter Buscemi*, and *Stanley F. Lechner;* for the Carriers Container Council, Inc., et al. by *C. Peter Lambos*, *Robert J. Attaway*, *Donato Caruso*, and *Robert S. Zuckerman;* for the Chamber of Commerce of the United States et al. by *Zachary D. Fasman*, *Neal D. Mollen*, *Jenny C. Wu*, *Stephen A. Bokar*, *Robin S. Conrad*, *Jan S. Amundson*, and *Quentin Riegel;* for the League of Voluntary Hospitals and Homes of New York et al. by *Howard L. Ganz* and *Steven C. Krane;* for the National Basketball Association by *Jeffrey A. Michkin* and *Richard W. Buchanan;* for the National Electrical Contractors Association, Inc., by *Gary L. Lieber;* for the National Hockey League by *Frank Rothman;* for the National Railway Labor Conference by *Richard T. Conway*, *Ralph J. Moore, Jr.*, *David P. Lee*, and *Joanna Moorhead;* and for the Office of the Commissioner of Baseball et al. by *Randy L. Levine* and *Thomas J. Ostertag.*

football players brought this antitrust suit against football club owners. The club owners had bargained with the players' union over a wage issue until they reached impasse. The owners then had agreed among themselves (but not with the union) to implement the terms of their own last best bargaining offer. The question before us is whether federal labor laws shield such an agreement from antitrust attack. We believe that they do. This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collective-bargaining process work. Like the Court of Appeals, we conclude that this need makes the exemption applicable in this case.

I

We can state the relevant facts briefly. In 1987, a collective-bargaining agreement between the National Football League (NFL or League), a group of football clubs, and the NFL Players Association, a labor union, expired. The NFL and the Players Association began to negotiate a new contract. In March 1989, during the negotiations, the NFL adopted Resolution G–2, a plan that would permit each club to establish a "developmental squad" of up to six rookie or "first-year" players who, as free agents, had failed to secure a position on a regular player roster. See App. 42. Squad members would play in practice games and sometimes in regular games as substitutes for injured players. Resolution G–2 provided that the club owners would pay all squad members the same weekly salary.

The next month, April, the NFL presented the developmental squad plan to the Players Association. The NFL proposed a squad player salary of $1,000 per week. The Players Association disagreed. It insisted that the club owners give developmental squad players benefits and protections similar to those provided regular players, and that they leave individual squad members free to negotiate their own salaries.

Two months later, in June, negotiations on the issue of developmental squad salaries reached an impasse. The NFL then unilaterally implemented the developmental squad program by distributing to the clubs a uniform contract that embodied the terms of Resolution G–2 and the $1,000 proposed weekly salary. The League advised club owners that paying developmental squad players more or less than $1,000 per week would result in disciplinary action, including the loss of draft choices.

In May 1990, 235 developmental squad players brought this antitrust suit against the League and its member clubs. The players claimed that their employers' agreement to pay them a $1,000 weekly salary violated the Sherman Act. See 15 U. S. C. § 1 (forbidding agreements in restraint of trade). The Federal District Court denied the employers' claim of exemption from the antitrust laws; it permitted the case to reach the jury; and it subsequently entered judgment on a jury treble-damages award that exceeded $30 million. The NFL and its member clubs appealed.

The Court of Appeals (by a split 2-to-1 vote) reversed. The majority interpreted the labor laws as "waiv[ing] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." 50 F. 3d 1041, 1056 (CADC 1995). The court held, consequently, that the club owners were immune from antitrust liability. We granted certiorari to review that determination. Although we do not interpret the exemption as broadly as did the Appeals Court, we nonetheless find the exemption applicable, and we affirm that court's immunity conclusion.

II

The immunity before us rests upon what this Court has called the "nonstatutory" labor exemption from the antitrust laws. *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 622 (1975); see also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676

(1965); *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, see 29 U. S. C. § 151; *Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959); which require good-faith bargaining over wages, hours, and working conditions, see 29 U. S. C. §§ 158(a)(5), 158(d); *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 348–349 (1958); and which delegate related rulemaking and interpretive authority to the National Labor Relations Board (Board), see 29 U. S. C. § 153; *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242–245 (1959).

This implicit exemption reflects both history and logic. As a matter of history, Congress intended the labor statutes (from which the Court has implied the exemption) in part to adopt the views of dissenting Justices in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), which Justices had urged the Court to interpret broadly a different *explicit* "statutory" labor exemption that Congress earlier (in 1914) had written directly into the antitrust laws. *Id.*, at 483–488 (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting) (interpreting § 20 of the Clayton Act, 38 Stat. 738, 29 U. S. C. § 52); see also *United States* v. *Hutcheson*, 312 U. S. 219, 230–236 (1941) (discussing congressional reaction to *Duplex*). In the 1930's, when it subsequently enacted the labor statutes, Congress, as in 1914, hoped to prevent judicial use of antitrust law to resolve labor disputes—a kind of dispute normally inappropriate for antitrust law resolution. See *Jewel Tea*, *supra*, at 700–709 (opinion of Goldberg, J.); *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365, 370, n. 7 (1960); A. Cox, Law and the National Labor Policy 3–8 (1960); cf. *Duplex*, *supra*, at 485 (Brandeis, J., dissenting) (explicit "statutory" labor exemption reflected view that "Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands"). The implicit ("nonstatutory") exemption interprets the labor statutes in

accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict. See *Jewel Tea*, *supra*, at 709–710.

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. See *Connell*, *supra*, at 622 (federal labor law's "goals" could "never" be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws); *Jewel Tea*, *supra*, at 711 (national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining); *Pennington*, *supra*, at 665 (implicit exemption necessary to harmonize Sherman Act with "national policy . . . of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation'") (quoting *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 211 (1964)).

The petitioners and their supporters concede, as they must, the legal existence of the exemption we have described. They also concede that, where its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees.

Accord, *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U. S. 261, 287, n. 5 (1968) (Harlan, J., concurring); *Jewel Tea*, *supra*, at 729–732, 735 (opinion of Goldberg, J.); Brief for AFL–CIO as *Amicus Curiae* in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, O. T. 1981, No. 81–334, pp. 16–17; see also P. Areeda & H. Hovenkamp, Antitrust Law ¶ 229'd (1995 Supp.) (collecting recent Court of Appeals cases); cf. *H. A. Artists & Associates, Inc.* v. *Actors' Equity Assn.*, 451 U. S. 704, 717, n. 20 (1981) (explicit "statutory" exemption applies only to "bona fide labor organization[s]"). Nor does the dissent take issue with these basic principles. See *post*, at 253–254. Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

Labor law itself regulates directly, and considerably, the kind of behavior here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. *Storer Communications, Inc.*, 294 N. L. R. B. 1056, 1090 (1989); *Taft Broadcasting Co.*, 163 N. L. R. B. 475, 478 (1967), enf'd, 395 F. 2d 622 (CADC 1968); see also *NLRB* v. *Katz*, 369 U. S. 736, 745, and n. 12 (1962). The collective-bargaining proceeding itself must be free of

any unfair labor practice, such as an employer's failure to have bargained in good faith. See *Akron Novelty Mfg. Co.*, 224 N. L. R. B. 998, 1002 (1976) (where employer has not bargained in good faith, it may not implement a term of employment); 1 P. Hardin, The Developing Labor Law 697 (3d ed. 1992) (same). These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process. See *Bonanno Linen Serv., Inc.*, 243 N. L. R. B. 1093, 1094 (1979) (describing use of impasse as a bargaining tactic), enf'd, 630 F. 2d 25 (CA1 1980), aff'd, 454 U. S. 404 (1982); *Colorado-Ute Elec. Assn.*, 295 N. L. R. B. 607, 609 (1989), enf. denied on other grounds, 939 F. 2d 1392 (CA10 1991), cert. denied, 504 U. S. 955 (1992).

Although the case law we have cited focuses upon bargaining by a single employer, no one here has argued that labor law does, or should, treat multiemployer bargaining differently in this respect. Indeed, Board and court decisions suggest that the joint implementation of proposed terms after impasse is a familiar practice in the context of multiemployer bargaining. See, *e. g.*, *El Cerrito Mill & Lumber Co.*, 316 N. L. R. B. 1005 (1995); *Paramount Liquor Co.*, 307 N. L. R. B. 676, 686 (1992); *NKS Distributors, Inc.*, 304 N. L. R. B. 338, 340–341 (1991), rev'd, 50 F. 3d 18 (CA9 1995); *Sage Development Co.*, 301 N. L. R. B. 1173, 1175 (1991); *Walker Constr. Co.*, 297 N. L. R. B. 746, 748 (1990), enf'd, 928 F. 2d 695 (CA5 1991); *Food Employers Council, Inc.*, 293 N. L. R. B. 333, 334, 345–346 (1989); *Tile, Terazzo & Marble Contractors Assn.*, 287 N. L. R. B. 769, 772 (1987), enf'd, 935 F. 2d 1249 (CA11 1991), cert. denied, 502 U. S. 1031 (1992); *Salinas Valley Ford Sales, Inc.*, 279 N. L. R. B. 679, 686, 690 (1986); *Carlsen Porsche Audi, Inc.*, 266 N. L. R. B. 141, 152–153 (1983); *Typographic Service Co.*, 238 N. L. R. B. 1565 (1978); *United Fire Proof Warehouse Co.* v. *NLRB*, 356 F. 2d 494, 498–499 (CA7 1966); *Cuyamaca Meats, Inc.* v. *Butchers'*

and Food Employers' Pension Trust Fund, 638 F. Supp. 885, 887 (SD Cal. 1986), aff'd, 827 F. 2d 491 (CA9 1987), cert. denied, 485 U. S. 1008 (1988). We proceed on that assumption.

Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. See Appendix, *infra,* p. 251 (multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements, and is used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports); *NLRB* v. *Truck Drivers,* 353 U. S. 87, 95 (1957) *(Buffalo Linen)* (Congress saw multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining"); *Charles D. Bonanno Linen Service, Inc.* v. *NLRB,* 454 U. S. 404, 409, n. 3 (1982) *(Bonanno Linen)* (multiemployer bargaining benefits both management and labor, by saving bargaining resources, by encouraging development of industry-wide worker benefits programs that smaller employers could not otherwise afford, and by inhibiting employer competition at the workers' expense); Brief for Respondent NLRB in *Bonanno Linen,* O. T. 1981, No. 80–931, p. 10, n. 7 (same); General Subcommittee on Labor, House Committee on Education and Labor, Multiemployer Association Bargaining and its Impact on the Collective Bargaining Process, 88th Cong., 2d Sess., 10–19, 32–33 (Comm. Print 1964) (same); see also C. Bonnett, Employers' Associations in the United States: A Study of Typical Associations (1922) (history). The upshot is that the practice at issue here plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system.

In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over

wages, hours, and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever. See, *e. g.*, *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930) (agreement to insert arbitration provisions in motion picture licensing contracts). Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, see, *e. g.*, *United States* v. *General Motors Corp.*, 384 U. S. 127, 142–143 (1966); *United States* v. *Foley*, 598 F. 2d 1323, 1331–1332 (CA4 1979), cert. denied, 444 U. S. 1043 (1980), or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision, see, *e. g.*, *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809–810 (1946); *United States* v. *Masonite Corp.*, 316 U. S. 265, 275 (1942); *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–227 (1939). See generally 6 P. Areeda, Antitrust Law ¶¶ 1416–1427 (1986); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair

labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. The same is true of postimpasse discussions aimed at renewed negotiations with the union. Nor would adherence to the terms of an expired collective-bargaining agreement eliminate a potentially plausible antitrust claim charging that they had "conspired" or tacitly "agreed" to do so, particularly if maintaining the status quo were not in the immediate economic self-interest of some. Cf. *Interstate Circuit, supra*, at 222–223; 6 Areeda, *supra*, ¶ 1425. All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.

We do not see any obvious answer to this problem. We recognize, as the Government suggests, that, in principle, antitrust courts might themselves try to evaluate particular kinds of employer understandings, finding them "reasonable" (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy. See *supra*, at 236–237; see also *Jewel Tea*, 381 U. S., at 716–719 (opinion of Goldberg, J.).

III

Both petitioners and their supporters advance several suggestions for drawing the exemption boundary line short of this case. We shall explain why we find them unsatisfactory.

A

Petitioners claim that the implicit exemption applies only to labor-management *agreements*—a limitation that they deduce from case law language, see, *e. g.*, *Connell*, 421 U. S., at 622 (exemption for "some union-employer *agreements*") (emphasis added), and from a proposed principle—that the exemption must rest upon labor-management consent. The language, however, reflects only the fact that the cases previously before the Court involved collective-bargaining agreements, see *id.*, at 619–620; *Pennington*, 381 U. S., at 660; *Jewel Tea*, *supra*, at 679–680; the language does not reflect the exemption's rationale, see 50 F. 3d, at 1050.

Nor do we see how an exemption limited by petitioners' principle of labor-management consent could work. One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired. Yet a multiemployer bargaining process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union. Petitioners cannot rescue their principle by claiming that the exemption applies only insofar as *both* labor and management consent to those understandings. Often labor will not (and should not) consent to certain common bargaining positions that employers intend to maintain. Cf. Areeda & Hovenkamp, Antitrust Law ¶ 229'd, at 277 ("[J]oint employer preparation and bargaining in the context of a formal multi-employer bargaining unit is clearly exempt"). Similarly, labor need not consent to certain tactics that this Court has approved as part of the multiemployer

bargaining process, such as unit-wide lockouts and the use of temporary replacements. See *NLRB* v. *Brown*, 380 U. S. 278, 284 (1965); *Buffalo Linen*, 353 U. S., at 97.

Petitioners cannot save their consent principle by weakening it, as by requiring union consent only to the multiemployer bargaining process itself. This general consent is automatically present whenever multiemployer bargaining takes place. See *Hi-Way Billboards, Inc.*, 206 N. L. R. B. 22 (1973) (multiemployer unit "based on consent" and "established by an unequivocal agreement by the parties"), enf. denied on other grounds, 500 F. 2d 181 (CA5 1974); *Weyerhaeuser Co.*, 166 N. L. R. B. 299, 299–300 (1967). As so weakened, the principle cannot help decide *which* related practices are, or are not, subject to antitrust immunity.

B

The Government argues that the exemption should terminate at the point of impasse. After impasse, it says, "employers no longer have a duty under the labor laws to maintain the status quo," and "are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union." Brief for United States et al. as *Amici Curiae* 17.

Employers, however, are not completely free at impasse to act independently. The multiemployer bargaining unit ordinarily remains intact; individual employers cannot withdraw. *Bonanno Linen*, 454 U. S., at 410–413. The duty to bargain survives; employers must stand ready to resume collective bargaining. See, *e. g.*, *Worldwide Detective Bureau*, 296 N. L. R. B. 148, 155 (1989); *Hi-Way Billboards, Inc.*, *supra*, at 23. And individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with "the duty to abide by the results of group bargaining." *Bonanno Linen*, *supra*, at 416. Regardless, the absence of a legal "duty" to act jointly is not determinative. This Court has implied antitrust immunities

that extend beyond statutorily *required* joint action to joint action that a statute "expressly or impliedly allows or assumes must also be immune." 1 P. Areeda & D. Turner, Antitrust Law ¶ 224, p. 145 (1978); see, *e. g.*, *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 682–691 (1975) (immunizing application of joint rule that securities law permitted, but did not require); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 720–730 (1975) (same).

More importantly, the simple "impasse" line would not solve the basic problem we have described above. *Supra*, at 241–242. Labor law permits employers, after impasse, to engage in considerable joint behavior, including joint lockouts and replacement hiring. See, *e. g.*, *Brown*, *supra*, at 289 (hiring of temporary replacement workers after lockout was "reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multiemployer bargaining unit"). Indeed, as a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union. See generally 1 Hardin, The Developing Labor Law, at 516–520, 696–699. What is to happen if the parties cannot reach an interim agreement? The other alternatives are limited. Uniform employer conduct is likely. Uniformity—at least when accompanied by discussion of the matter—invites antitrust attack. And such attack would ask antitrust courts to decide the lawfulness of activities intimately related to the bargaining process.

The problem is aggravated by the fact that "impasse" is often temporary, see *Bonanno Linen*, *supra*, at 412 (approving Board's view of impasse as "a recurring feature in the bargaining process, . . . a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force") (internal quotation marks omitted); W. Sim-

kin & N. Fidandis, Mediation and the Dynamics of Collective Bargaining 139–140 (2d ed. 1986); it may differ from bargaining only in degree, see 1 Hardin, *supra*, at 691–696; *Taft Broadcasting Co.*, 163 N. L. R. B., at 478; it may be manipulated by the parties for bargaining purposes, see *Bonanno Linen*, *supra*, at 413, n. 8 (parties might, for strategic purposes, "precipitate an impasse"); and it may occur several times during the course of a single labor dispute, since the bargaining process is not over when the first impasse is reached, cf. J. Bartlett, Familiar Quotations 754:8 (16th ed. 1992). How are employers to discuss future bargaining positions during a temporary impasse? Consider, too, the adverse consequences that flow from failing to guess how an *antitrust* court would later draw the impasse line. Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.

The United States responds with suggestions for softening an "impasse" rule by extending the exemption after impasse "for such time as would be reasonable in the circumstances" for employers to consult with counsel, confirm that impasse has occurred, and adjust their business operations, Brief for United States et al. as *Amici Curiae* 24; by reestablishing the exemption once there is a "resumption of good-faith bargaining," *id.*, at 18, n. 5; and by looking to antitrust law's "rule of reason" to shield—"in some circumstances"—such joint actions as the unit-wide lockout or the concerted maintenance of previously established joint benefit or retirement plans, *ibid.* But even as so modified, the impasse-related rule creates an exemption that can evaporate in the middle of the bargaining process, leaving later antitrust courts free to second-guess the parties' bargaining decisions

and consequently forcing them to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide. Cf. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745* v. *NLRB*, 355 F. 2d 842, 844–845 (CADC 1966) ("The problem of deciding when further bargaining . . . is futile is often difficult for the bargainers and is necessarily so for the Board. But in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal . . . or better suited to the expert experience of a board which deals constantly with such problems").

C

Petitioners and their supporters argue in the alternative for a rule that would exempt postimpasse agreement about bargaining "tactics," but not postimpasse agreement about substantive "terms," from the reach of antitrust. See 50 F. 3d, at 1066–1069 (Wald, J., dissenting). They recognize, however, that both the Board and the courts have said that employers can, and often do, employ the imposition of "terms" as a bargaining "tactic." See, *e. g.*, *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 316 (1965); *Colorado-Ute Elec. Assn., Inc.* v. *NLRB*, 939 F. 2d 1392, 1404 (CA10 1991), cert. denied, 504 U. S. 955 (1992); *Circuit-Wise, Inc.*, 309 N. L. R. B. 905, 921 (1992); *Hi-Way Billboards*, 206 N. L. R. B., at 23; *Bonanno Linen*, 243 N. L. R. B., at 1094. This concession as to joint "tactical" implementation would turn the presence of an antitrust exemption upon a determination of the employers' primary purpose or motive. See, *e. g.*, 50 F. 3d, at 1069 (Wald, J., dissenting). But to ask antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive is to ask them to conduct an inquiry often more amorphous than those we have previously discussed. And, in our view, a labor/antitrust line drawn on such a basis would too often raise

the same related (previously discussed) problems. See *supra*, at 237, 241–242; *Jewel Tea*, 381 U. S., at 716 (opinion of Goldberg, J.) (expressing concern about antitrust judges "roaming at large" through the bargaining process).

D

Petitioners make several other arguments. They point, for example, to cases holding applicable, in collective-bargaining contexts, general "backdrop" statutes, such as a state statute requiring a plant-closing employer to make employee severance payments, *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987), and a state statute mandating certain minimum health benefits, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985). Those statutes, however, "'neither encourage[d] nor discourage[d] the collective-bargaining processes that are the subject of the [federal labor laws].'" *Fort Halifax*, *supra*, at 21 (quoting *Metropolitan Life*, *supra*, at 755). Neither did those statutes come accompanied with antitrust's labor-related history. Cf. *Oliver*, 358 U. S., at 295–297 (state antitrust law interferes with collective bargaining and is not applicable to labor-management agreement).

Petitioners also say that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is "special." We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption. We concede that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 101–102 (1984); App. 110–115 (declaration of NFL Commissioner). In the present context, however, that circumstance

makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us.

We also concede that football players often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers. See *post,* at 255 (STEVENS, J., dissenting). But this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table. We do not see how it could make a critical legal difference in determining the underlying framework in which bargaining is to take place. See generally Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971). Indeed, it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy.

The dissent points to other "unique features" of the parties' collective-bargaining relationship, which, in the dissent's view, make the case "atypical." *Post,* at 255. It says, for example, that the employers imposed the restraint simply to enforce compliance with league-wide rules, and that the bargaining consisted of nothing more than the sending of a "notice," and therefore amounted only to "so-called" bargaining. *Post,* at 256–257. Insofar as these features underlie an argument for looking to the employers' true purpose, we have already discussed them. See *supra,* at 247–248. Insofar as they suggest that there was not a genuine impasse, they fight the basic assumption upon which the District Court, the Court of Appeals, petitioners, and this Court rest the case. See 782 F. Supp. 125, 134 (DC 1991); 50 F. 3d, at 1056–1057; Pet. for Cert. i. Ultimately, we cannot find a satisfactory basis for distinguishing football players from

other organized workers. We therefore conclude that all must abide by the same legal rules.

* * *

For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. See, *e. g.*, 50 F. 3d, at 1057 (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co.*, 316 N. L. R. B., at 1006–1007 (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Buffalo Linen*, 353 U. S., at 96 (internal quotation marks omitted); see also *Jewel Tea*, 381 U. S., at 710, n. 18.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

TABLE A

Major Bargaining Units and Employment in Private Industry, by Type of Bargaining Unit, 1994.

(Covers bargaining units of 1,000 or more workers.)

	Number		*Percent*	
Type	*Units*	*Employment*	*Units*	*Employment*
I	522	2,305,478	44	43
M&S	664	3,040,159	56	57
Total	1,186	5,345,637	100	100

I = Multiemployer.
M = One company, more than one location.
S = One company, single location.
Source: U. S. Dept. of Labor, Bureau of Labor Statistics, unpublished data (Feb. 14, 1996) (available in Clerk of Court's case file).

TABLE B

Major Multiemployer Collective Bargaining Units and Employment in Private Industry, by Industry, 1994.

(Covers bargaining units of 1,000 or more workers.)

	Number		*Percent*	
Type	*Units*	*Employment*	*Units*	*Employment*
All industries	522	2,305,478	100	100
Manufacturing	45	210,050	9	9
Food	13	50,750	2	2
Apparel	23	141,600	4	6
Other	9	17,700	2	1
Nonmanufacturing	477	2,095,428	91	91
Mining	2	267,500	(1)	3
Construction	337	995,443	65	43
Railroads	12	189,183	2	8
Other transportation	20	156,662	4	7
Wholesale trade	6	8,500	1	(1)
Retail trade	37	314,100	7	14
Real estate	11	85,800	2	4
Hotels and motels	11	79,200	2	3
Business services	13	63,200	2	3
Health services	8	65,100	2	3
Other	20	70,740	4	3

(1) = More than 0 and less than 0.05 percent.
Source: U. S. Dept. of Labor, Bureau of Labor Statistics, unpublished data (Apr. 17, 1996) (available in Clerk of Court's case file).

JUSTICE STEVENS, dissenting.

In his classic dissent in *Lochner* v. *New York*, 198 U. S. 45, 75 (1905), Justice Holmes reminded us that our disagreement with the economic theory embodied in legislation should not affect our judgment about its constitutionality. It is equally important, of course, to be faithful to the economic theory underlying broad statutory mandates when we are construing their impact on areas of the economy not specifically addressed by their texts. The unique features of this case lead me to conclude that the Court has reached a decision that conflicts with the basic purpose of both the antitrust laws and the national labor policy expressed in a series of congressional enactments.

I

The basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978). Collusion among competitors, it is believed, may produce prices that harm consumers. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1940). Similarly, the Court has held, a marketwide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act. *Anderson* v. *Shipowners Assn. of Pacific Coast*, 272 U. S. 359 (1926).

The jury's verdict in this case has determined that the marketwide agreement among these employers fixed the salaries of the replacement players at a dramatically lower level than would obtain in a free market. While the special characteristics of this industry may provide a justification for the agreement under the rule of reason, see *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 100–104 (1984), at this stage of the proceeding our analysis of the exemption issue must accept the premise that the agreement is unlawful unless it is exempt.

The basic premise underlying our national labor policy is that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be.[1] Whether or not the premise is true in fact, it is surely the basis for the statutes that encourage and protect the collective-bargaining process, including the express statutory exemptions from the antitrust laws that Congress enacted in order to protect union activities.[2] Those statutes were enacted to enable collective action by union members to achieve wage levels that are higher than would be available in a free market. See *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 40 (1957).

The statutory labor exemption protects the right of workers to act collectively to seek better wages, but does not

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[1] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U. S. C. § 151; R. Posner & F. Easterbrook, Antitrust 31 (2d ed. 1981) ("The main purpose of labor unions is to raise wages by suppressing competition among workers . . ."); see also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 723 (1965) (opinion of Goldberg, J.) ("The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment").

[2] "The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. § 17 and 29 U. S. C. § 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U. S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers* v. *Pennington*, 381 U. S. 657, 662 (1965)." *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 621–622 (1975).

"exempt concerted action or agreements between unions and nonlabor parties." *Connell Constr. Co.* v. *Plumbers*, 421 U. S. 616, 621–622 (1975). It is the judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions. *Ibid.*

The limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees' wages may enjoy the benefits of the resulting agreements. The purpose of the labor laws would be frustrated if it were illegal for employers to enter into industrywide agreements providing supracompetitive wages for employees. For that reason, we have explained that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*, at 622.

Consistent with basic labor law policies, I agree with the Court that the judicially crafted labor exemption must also cover some collective action that employers take in response to a collective-bargaining agent's demands for higher wages. Immunizing such action from antitrust scrutiny may facilitate collective bargaining over labor demands. So, too, may immunizing concerted employer action designed to maintain the integrity of the multiemployer bargaining unit, such as lockouts that are imposed in response to "a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 93 (1957).

In my view, however, neither the policies underlying the two separate statutory schemes, nor the narrower focus on the purpose of the nonstatutory exemption, provides a justification for exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level

that would be produced in a free market. Nor do those policies support a rule that would allow employers to suppress wages by implementing noncompetitive agreements among themselves on matters that have not previously been the subject of either an agreement with labor or even a demand by labor for inclusion in the bargaining process. That, however, is what is at stake in this litigation.

II

In light of the accommodation that has been struck between antitrust and labor law policy, it would be most ironic to extend an exemption crafted to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market. Perhaps aware of the irony, the Court chooses to analyze this case as though it represented a typical impasse in an unexceptional multiemployer bargaining process. In so doing, it glosses over three unique features of the case that are critical to the inquiry into whether the policies of the labor laws require extension of the nonstatutory labor exemption to this atypical case.

First, in this market, unlike any other area of labor law implicated in the cases cited by the Court, player salaries are individually negotiated. The practice of individually negotiating player salaries prevailed even prior to collective bargaining.[3] The players did not challenge the prevailing

[3] As the District Court explained: "The present case does not involve any change in preexisting wage terms of either an active or expired collective bargaining agreement. In fact, creation of the developmental squads added a novel category of players to each NFL club. These players were not treated under the salary terms applicable to regular NFL players. Under the 1982 Collective Bargaining Agreement, the NFL players were expressly given the right to negotiate the salary terms of their contracts. 1982 Collective Bargaining Agreement at Article XXII, Plaintiffs' Exhibits at 1. By contrast, the developmental squad contracts indicates that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non-negotiable

practice because, unlike employees in most industries, they want their compensation to be determined by the forces of the free market rather than by the process of collective bargaining. Thus, although the majority professes an inability to understand anything special about professional sports that should affect the framework of labor negotiations, *ante*, at 248–249, in this business it is the employers, not the employees, who seek to impose a noncompetitive uniform wage on a segment of the market and to put an end to competitive wage negotiations.

Second, respondents concede that the employers imposed the wage restraint to force owners to comply with league-wide rules that limit the number of players that may serve on a team, not to facilitate a stalled bargaining process, or to revisit any issue previously subjected to bargaining. Brief for Respondents 4. The employers could have confronted the culprits directly by stepping up enforcement of roster limits. They instead chose to address the problem by unilaterally preventing players from individually competing in the labor market.

Third, although the majority asserts that the "club owners had bargained with the players' union over a wage issue until they reached impasse," *ante*, at 234, that hardly constitutes a complete description of what transpired. When the employers' representative advised the union that they proposed to pay the players a uniform wage determined by the owners, the union promptly and unequivocally responded that their proposal was inconsistent with the "principle" of individual salary negotiation that had been accepted in the past and that predated collective bargaining.[4] The so-called "bar-

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salary of $1,000 per week. Plaintiffs' Exhibits at 8, 9, 15 & 28." 782 F. Supp. 125, 138 (DC 1991).

[4] In a memorandum summarizing his meeting with the union representative, the owners representative stated, in part:

"Gene [Upshaw] indicated he fully understood the developmental squad but could not agree to any arrangement that eliminated the right of any

gaining" that followed amounted to nothing more than the employers' notice to the union that they had decided to implement a decision to replace individual salary negotiations with a uniform wage level for a specific group of players.[5]

Given these features of the case, I do not see why the employers should be entitled to a judicially crafted exemption from antitrust liability. We have explained that "[t]he nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Constr. Co.*, 421 U. S., at 622. I know of no similarly strong labor policy that favors the association of employers to eliminate a competitive method of negotiating wages that predates collective bargaining and that labor would prefer to preserve.

Even if some collective action by employers may justify an exemption because it is necessary to maintain the "integrity of the multiemployer bargaining unit," *NLRB* v. *Brown*, 380 U. S. 278, 289 (1965), no such justification exists here. The employers imposed a fixed wage even though there was no dispute over the pre-existing principle that player salaries should be individually negotiated. They sought only to prevent certain owners from evading roster limits and thereby gaining an unfair advantage. Because "the employer's interest is a competitive interest rather than an interest in regulating its own labor relations," *Mine Workers* v. *Pennington*, 381 U. S. 657, 667 (1965), there would seem to be no

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player to negotiate his individual salary. Upshaw said that no matter what salary level we proposed to pay developmental players, whether it was our $1,000 weekly or a higher number, the union would not 'in principle' permit two classes of players to exist, one with individual bargaining rights and one without." App. 19–20.

[5] The unique features of this case presumably explain why the National Labor Relations Board (Labor Board) can endorse the position of the players in this case without fearing the adverse impact on the bargaining process in the hypothetical cases that concern the Court. Brief for United States et al. as *Amici Curiae* 27, n. 10.

more reason to exempt this concerted, anticompetitive employer action from the antitrust laws than the action held unlawful in *Radovich* v. *National Football League*, 352 U. S. 445 (1957).

The point of identifying the unique features of this case is not, as the Court suggests, to make the case that professional football players, alone among workers, should be entitled to enforce the antitrust laws against anticompetitive collective employer action. *Ante*, at 249. Other employees, no less than well-paid athletes, are entitled to the protections of the antitrust laws when their employers unite to undertake anticompetitive action that causes them direct harm and alters the state of employer-employee relations that existed prior to unionization. Here that alteration occurred because the wage terms that the employers unilaterally imposed directly conflict with a pre-existing principle of agreement between the bargaining parties. In other contexts, the alteration may take other similarly anticompetitive and unjustifiable forms.

III

Although exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still, the Court provides a sweeping justification for the exemption that it creates today. The consequence is a newly minted exemption that, as I shall explain, the Court crafts only by ignoring the reasoning of one of our prior decisions in favor of the views of the dissenting Justice in that case. Of course, the Court actually holds only that this new exemption applies in cases such as the present in which the parties to the bargaining process are affected by the challenged anticompetitive conduct. *Ante*, at 250. But that welcome limitation on its opinion fails to make the Court's explanation of its result in this case any more persuasive.

The Court explains that the nonstatutory labor exemption serves to ensure that "antitrust courts" will not end up substituting their views of labor policy for those of either the

Labor Board or the bargaining parties. *Ante*, at 236–237. The Court concludes, therefore, that almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the Nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place. It notes that a contrary conclusion would require "antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive," a task that it believes too "amorphous" to be permissible. *Ante*, at 247.

The argument that "antitrust courts" should be kept out of the collective-bargaining process has a venerable lineage. See *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 483–488 (1921) (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). Our prior precedents subscribing to its basic point, however, do not justify the conclusion that employees have no recourse other than the Labor Board when employers collectively undertake anticompetitive action. In fact, they contradict it.

We have previously considered the scope of the nonstatutory labor exemption only in cases involving challenges to anticompetitive *agreements* between unions and employers brought by other employers not parties to those agreements. *Ante*, at 243. Even then, we have concluded that the exemption does not always apply. See *Mine Workers* v. *Pennington*, 381 U. S., at 663.

As *Pennington* explained, the mere fact that an antitrust challenge touches on an issue, such as wages, that is subject to mandatory bargaining does not suffice to trigger the judicially fashioned exemption. *Id.*, at 664. Moreover, we concluded that the exemption should not obtain in *Pennington* itself only after we examined the motives of one of the parties to the bargaining process. *Id.*, at 667.

The Court's only attempt to square its decision with *Pennington* occurs at the close of its opinion. It concludes that

the exemption applies because the employers' action "grew out of, and was directly related to, the lawful operation of the bargaining process," "[i]t involved a matter that the parties were required to negotiate collectively," and that "concerned only the parties to the collective-bargaining relationship." *Ante*, at 250.

As to the first two qualifiers, the same could be said of *Pennington*. Indeed, the same was said *and rejected* in *Pennington*. "This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement." 381 U. S., at 664–665.

The final qualifier does distinguish *Pennington*, but only partially so. To determine whether the exemption applied in *Pennington*, we undertook a detailed examination into whether the policies of labor law so strongly supported the agreement struck by the bargaining parties that it should be immune from antitrust scrutiny. We concluded that because the agreement affected employers not parties to the bargaining process, labor law policies could not be understood to require the exemption.

Here, however, the Court does not undertake a review of labor law policy to determine whether it would support an exemption for the unilateral imposition of anticompetitive wage terms by employers on a union. The Court appears to conclude instead that the exemption should apply merely because the employers' action was implemented during a lawful negotiating process concerning a mandatory subject of bargaining. Thus, the Court's analysis would seem to constitute both an unprecedented expansion of a heretofore limited exemption, and an unexplained repudiation of the reasoning in a prior, nonconstitutional decision that Congress itself has not seen fit to override.

The Court nevertheless contends that the "rationale" of our prior cases supports its approach. *Ante*, at 243. As support for that contention, it relies heavily on the views espoused in Justice Goldberg's separate opinion in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965). At five critical junctures in its opinion, see *ante*, at 236, 237–238, 242, 247–248, the Court invokes that separate concurrence to explain why, for purposes of applying the nonstatutory labor exemption, labor law policy admits of no distinction between collective employer action taken in response to labor demands and collective employer action of the kind we consider here.

It should be remembered that *Jewel Tea* concerned only the question whether an *agreement* between employers and a union may be exempt, and that even then the Court did not accept the broad antitrust exemption that Justice Goldberg advocated. Instead, Justice White, the author of *Pennington*, writing for Chief Justice Warren and Justice Brennan, explained that even in disputes over the lawfulness of agreements about terms that are subject to mandatory bargaining, courts must examine the bargaining process to determine whether antitrust scrutiny should obtain. *Jewel Tea*, 381 U. S., at 688–697. "The crucial determinant is not the form of the agreement—*e. g.*, prices or wages—but its relative impact on the product market *and the interests of union members.*" *Id.*, at 690, n. 5 (emphasis added). Moreover, the three dissenters, Justices Douglas, Clark, and Black, concluded that the union was entitled to no immunity at all. *Id.*, at 735–738.

It should also be remembered that Justice Goldberg used his separate opinion in *Jewel Tea* to explain his reasons for *dissenting* from the Court's opinion in *Pennington*. He explained that the Court's approach in *Pennington* was unjustifiable precisely because it permitted "antitrust courts" to reexamine the bargaining process. The Court fails to explain its apparent substitution in this case of Justice Gold-

berg's understanding of the exemption, an understanding previously endorsed by only two other Justices, for the one adopted by the Court in *Pennington*.

The Court's silence is all the more remarkable in light of the patent factual distinctions between *Jewel Tea* and the present case. It is not at all clear that Justice Goldberg himself understood his expansive rationale to require application of the exemption in circumstances such as those before us here. Indeed, the main theme of his opinion was that the antitrust laws should not be used to circumscribe bargaining over union demands. *Jewel Tea*, 381 U. S., at 723–725. Moreover, Justice Goldberg proved himself to be a most unreliable advocate for the sweeping position that the Court attributes to him.

Not long after leaving the Court, Justice Goldberg served as counsel for Curt Flood, a professional baseball player who contended that major league baseball's reserve clause violated the antitrust laws. *Flood* v. *Kuhn*, 407 U. S. 258 (1972). Although the *Flood* case primarily concerned whether professional baseball should be exempt from antitrust law altogether, see *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), the labor law dimensions of the case did not go unnoticed.

The article that first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse was written shortly after this Court granted certiorari in *Flood*, see Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), and the parties to the case addressed the very questions now before us. Aware of both this commentary, and, of course, his own prior opinion in *Jewel Tea*, Justice Goldberg explained in his brief to this Court why baseball's reserve clause should not be protected from antitrust review by the nonstatutory labor exemption.

> "This Court has held that *even* a labor organization, the principal intended beneficiary of the so-called labor exemption, may not escape antitrust liability when it acts, not unilaterally and in the sole interest of its own members, but in concert with employers 'to prescribe labor standards outside the bargaining unit[.]' And this is so even when the issue is so central to bargaining as wages. *Mine Workers* v. *Pennington*, 381 U. S. at 668. Compare *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965). See *Ramsey* v. *Mine Workers*, 401 U. S. 302, 307 (1971). . . .
>
> "The separate opinion on which respondents focus did express the view that 'collective bargaining activity on mandatory subjects of bargaining' is exempt from antitrust regulation, without regard to whether the union conduct involved is 'unilateral.' *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. at 732 (concurring opinion). But the author of that opinion agreed with the majority that agreements between unions and nonlabor groups on hard-core restraints like 'price-fixing and market allocation' were not exempt. 381 U. S. at 733. And there is no support in any of the opinions filed in *Meat Cutters* for Baseball's essential, if tacit, contention that unilateral, hard-core anticompetitive activity by employers acting alone—the present case—is somehow exempt from antitrust regulation." Reply Brief for Petitioner in *Flood* v. *Kuhn*, O. T. 1971, No. 71–32, pp. 13–14.

Moreover, Justice Goldberg explained that the extension of antitrust immunity to unilateral, anticompetitive employer action would be particularly inappropriate because baseball's reserve clause predated collective bargaining.

> "This case is in fact much clearer than *Pennington*, *Meat Cutters*, or *Ramsey*, for petitioner does not challenge the fruits of collective bargaining activity. He seeks relief from a scheme—the reserve system—which

> Baseball admits has been in existence for nearly a century, and which the trial court expressly found was 'created and imposed by the club owners long before the arrival of collective bargaining.' " *Id.*, at 14.

I would add only that this case is in fact much clearer than *Flood*, for there the owners sought only to *preserve* a restraint on competition to which the union had not agreed, while here they seek to *create* one.

Adoption of Justice Goldberg's views would mean, of course, that in some instances "antitrust courts" would have to displace the authority of the Labor Board. The labor laws do not exist, however, to ensure the perpetuation of the Board's authority. That is why we have not previously adopted the Court's position. That is also why in other contexts we have not thought the mere existence of a collective-bargaining agreement sufficient to immunize employers from background laws that are similar to the Sherman Act. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985).[6]

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[6] In *Teamsters* v. *Oliver*, 358 U. S. 283 (1959), we held that a state antitrust law could not be used to challenge an employer-union agreement. Justice White's opinion in *Jewel Tea* explains, however, that *Oliver* held only that "[a]s the agreement did not embody a '"remote and indirect approach to the subject of wages" . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract,' [358 U. S.], at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law." *Jewel Tea Co.*, 381 U. S., at 690, n. 5.

Moreover, in the petition for certiorari in *Flood*, Justice Goldberg explained that *Oliver* was not controlling.

"Petitioner has not addressed the contention advanced by respondents at trial but not reached by the courts below, that the reserve system is a matter for collective bargaining and hence exempt from state and federal antitrust laws under *Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959), and *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965). Neither of these decisions holds that an *employer* conspiracy to restrain trade is exempted from antitrust regulation where an employee group has been implicated in the scheme. No Justice participating in *Meat Cutters* dissented from the

IV

Congress is free to act to exempt the anticompetitive employer conduct that we review today. In the absence of such action, I do not believe it is for us to stretch the limited exemption that we have fashioned to facilitate the express statutory exemption created for labor's benefit so that unions must strike in order to restore a prior practice of individually negotiating salaries. I therefore agree with the position that the District Court adopted below.

> "Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the nonstatutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, *H. K. Porter Co.* v. *NLRB*, 397 U. S. at 108 . . . (one of fundamental policies of NLRA is freedom of contract), but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutu-

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proposition that hard core 'anticompetitive commercial restraint[s]' like 'price-fixing and market allocation'—and petitioner would add group boycotts—were subject to antitrust regulation even where bargained about. 381 U. S. 732–33 (concurring opinion). As this Court unanimously warned in 1949, 'Benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of antitrust fires.' *United States* v. *Women's Sportswear Mfr's Ass'n*, 336 U. S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. [797] (1945). Similar arguments by football were rejected by this Court in *Radovich* [v. *National Football League*, 352 U. S. 445 (1957),] as 'without merit,' and the reserve systems of other sports are now regulated by state and federal antitrust laws." Pet. for Cert. in *Flood* v. *Kuhn*, O. T. 1971, No. 71–32, p. 21, n. 9.

> ally acceptable to employer and labor union alike. Labor unions would be unlikely to sign collective bargaining agreements with employers if they believed that they would be forced to accept terms to which they never agreed." 782 F. Supp. 125, 139 (DC 1991) (footnote omitted).

Accordingly, I respectfully dissent.

Syllabus

UNITED STATES *v.* URSERY

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

No. 95–345. Argued April 17, 1996—Decided June 24, 1996*

In No. 95–345, the Government instituted civil forfeiture proceedings under 21 U. S. C. § 881(a)(7) against respondent Ursery's house, alleging that it had been used to facilitate illegal drug transactions. Shortly before Ursery settled that claim, he was indicted, and was later convicted, of manufacturing marijuana in violation of § 841(a)(1). In No. 95–346, the Government filed a civil *in rem* complaint against various property seized from, or titled to, respondents Arlt and Wren or Arlt's corporation, alleging that each item was subject to forfeiture under 18 U. S. C. § 981(a)(1)(A) because it was involved in money laundering violative of § 1956, and to forfeiture under 21 U. S. C. § 881(a)(6) as the proceeds of a felonious drug transaction. Litigation of the forfeiture action was deferred while Arlt and Wren were prosecuted on drug and money-laundering charges under § 846 and 18 U. S. C. §§ 371 and 1956. After their convictions, the District Court granted the Government's motion for summary judgment in the forfeiture proceeding. The Courts of Appeals reversed Ursery's conviction and the forfeiture judgment against Arlt and Wren, holding that the Double Jeopardy Clause prohibits the Government from both punishing a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding. The courts reasoned in part that *United States* v. *Halper*, 490 U. S. 435, and *Austin* v. *United States*, 509 U. S. 602, meant that, as a categorical matter, civil forfeitures always constitute "punishment" for double jeopardy purposes. This Court consolidated the cases.

Held: In rem civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. Pp. 273–292.

(a) Congress long has authorized the Government to bring parallel criminal actions and *in rem* civil forfeiture proceedings based upon the same underlying events, see, *e. g.*, *The Palmyra*, 12 Wheat. 1, 14–15, and this Court consistently has concluded that the Double Jeopardy Clause does not apply to such forfeitures because they do not impose punishment, see, *e. g.*, *Various Items of Personal Property* v. *United States*,

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*Together with No. 95–346, *United States* v. *$405,089.23 in United States Currency et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

282 U. S. 577, 581; *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235–236 *(per curiam)*. In its most recent case, *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, the Court held that a forfeiture was not barred by a prior criminal proceeding after applying a two-part test asking, first, whether Congress intended the particular forfeiture to be a remedial civil sanction or a criminal penalty, and, second, whether the forfeiture proceedings are so punitive in fact as to establish that they may not legitimately be viewed as civil in nature, despite any congressional intent to establish a civil remedial mechanism. Pp. 274–278.

(b) Though the *89 Firearms* test was more refined, perhaps, than the Court's *Various Items* analysis, the conclusion was the same in each case: *In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment for double jeopardy purposes. See *Gore* v. *United States*, 357 U. S. 386, 392. The Courts of Appeals misread *Halper*, *Austin*, and *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, as having abandoned this oft-affirmed rule. None of those decisions purported to overrule *Various Items*, *Emerald Cut Stones*, and *89 Firearms* or to replace the Court's traditional understanding. It would have been remarkable for the Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so. Moreover, the cases in question did not deal with the subject of these cases: *in rem* civil forfeitures for double jeopardy purposes. *Halper* involved *in personam* civil penalties under the Double Jeopardy Clause. *Kurth Ranch* considered a punitive state tax imposed on marijuana under that Clause. And *Austin* dealt with civil forfeitures under the Eighth Amendment's Excessive Fines Clause. Pp. 278–288.

(c) The forfeitures at issue are civil proceedings under the two-part *89 Firearms* test. First, there is little doubt that Congress intended proceedings under §§ 881 and 981 to be civil, since those statutes' procedural enforcement mechanisms are themselves distinctly civil in nature. See, *e. g.*, *89 Firearms*, 465 U. S., at 363. Second, there is little evidence, much less the "clearest proof" that the Court requires, see, *e. g.*, *id.*, at 365, suggesting that forfeiture proceedings under those sections are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary. These statutes are, in most significant respects, indistinguishable from those reviewed, and held not to be punitive, in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*. That these are civil proceedings is also supported by other factors that the Court has found persuasive, including the considerations that (1) *in rem* civil forfeiture has not historically been regarded as punishment; (2)

Syllabus

there is no requirement in the statutes at issue that the Government demonstrate scienter in order to establish that the property is subject to forfeiture; (3) though both statutes may serve a deterrent purpose, this purpose may serve civil as well as criminal goals; and (4) the fact that both are tied to criminal activity is insufficient in itself to render them punitive. See, *e. g.*, *United States* v. *Ward*, 448 U. S. 242, 247–248, n. 7, 249. Pp. 288–292.

No. 95–345, 59 F. 3d 568, and No. 95–346, 33 F. 3d 1210 and 56 F. 3d 41, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 292. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 297. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 297.

Michael R. Dreeben argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Days*, *Acting Assistant Attorney General Keeney*, *Miguel A. Estrada*, *Kathleen A. Felton*, and *Joseph Douglas Wilson*.

Jeffry K. Finer argued the cause for respondents in No. 95–346. With him on the briefs were *Jeffrey Steinborn*, *David Michael*, and *E. E. Edwards III*.

Lawrence S. Robbins argued the cause for respondent in No. 95–345. With him on the brief were *Donald M. Falk* and *Lawrence J. Emery*, by appointment of the Court, 516 U. S. 1109.†

†Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *John M. Bailey*, Chief State's Attorney of Connecticut, and *Mary H. Lesser*, Assistant State's Attorney, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Pamela Carter* of Indiana, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *A. B. Chandler III* of Kentucky,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In separate cases, the United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Ninth Circuit held that the Double Jeopardy Clause prohibits the Government from both punishing a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding. We consolidated those cases for our review, and now reverse. These civil forfeitures (and civil forfeitures generally), we hold, do

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Richard P. Ieyoub of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Deborah T. Poritz* of New Jersey, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Pedro R. Pierluisi* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming; for the County of San Bernardino, California, et al. by *Dennis L. Stout*, *Dee R. Edgeworth*, *Michael J. Yraceburn*, *Phillip R. Urie*, and *Armando G. Cuellar, Jr.;* for the Cook County State's Attorney's Office et al. by *Jack O'Malley, Renee Goldfarb*, and *Janet Powers Doyle;* and for the Thirty-nine Counties of the State of Washington by *Norm Maleng*, *Barbara A. Mack*, *David Bruneau*, *Arthur Curtis*, *Allen C. Nielson*, *Russ Hauge*, *Jeremy Randolf*, *John Ladenburg*, *Jim Sweetser*, *James L. Nagle*, and *Jeffrey C. Sullivan.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Susan N. Herman*, *Gerard E. Lynch*, and *Steven R. Shapiro;* for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Richard M. Weintraub*, and *Bernard J. Farber;* for the National Association of Criminal Defense Lawyers by *Richard J. Troberman* and *David B. Smith;* and for Advocates for Highway and Auto Safety et al. by *Henry M. Jasny.*

not constitute "punishment" for purposes of the Double Jeopardy Clause.

I

No. 95–345: Michigan Police found marijuana growing adjacent to respondent Guy Ursery's house, and discovered marijuana seeds, stems, stalks, and a grow light within the house. The United States instituted civil forfeiture proceedings against the house, alleging that the property was subject to forfeiture under 84 Stat. 1276, as amended, 21 U. S. C. § 881(a)(7), because it had been used for several years to facilitate the unlawful processing and distribution of a controlled substance. Ursery ultimately paid the United States $13,250 to settle the forfeiture claim in full. Shortly before the settlement was consummated, Ursery was indicted for manufacturing marijuana, in violation of § 841(a)(1). A jury found him guilty, and he was sentenced to 63 months in prison.

The Court of Appeals for the Sixth Circuit by a divided vote reversed Ursery's criminal conviction, holding that the conviction violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. 59 F. 3d 568 (1995). The court based its conclusion in part upon its belief that our decisions in *United States* v. *Halper*, 490 U. S. 435 (1989), and *Austin* v. *United States*, 509 U. S. 602 (1993), meant that any civil forfeiture under § 881(a)(7) constitutes punishment for purposes of the Double Jeopardy Clause. Ursery, in the court's view, had therefore been "punished" in the forfeiture proceeding against his property, and could not be subsequently criminally tried for violation of 21 U. S. C. § 841(a)(1).

No. 95–346: Following a jury trial, Charles Wesley Arlt and James Wren were convicted of: conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U. S. C. § 846; conspiracy to launder monetary instruments, in violation of 18 U. S. C. § 371; and numerous counts of money laundering, in violation of § 1956. The District Court

sentenced Arlt to life in prison and a 10-year term of supervised release, and imposed a fine of $250,000. Wren was sentenced to life imprisonment and a 5-year term of supervised release.

Before the criminal trial had started, the United States had filed a civil *in rem* complaint against various property seized from, or titled to, Arlt and Wren, or Payback Mines, a corporation controlled by Arlt. The complaint alleged that each piece of property was subject to forfeiture both under 18 U. S. C. § 981(a)(1)(A), which provides that "[a]ny property . . . involved in a transaction or attempted transaction in violation of" § 1956 (the money-laundering statute) "is subject to forfeiture to the United States"; and under 21 U. S. C. § 881(a)(6), which provides for the forfeiture of (i) "[a]ll . . . things of value furnished or intended to be furnished by any person in exchange for" illegal drugs, (ii) "all proceeds traceable to such an exchange," and (iii) "all moneys, negotiable instruments, and securities used or intended to be used to facilitate" a federal drug felony. The parties agreed to defer litigation of the forfeiture action during the criminal prosecution. More than a year after the conclusion of the criminal trial, the District Court granted the Government's motion for summary judgment in the civil forfeiture proceeding.

Arlt and Wren appealed the decision in the forfeiture action, and the Court of Appeals for the Ninth Circuit reversed, holding that the forfeiture violated the Double Jeopardy Clause. 33 F. 3d 1210 (1994), amended 56 F. 3d 41 (1995). The court's decision was based in part upon the same view as that expressed by the Court of Appeals for the Sixth Circuit in Ursery's case—that our decisions in *Halper*, *supra*, and *Austin*, *supra*, meant that, as a categorical matter, forfeitures under §§ 981(a)(1)(A) and 881(a)(6) always constitute "punishment."

We granted the Government's petition for certiorari in each of the two cases, and we now reverse. 516 U. S. 1070 (1996).

II

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. The Clause serves the function of preventing both "successive punishments and . . . successive prosecutions." *United States* v. *Dixon*, 509 U. S. 688, 696 (1993), citing *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). The protection against multiple punishments prohibits the Government from "'punishing twice, or attempting a second time to punish criminally for the same offense.'" *Witte* v. *United States*, 515 U. S. 389, 396 (1995) (emphasis deleted), quoting *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938).

In the decisions that we review, the Courts of Appeals held that the civil forfeitures constituted "punishment," making them subject to the prohibitions of the Double Jeopardy Clause. The Government challenges that characterization of the forfeitures, arguing that the courts were wrong to conclude that civil forfeitures are punitive for double jeopardy purposes.[1]

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[1] The Government raises three other challenges to the decisions that we review. First, focusing on the decision of the Court of Appeals for the Sixth Circuit in No. 95–345, the Government contends that the Double Jeopardy Clause applies only to prohibit a punishment imposed following a "jeopardy," and that a civil forfeiture, regardless whether it is a "punishment," is not a "jeopardy." Thus, because Ursery had not been placed in "jeopardy" in the civil forfeiture proceeding against his house, the Double Jeopardy Clause was inapplicable to his criminal prosecution. Second, the Government argues that the civil forfeiture of property is not the same offense as a criminal prosecution, and therefore that the double jeopardy protection against multiple punishments for the same offense is not at issue here. Finally, the Government argues that a civil forfeiture action that is parallel and contemporaneous with a criminal prosecution should be deemed to constitute a single proceeding within the meaning of the Double Jeopardy Clause.

Because we conclude that the civil forfeitures involved in these cases do not constitute punishment under the Double Jeopardy Clause, see *infra*, at 292, we do not address those three arguments in this opinion.

A

Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events. See, *e. g.*, Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39 (goods unloaded at night or without a permit subject to forfeiture and persons unloading subject to criminal prosecution); § 25, *id.*, at 43 (persons convicted of buying or concealing illegally imported goods subject to both monetary fine and *in rem* forfeiture of the goods); § 34, *id.*, at 46 (imposing criminal penalty and *in rem* forfeiture where person convicted of relanding goods entitled to drawback); see also *The Palmyra*, 12 Wheat. 1, 14–15 (1827) ("Many cases exist, where there is both a forfeiture *in rem* and a personal penalty"); cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 683 (1974) (discussing adoption of forfeiture statutes by early Congresses). And, in a long line of cases, this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment.

One of the first cases to consider the relationship between the Double Jeopardy Clause and civil forfeiture was *Various Items of Personal Property* v. *United States*, 282 U. S. 577 (1931). In *Various Items*, the Waterloo Distilling Corporation had been ordered to forfeit a distillery, warehouse, and denaturing plant, on the ground that the corporation had conducted its distilling business in violation of federal law. The Government conceded that the corporation had been convicted of criminal violations prior to the initiation of the forfeiture proceeding, and admitted that the criminal conviction had been based upon "the transactions set forth . . . as a basis for the forfeiture." *Id.*, at 579. Considering the corporation's argument that the forfeiture action violated the Double Jeopardy Clause, this Court unanimously held that the Clause was inapplicable to civil forfeiture actions:

> "[This] forfeiture proceeding . . . is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. *The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.*" *Id.*, at 581 (citations omitted; emphasis added).

In reaching its conclusion, the Court drew a sharp distinction between *in rem* civil *forfeitures* and *in personam* civil *penalties* such as fines: Though the latter could, in some circumstances, be punitive, the former could not. *Ibid.* Referring to a case that was decided the same day as *Various Items*, the Court made its point absolutely clear:

> "In *United States* v. *La Franca*, [282 U. S.] 568, we hold that, under § 5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense." *Id.*, at 580.

Had the Court in *Various Items* found that a civil forfeiture could constitute a "punishment" under the Fifth Amendment, its holding would have been quite remarkable. As that Court recognized, "[a]t common law, in many cases, the right of forfeiture did not attach until the offending person had been convicted and the record of conviction produced." *Ibid.* In other words, at common law, not only was it the case that a criminal conviction did not *bar* a civil forfeiture, but, in fact, the civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained. Though this Court had held that common-law rule inapplicable where

the right of forfeiture was "created by statute, *in rem*, cognizable on the revenue side of the exchequer," *The Palmyra*, *supra*, at 14, it never had suggested that the Constitution *prohibited* for statutory civil forfeiture what was *required* for common-law civil forfeiture. For the *Various Items* Court to have held that the forfeiture was prohibited by the prior criminal proceeding would have been directly contrary to the common-law rule, and would have called into question the constitutionality of forfeiture statutes thought constitutional for over a century. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 327–328 (1936) (Evidence of a longstanding legislative practice "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice").

Following its decision in *Various Items*, the Court did not consider another double jeopardy case involving a civil forfeiture for 40 years. Then, in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972) *(per curiam)*, the Court's brief opinion reaffirmed the rule of *Various Items*. In *Emerald Cut Stones*, after having been acquitted of smuggling jewels into the United States, the owner of the jewels intervened in a proceeding to forfeit them as contraband. We rejected the owner's double jeopardy challenge to the forfeiture, holding that "[i]f for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." 409 U. S., at 235. Noting that the forfeiture provisions had been codified separately from parallel criminal provisions, the Court determined that the forfeiture clearly was "a civil sanction." *Id.*, at 236. The forfeitures were not criminal punishments because they did not impose a second *in personam* penalty for the criminal defendant's wrongdoing.

In our most recent decision considering whether a civil forfeiture constitutes punishment under the Double Jeopardy Clause, we again affirmed the rule of *Various Items*. In

United States v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984), the owner of the defendant weapons was acquitted of charges of dealing firearms without a license. The Government then brought a forfeiture action against the firearms under 18 U. S. C. § 924(d), alleging that they were used or were intended to be used in violation of federal law.

In another unanimous decision, we held that the forfeiture was not barred by the prior criminal proceeding. We began our analysis by stating the rule for our decision:

> "Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether a § 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." *89 Firearms*, *supra*, at 362 (citations omitted).

Our inquiry proceeded in two stages. In the first stage, we looked to Congress' intent, and concluded that "Congress designed forfeiture under § 924(d) as a remedial civil sanction." 465 U. S., at 363. This conclusion was based upon several findings. First, noting that the forfeiture proceeding was *in rem*, we found it significant that "[a]ctions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object." *Ibid.*, citing *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S., at 684. Second, we found that the forfeiture provision, because it reached both weapons used in violation of federal law and those "intended to be used" in such a manner, reached a broader range of conduct than its criminal analog. Third, we concluded that the civil forfeiture "further[ed] broad remedial aims," including both "discouraging unregulated commerce in firearms" and "removing from circulation firearms that have been used or intended for use outside regulated channels of commerce." *89 Firearms*, *supra*, at 364.

In the second stage of our analysis, we looked to " 'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism," 465 U. S., at 365, quoting *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980). Considering several factors that we had used previously in order to determine whether a civil proceeding was so punitive as to require application of the full panoply of constitutional protections required in a criminal trial, see *id.*, at 248, we found only one of those factors to be present in the § 924(d) forfeiture. By itself, however, the fact that the behavior proscribed by the forfeiture was already a crime proved insufficient to turn the forfeiture into a punishment subject to the Double Jeopardy Clause. Hence, we found that the gun owner had "failed to establish by the 'clearest proof' that Congress has provided a sanction so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' " *89 Firearms, supra,* at 366, quoting *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956). We concluded our decision by restating that civil forfeiture is "not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature." *89 Firearms*, *supra*, at 366.

B

Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme. Though the two-part analytical construct employed in *89 Firearms* was more refined, perhaps, than that we had used over 50 years earlier in *Various Items*, the conclusion was the same in each case: *In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause. See *Gore* v. *United States*, 357 U. S. 386, 392 (1958) ("In applying a provision like that of double jeopardy, which is rooted in history

and is not an evolving concept . . . , a long course of adjudication in this Court carries impressive authority").

In the cases that we currently review, the Court of Appeals for the Ninth Circuit recognized as much, concluding that after *89 Firearms*, "the law was clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes." 33 F. 3d, at 1218. Nevertheless, that court read three of our decisions to have "abandoned" *89 Firearms* and the oft-affirmed rule of *Various Items*. According to the Court of Appeals for the Ninth Circuit, through our decisions in *United States* v. *Halper*, 490 U. S. 435 (1989), *Austin* v. *United States*, 509 U. S. 602 (1993), and *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767 (1994), we "changed [our] collective mind," and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes." 33 F. 3d, at 1218–1219. The Court of Appeals for the Sixth Circuit shared the view of the Ninth Circuit, though it did not directly rely upon *Kurth Ranch*. We turn now to consider whether *Halper*, *Austin*, and *Kurth Ranch* accomplished the radical jurisprudential shift perceived by the Courts of Appeals.

In *Halper*, we considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." *Halper*, *supra*, at 436. Based upon his submission of 65 inflated Medicare claims, each of which overcharged the Government by $9, Halper was criminally convicted of 65 counts of violating the false-claims statute, 18 U. S. C. § 287 (1982 ed.), as well as of 16 counts of mail fraud, and was sentenced to two years in prison and fined $5,000. Following that criminal conviction, the Government successfully brought a civil action against Halper under 31 U. S. C. § 3729 (1982 ed. and Supp. II). The District Court hearing the civil action determined that Halper was liable to the Government for over $130,000 under § 3729, which then provided for liability in the amount of

$2,000 per violation, double the Government's actual damages, and court costs. The court concluded that imposing the full civil penalty would constitute a second punishment for Halper's already-punished criminal offense, however, and therefore reduced Halper's liability to double the actual damages suffered by the Government and the costs of the civil action. The Government directly appealed that decision to this Court.

This Court agreed with the District Court's analysis. We determined that our precedent had established no absolute and irrebuttable rule that a civil fine cannot be "punishment" under the Double Jeopardy Clause. Though it was well established that "a civil remedy does not rise to the level of 'punishment' merely because Congress provided for civil recovery in excess of the Government's actual damages," we found that our case law did "not foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U. S., at 442. Emphasizing the case-specific nature of our inquiry, *id.*, at 448, we compared the size of the fine imposed on Halper, $130,000, to the damages actually suffered by the Government as a result of Halper's actions, estimated by the District Court at $585. Noting that the fine was more than 220 times greater than the Government's damages, we agreed with the District Court that "Halper's $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy." *Id.*, at 452. We remanded to the District Court so that it could hear evidence regarding the Government's actual damages, and could then reduce Halper's liability to a nonpunitive level. *Ibid.*

In *Austin*, we considered whether a civil forfeiture could violate the Excessive Fines Clause of the Eighth Amendment to the Constitution, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed . . . ." Aware that Austin had sold two grams of cocaine the pre-

vious day, police searched his mobile home and body shop. Their search revealed small amounts of marijuana and cocaine, a handgun, drug paraphernalia, and almost $5,000 in cash. Austin was charged with one count of possessing cocaine with intent to distribute, to which he pleaded guilty. The Government then initiated a civil forfeiture proceeding against Austin's mobile home and auto shop, contending that they had been "used" or were "intended for use" in the commission of a drug offense. See 21 U. S. C. §§ 881(a)(4) and (a)(7). Austin contested the forfeiture on the ground of the Excessive Fines Clause, but the District Court and the Court of Appeals held the forfeiture constitutional.

We limited our review to the question "whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U. S. C. §§ 881(a)(4) and (a)(7)." *Austin*, *supra*, at 604. We began our analysis by rejecting the argument that the Excessive Fines Clause was limited solely to criminal proceedings: The relevant question was not whether a particular proceeding was criminal or civil, we determined, but rather was whether forfeiture under §§ 881 (a)(4) and (a)(7) constituted "punishment" for the purposes of the Eighth Amendment. *Austin*, *supra*, at 610. In an effort to answer that question, we briefly reviewed the history of civil forfeiture both in this country and in England, see 509 U. S., at 611–618, taking a categorical approach that contrasted sharply with *Halper*'s case-specific approach to determining whether a civil penalty constitutes punishment. Ultimately, we concluded that "forfeiture under [§§ 881(a)(4) and (a)(7)] constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." 509 U. S., at 622 (citation omitted).

In *Department of Revenue of Mont.* v. *Kurth Ranch*, *supra*, we considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when the taxpayer had already been criminally convicted of own-

ing the marijuana that was taxed. We first established that the fact that Montana had labeled the civil sanction a "tax" did not end our analysis. We then turned to consider whether the tax was so punitive as to constitute a punishment subject to the Double Jeopardy Clause. Several differences between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: Thus, only a person charged with a criminal offense was subject to the tax. We also noted that the taxpayer did not own or possess the taxed marijuana at the time that the tax was imposed. From these differences, we determined that the tax was motivated by a " 'penal and prohibitory intent rather than the gathering of revenue.' " *Id.*, at 781. Concluding that the Montana tax proceeding "was the functional equivalent of a successive criminal prosecution," we affirmed the Court of Appeals' judgment barring the tax. *Id.*, at 784.

We think that the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Ninth Circuit misread *Halper*, *Austin*, and *Kurth Ranch*. None of those decisions purported to overrule the well-established teaching of *Various Items*, *Emerald Cut Stones*, and *89 Firearms*. *Halper* involved not a civil *forfeiture*, but a civil *penalty*. That its rule was limited to the latter context is clear from the decision itself, from the historical distinction that we have drawn between civil forfeiture and civil penalties, and from the practical difficulty of applying *Halper* to a civil forfeiture.

In *Halper*, we emphasized that our decision was limited to the context of civil penalties:

> "What we announce now is a rule for the rare case, the case such as the one before us, where *a fixed-penalty provision* subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a

> defendant previously has sustained a criminal penalty and the *civil penalty* sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." 490 U. S., at 449–450 (emphasis added).

The narrow focus of *Halper* followed from the distinction that we have drawn historically between civil forfeiture and civil penalties. Since at least *Various Items*, we have distinguished civil penalties such as fines from civil forfeiture proceedings that are *in rem*. While a "civil action to recover . . . penaltie[s] is punitive in character," and much like a criminal prosecution in that "it is the wrongdoer in person who is proceeded against . . . and punished," in an *in rem* forfeiture proceeding, "[i]t is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned." *Various Items*, 282 U. S., at 580–581. Thus, though for double jeopardy purposes we have never balanced the value of property forfeited in a particular case against the harm suffered by the Government in that case, we have balanced the size of a particular civil penalty against the Government's harm. See, *e. g.*, *Rex Trailer Co.* v. *United States*, 350 U. S., at 154 (fines not "so unreasonable or excessive" as to transform a civil remedy into a criminal penalty); *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943) (fine of $315,000 not so disproportionate to Government's harm of $101,500 as to transform the fine into punishment). Indeed, the rule set forth in *Halper* developed from the teaching of *Rex Trailer* and *Hess*. See *Halper*, *supra*, at 445–447.

It is difficult to see how the rule of *Halper* could be applied to a civil forfeiture. Civil penalties are designed as a rough form of "liquidated damages" for the harms suffered by the

Government as a result of a defendant's conduct. See *Rex Trailer*, *supra*, at 153–154. The civil penalty involved in *Halper*, for example, provided for a fixed monetary penalty for each false claim count on which the defendant was convicted in the criminal proceeding. Whether a "fixed-penalty provision" that seeks to compensate the Government for harm it has suffered is "so extreme" and "so divorced" from the penalty's nonpunitive purpose of compensating the Government as to be a punishment may be determined by balancing the Government's harm against the size of the penalty. Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the nonpunitive purposes of that forfeiture. Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.[2]

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[2] JUSTICE STEVENS' dissent is grounded in the different interpretation that he gives *Halper*. He finds that *Halper* announced "two different rules": a general rule, applicable to all civil sanctions, useful for determining whether a sanction is "of a punitive character"; and a "narrower rule," similar to our understanding of the case, that requires "an accounting of the Government's damages and costs." *Post*, at 308. JUSTICE STEVENS faults us in these cases for failing to apply the "general rule" of *Halper*.

The problem with JUSTICE STEVENS' interpretation of *Halper*, of course, and therefore with his entire argument, is that *Halper* did not announce two rules. Nowhere in *Halper* does the Court set forth two distinct rules or purport to apply a two-step analysis. JUSTICE STEVENS finds his "general rule" in a dictum from *Halper:* "'[A] civil sanction that

We recognized as much in *Kurth Ranch*. In that case, the Court expressly disclaimed reliance upon *Halper*, finding that its case-specific approach was impossible to apply outside the context of a fixed civil-penalty provision. Reviewing the Montana marijuana tax, we held that because "tax

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cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.'" *Post*, at 306, quoting *United States* v. *Halper*, 490 U. S. 435, 448 (1989). But the discussion immediately following that dictum makes clear that it states not a new and separate test for whether a sanction is a punishment, but rather only a rephrasing of JUSTICE STEVENS' "narrower" rule, *i. e.*, the rule requiring an "accounting of the Government's damages and costs." *Id.*, at 449.

"We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished . . . may not be subjected to an additional civil sanction *to the extent* that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

"We acknowledge that this inquiry will not be an exact pursuit. In our decided cases we have noted that the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain. . . . [I]t would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment." *Id.*, at 448–449 (emphasis added); see also *id.*, at 449–451.

The "general rule" discovered by JUSTICE STEVENS in *Halper* would supplant, not mimic, see *post*, at 306, the rule of *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984), and *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972). Whether a particular sanction "cannot fairly be said *solely* to serve a remedial purpose" is an inquiry radically different from that we have traditionally employed in order to determine whether, as a categorical matter, a civil sanction is subject to the Double Jeopardy Clause. Yet nowhere in *Halper* does the Court purport to make such a sweeping change in the law, instead emphasizing repeatedly the narrow scope of its decision. *Halper*, *supra*, at 449 (announcing rule for "the rare case"). If the "general rule" of JUSTICE STEVENS were applied literally, then virtually every sanction would be declared to be a punishment: It is hard to imagine a sanction that has no punitive aspect whatsoever. JUSTICE STEVENS' interpretation of *Halper* is both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent.

statutes serve a purpose quite different from civil penalties, . . . *Halper*'s method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Kurth Ranch*, 511 U. S., at 784 (internal quotation marks omitted); see also *id.*, at 786 (REHNQUIST, C. J., dissenting) (*Halper* inapplicable outside of "'fixed-penalty provision[s]'" that are meant "to recover the costs incurred by the Government for bringing someone to book for some violation of law"). This is not to say that there is no occasion for analysis of the Government's harm. *89 Firearms* makes clear the relevance of an evaluation of the harms alleged. The point is simply that *Halper*'s case-specific approach is inapplicable to civil forfeitures.

In the cases that we review, the Courts of Appeals did not find *Halper* difficult to apply to civil forfeiture because they concluded that its case-by-case balancing approach had been supplanted in *Austin* by a categorical approach that found a civil sanction to be punitive if it could not "fairly be said solely to serve a remedial purpose." See *Austin*, 509 U. S., at 610; see also *Halper*, 490 U. S., at 448. But *Austin*, it must be remembered, did not involve the Double Jeopardy Clause at all. *Austin* was decided solely under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment. The only discussion of the Double Jeopardy Clause contained in *Austin* appears in a footnote that acknowledges our decisions holding that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings . . . where the forfeiture could properly be characterized as remedial." *Austin*, *supra*, at 608, n. 4. And in *Austin* we expressly recognized and approved our decisions in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972), and *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984). See *Austin*, *supra*, at 608, n. 4.

We acknowledged in *Austin* that our categorical approach under the Excessive Fines Clause was wholly distinct from the case-by-case approach of *Halper*, and we explained that the difference in approach was based in a significant difference between the purposes of our analysis under each constitutional provision. See *Austin*, *supra*, at 622, n. 14. It is unnecessary in a case under the Excessive Fines Clause to inquire at a preliminary stage whether the civil sanction imposed in that particular case is totally inconsistent with any remedial goal. Because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be "excessive," see *Austin*, 509 U. S., at 622–623 (declining to establish criteria for excessiveness), a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative of the excessiveness analysis that would follow. See *id.*, at 622, n. 14 ("[I]t appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures . . . or only to those that cannot be characterized as purely remedial," because the Excessive Fines Clause "prohibits only the imposition of 'excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event"). Forfeitures effected under 21 U. S. C. §§ 881(a)(4) and (a)(7) are subject to review for excessiveness under the Eighth Amendment after *Austin;* this does not mean, however, that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy. The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence.

In sum, nothing in *Halper*, *Kurth Ranch*, or *Austin* purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause. Congress long has authorized the Government to bring parallel criminal proceedings and civil

forfeiture proceedings, and this Court consistently has found civil forfeitures not to constitute punishment under the Double Jeopardy Clause. It would have been quite remarkable for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so. *Halper* dealt with *in personam* civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the Excessive Fines Clause. None of those cases dealt with the subject of these cases: *in rem* civil forfeitures for purposes of the Double Jeopardy Clause.

C

We turn now to consider the forfeitures in these cases under the teaching of *Various Items*, *Emerald Cut Stones*, and *89 Firearms*. Because it provides a useful analytical tool, we conduct our inquiry within the framework of the two-part test used in *89 Firearms*. First, we ask whether Congress intended proceedings under 21 U. S. C. § 881 and 18 U. S. C. § 981 to be criminal or civil. Second, we turn to consider whether the proceedings are so punitive in fact as to "persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature," despite Congress' intent. 465 U. S., at 366.

There is little doubt that Congress intended these forfeitures to be civil proceedings. As was the case in *89 Firearms*, "Congress' intent in this regard is most clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute[s]." *Id.*, at 363. Both 21 U. S. C. § 881 and 18 U. S. C. § 981, which is entitled "Civil forfeiture," provide that the laws "relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred" under §§ 881 and 981. See 21 U. S. C. § 881(d); 18 U. S. C. § 981(d). Because forfeit-

ure proceedings under the customs laws are *in rem*, see 19 U. S. C. § 1602 *et seq.*, it is clear that Congress intended that a forfeiture under § 881 or § 981, like the forfeiture reviewed in *89 Firearms*, would be a proceeding *in rem*. Congress specifically structured these forfeitures to be impersonal by targeting the property itself. "In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object." *89 Firearms*, *supra*, at 363, citing *Calero-Toledo*, 416 U. S., at 684.

Other procedural mechanisms governing forfeitures under §§ 881 and 981 also indicate that Congress intended such proceedings to be civil. Forfeitures under either statute are governed by 19 U. S. C. § 1607, which provides that actual notice of the impending forfeiture is unnecessary when the Government cannot identify any party with an interest in the seized article, and by § 1609, which provides that seized property is subject to forfeiture through a summary administrative procedure if no party files a claim to the property. And 19 U. S. C. § 1615, which governs the burden of proof in forfeiture proceedings under §§ 881 and 981, provides that once the Government has shown probable cause that the property is subject to forfeiture, then "the burden of proof shall lie upon [the] claimant." In sum, "[b]y creating such distinctly civil procedures for forfeitures under [§§ 881 and 981], Congress has 'indicate[d] clearly that it intended a civil, not a criminal sanction.'" *89 Firearms*, *supra*, at 363, quoting *Helvering* v. *Mitchell*, 303 U. S. 391, 402 (1938).[3]

[3] JUSTICE STEVENS mischaracterizes our holding. We do not hold that *in rem* civil forfeiture is *per se* exempt from the scope of the Double Jeopardy Clause. See *post*, at 300–305. Similarly, we do not rest our conclusion in these cases upon the long-recognized fiction that a forfeiture *in rem* punishes only malfeasant property rather than a particular person. See *post*, at 313–316. That a forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy. See, *e. g.*, *89 Firearms*, 465 U. S., at 363. Nevertheless, where the "clearest proof" indicates that an *in rem* civil forfeiture is "so

Moving to the second stage of our analysis, we find that there is little evidence, much less the "'clearest proof'" that we require, see *89 Firearms*, *supra*, at 365, quoting *Ward*, 448 U. S., at 249, suggesting that forfeiture proceedings under 21 U. S. C. §§ 881(a)(6) and (a)(7), and 18 U. S. C. § 981(a)(1)(A), are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary. The statutes involved in these cases are, in most significant respects, indistinguishable from those reviewed, and held not to be punitive, in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*.

Most significant is that § 981(a)(1)(A) and §§ 881(a)(6) and (a)(7), while perhaps having certain punitive aspects, serve important nonpunitive goals. Title 21 U. S. C. § 881(a)(7), under which Ursery's property was forfeited, provides for the forfeiture of "all real property . . . which is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal drug felony. Requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes. See *Bennis* v. *Michigan*, 516 U. S. 442, 452 (1996) ("Forfeiture of property prevents illegal uses . . . by imposing an economic penalty, thereby rendering illegal behavior unprofitable"); *89 Firearms*, *supra*, at 364 (forfeiture "discourages unregulated commerce in firearms"); *Calero-Toledo*, *supra*, at 687–688. In many circumstances, the forfeiture may abate a nuisance. See, *e. g.*, *United States* v. *141st Street Corp.*, 911 F. 2d 870 (CA2 1990) (forfeiting apartment building used to sell crack cocaine); see also *Bennis*, *supra*, at 452 (affirming application of Michigan statute abating car as a nuisance; forfeiture "prevent[s] further illicit use of" property); cf. *89 Firearms*, 465

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punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause. *Id.*, at 365.

U. S., at 364 (forfeiture "remov[ed] from circulation firearms that have been used or intended for use" illegally); *Emerald Cut Stones*, 409 U. S., at 237 (forfeiture "prevented forbidden merchandise from circulating in the United States").

The forfeiture of the property claimed by Arlt and Wren took place pursuant to 18 U. S. C. § 981(a)(1)(A) and 21 U. S. C. § 881(a)(6). Section 981(a)(1)(A) provides for the forfeiture of "[a]ny property" involved in illegal money-laundering transactions. Section 881(a)(6) provides for the forfeiture of "[a]ll . . . things of value furnished or intended to be furnished by any person in exchange for" illegal drugs; "all proceeds traceable to such an exchange"; and "all moneys, negotiable instruments, and securities used or intended to be used to facilitate" a federal drug felony. The same remedial purposes served by § 881(a)(7) are served by §§ 881(a)(6) and 981(a)(1)(A). Only one point merits separate discussion. To the extent that § 881(a)(6) applies to "proceeds" of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts.

Other considerations that we have found relevant to the question whether a proceeding is criminal also tend to support a conclusion that § 981(a)(1)(A) and §§ 881(a)(6) and (a)(7) are civil proceedings. See *Ward*, *supra*, at 247–248, n. 7, 249 (listing relevant factors and noting that they are neither exhaustive nor dispositive). First, in light of our decisions in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*, and the long tradition of federal statutes providing for a forfeiture proceeding following a criminal prosecution, it is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment, as we have understood that term under the Double Jeopardy Clause. Second, there is no requirement in the statutes that we currently review that the Government demonstrate scienter in order to establish that the property is subject to forfeiture; indeed, the property may be subject to forfeiture even if no party files a

claim to it and the Government never shows any connection between the property and a particular person. See 19 U. S. C. § 1609. Though both §§ 881(a) and 981(a) contain an "innocent owner" exception, we do not think that such a provision, without more indication of an intent to punish, is relevant to the question whether a statute is punitive under the Double Jeopardy Clause. Third, though both statutes may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals. See, *e. g.*, *89 Firearms*, *supra*, at 364; *Calero-Toledo*, 416 U. S., at 677–678. We recently reaffirmed this conclusion in *Bennis* v. *Michigan*, *supra*, at 452, where we held that "forfeiture . . . serves a deterrent purpose distinct from any punitive purpose." Finally, though both statutes are tied to criminal activity, as was the case in *89 Firearms*, this fact is insufficient to render the statutes punitive. See *89 Firearms*, *supra*, at 365–366. It is well settled that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *Helvering*, 303 U. S., at 399. By itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the "clearest proof" necessary to show that a proceeding is criminal.

We hold that these *in rem* civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. The judgments of the Court of Appeals for the Sixth Circuit, in No. 95–345, and of the Court of Appeals for the Ninth Circuit, in No. 95–346, are, accordingly, reversed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the Court's opinion and add these further observations.

In *Austin* v. *United States*, 509 U. S. 602, 619–622 (1993), we described the civil *in rem* forfeiture provision of 21 U. S. C. § 881(a)(7) at issue here as punitive. In *Libretti* v. *United States*, 516 U. S. 29 (1995), we reviewed 21 U. S. C.

§ 853, which in almost identical terms provides for criminal forfeiture of property involved in or derived from drug crimes. We held that the "fundamental nature of criminal forfeiture" is punishment. 516 U. S., at 41. Today the Court holds that the civil *in rem* forfeitures here are not punishment implicating the protections of the Double Jeopardy Clause. *Ante*, at 292. I write to explain why, in my view, our holding is consistent with both *Austin* and *Libretti*.

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. We have interpreted the Double Jeopardy Clause to "protec[t] against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 306–307 (1984); *Jones* v. *Thomas*, 491 U. S. 376, 380–381 (1989).

Although there is language in our cases to the contrary, see *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 700 (1965); *Boyd* v. *United States*, 116 U. S. 616, 634 (1886), civil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense. We made this clear in *Various Items of Personal Property* v. *United States*, 282 U. S. 577 (1931), which the Court is right to deem the seminal case in this area, *ante*, at 274.

> "[This] forfeiture proceeding . . . is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply." 282 U. S., at 581 (citations omitted).

Embracing the rule of *Various Items*, that the Double Jeopardy Clause applies only to *in personam* punishments of the wrongdoer and not *in rem* forfeitures, does not imply that forfeiture inflicts no punishment. Though I have expressed my doubts about the view expressed in *Austin*, 509 U. S., at 611–618, that throughout history forfeitures have been intended to punish blameworthy owners, *id.*, at 629 (opinion concurring in part and concurring in judgment); *Bennis* v. *Michigan*, 516 U. S. 442, 472–473 (1996) (dissenting opinion), I did not there question the punitive nature of § 881(a)(7), nor do I now. Under this statute, providing for the forfeiture of real property used to facilitate a drug offense, only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime. *Ibid.*

The key distinction is that the instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. See *Austin*, *supra*, at 619 (statutory "exemptions serve to focus the provisions on the culpability of the owner"). The theory is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because either he uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property. Cf. *One 1958 Plymouth Sedan*, *supra*, at 699 ("There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [the owner] to its possible loss"). The same rationale is at work in the statutory provisions enabling forfeiture of currency "used or intended to be used" to facilitate a criminal offense, § 881(a)(6). See also 18 U. S. C. § 981(a)(1)(A) (property involved in money-laundering transactions or attempts in violation of 18 U. S. C. § 1956). Since the punishment befalls any propertyholder who cannot claim statutory inno-

cence, whether or not he committed any criminal acts, it is not a punishment for a person's criminal wrongdoing.

Forfeiture, then, punishes an owner by taking property involved in a crime, and it may happen that the owner is also the wrongdoer charged with a criminal offense. But the forfeiture is not a second *in personam* punishment for the offense, which is all the Double Jeopardy Clause prohibits. See *ante*, at 276 ("The forfeitures were not criminal punishments because they did not impose a second *in personam* penalty for the criminal defendant's wrongdoing"); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235 (1972) *(per curiam)* ("[T]he forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments").

Civil *in rem* forfeiture has long been understood as independent of criminal punishments. In *The Palmyra*, 12 Wheat. 1 (1827), we rejected a claim that a libel *in rem* required a conviction for the criminal offense charged in the libel. Distinguishing forfeitures of a felon's goods and chattels, which required proof of a conviction, we noted that the statutory *in rem* "offence is attached primarily to the thing," and that often *in rem* forfeiture was imposed in the absence of any *in personam* penalty. *Id.*, at 14. Examining American and English statutes, we concluded: "[T]he practice has been, and so this Court understand[s] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.*, at 15.

Distinguishing between *in rem* and *in personam* punishments does not depend upon, or revive, the fiction alive in *Various Items*, *supra*, at 581, but condemned in *Austin*, *supra*, at 615, n. 9, that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of the forfeiture, not the property. See *United States* v. *United States Coin & Currency*, 401 U. S. 715, 718 (1971). The distinction

simply recognizes that Congress, in order to quiet title to forfeitable property in one proceeding, has structured the forfeiture action as a proceeding against the property, not against a particular defendant. Indeed, the Government will often file a forfeiture complaint without any knowledge of who the owner is. See *ante*, at 291–292. True, the forfeiture statutes require proof of a violation of a drug trafficking or other offense, but the purpose of this predicate showing is just to establish that the property was used in a crime. In contrast to criminal forfeiture, see 21 U. S. C. § 853(a), civil *in rem* forfeiture actions do not require a showing that the owner who stands to lose his property interest has committed a criminal offense. See § 881(a)(6) ("any violation of this subchapter"); § 881(a)(7) ("a violation of this subchapter"); 18 U. S. C. § 981(a)(1)(A) ("a transaction or attempted transaction in violation of" § 1956). The offenses committed by Ursery, Arlt, and Wren were proffered as evidence that the property was used in a crime, but this does not make forfeiture a punishment for those offenses. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 366 (1984) (civil forfeiture is "not an additional penalty for the commission of a criminal act").

For this reason, JUSTICE STEVENS' attempt, *post*, at 317, to rely on the same-elements test of *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), is unavailing. *Blockburger* is a misfit in this context; it compares the elements of two offenses charged against a defendant. The forfeiture cause of action is not charging a second offense of the person; it is a proceeding against the property in which proof of a criminal violation by any person will suffice, provided that some knowledge of, or consent to, the crime on the part of the property owner is also established.

In Part II–C of its opinion, the Court conducts the two-part inquiry established in *89 Firearms*, *supra*, at 362–366, as to whether, first, Congress intended the proceedings to be civil, and, second, the forfeitures are so punitive as to be

criminal in nature and therefore subject to the Double Jeopardy Clause. *Ante*, at 288. The test was imported by the *89 Firearms* Court from cases involving civil *in personam* penalties. See 465 U. S., at 362 (citing *Helvering* v. *Mitchell*, 303 U. S. 391, 398–399 (1938), and *United States* v. *Ward*, 448 U. S. 242, 248 (1980)). In the context of these cases and the precedents bearing upon them, I am not sure the test adds much to the clear rule of *Various Items* that civil *in rem* forfeiture of property involved in a crime is not punishment subject to the Double Jeopardy Clause. As to the first prong of the test, any *in rem* proceeding is civil. As to the second prong, so long as forfeiture hinges on the property's use in a crime, there will always be the remedial purpose the Court identifies of preventing property owners from allowing their goods to be used for illegal purposes, *ante*, at 290. I acknowledge *89 Firearms* to be precedent, however, and, because the Court's application of the test is consistent with *Various Items*, I join its opinion in full.

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

In my view, the Double Jeopardy Clause prohibits successive prosecution, not successive punishment. See *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 798 (1994) (SCALIA, J., dissenting). Civil forfeiture proceedings of the sort at issue here are not criminal prosecutions, even under the standard of *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 164 (1963), and *United States* v. *Ward*, 448 U. S. 242, 248–251 (1980).

JUSTICE STEVENS, concurring in the judgment in part and dissenting in part.

The question the Court poses is whether civil forfeitures constitute "punishment" for purposes of the Double Jeopardy Clause. Because the numerous federal statutes authorizing forfeitures cover such a wide variety of situations, it is quite

wrong to assume that there is only one answer to that question. For purposes of analysis it is useful to identify three different categories of property that are subject to seizure: proceeds, contraband, and property that has played a part in the commission of a crime. The facts of these two cases illustrate the point.

In No. 95–346 the Government has forfeited $405,089.23 in currency. Those funds are the proceeds of unlawful activity. They are not property that respondents have any right to retain. The forfeiture of such proceeds, like the confiscation of money stolen from a bank, does not punish respondents because it exacts no price in liberty or lawfully derived property from them. I agree that the forfeiture of such proceeds is not punitive and therefore I concur in the Court's disposition of No. 95–346.

None of the property seized in No. 95–345 constituted proceeds of illegal activity. Indeed, the facts of that case reveal a dramatically different situation. Respondent Ursery cultivated marijuana in a heavily wooded area not far from his home in Shiawassee County, Michigan. The illegal substance was consumed by members of his family, but there is no evidence, and no contention by the Government, that he sold any of it to third parties. Acting on the basis of the incorrect assumption that the marijuana plants were on respondent's property, Michigan police officers executed a warrant to search the premises. In his house they found marijuana seeds, stems, stalks, and a grow light. I presume those items were seized, and I have no difficulty concluding that such a seizure does not constitute punishment because respondent had no right to possess contraband. Accordingly, I agree with the Court's opinion insofar as it explains why the forfeiture of contraband does not constitute punishment for double jeopardy purposes.

The critical question presented in No. 95–345 arose, not out of the seizure of contraband by the Michigan police, but rather out of the decision by the United States attorney to

take respondent's home. There is no evidence that the house had been purchased with the proceeds of unlawful activity and the house itself was surely not contraband. Nonetheless, 21 U. S. C. § 881(a)(7) authorized the Government to seek forfeiture of respondent's residence because it had been used to facilitate the manufacture and distribution of marijuana.[1] Respondent was then himself prosecuted for and convicted of manufacturing marijuana. In my opinion none of the reasons supporting the forfeiture of proceeds or contraband provides a sufficient basis for concluding that the confiscation of respondent's home was not punitive.

The Government has advanced four arguments in support of its position that the forfeiture of respondent's home under § 881(a)(7) followed by his prosecution under § 841(a)(1) did not violate the Double Jeopardy Clause: (1) the forfeiture was not punitive; (2) even if punitive, it was not a "jeopardy"; (3) even if both the forfeiture and the prosecution were jeopardies, they were not based on the same offense under the

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[1] The contraband found on the premises was evidence that the building had been used to facilitate the commission of a violation of Title 21 punishable by more than one year's imprisonment. To justify that forfeiture, the Government assumed the burden of proving (a) that respondent had committed such an offense, and (b) that the property had played some part in it. The statute provides as follows:

"§ 881. Forfeitures

"(a) Subject property

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . . . .

"(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." § 881(a)(7).

rule of *Blockburger* v. *United States*, 284 U. S. 299 (1932); and (4) in all events, the two cases should be deemed to constitute a single proceeding for double jeopardy purposes. Because the Court addresses only the first of these arguments, I shall begin by explaining why both reason and precedent support the conclusion that the taking of respondent's home was unmistakably punitive in character. I shall then comment on the other three arguments.

I

In recent years, both Congress and the state legislatures have armed their law enforcement authorities with new powers to forfeit property that vastly exceed their traditional tools.[2] In response, this Court has reaffirmed the funda-

[2] JUSTICE THOMAS has expressed his concern about both the unusual scope and the novelty of the very statute used to carry out the forfeiture in these cases:

"I am disturbed by the breadth of new civil forfeiture statutes such as 21 U. S. C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense. As JUSTICE O'CONNOR points out, . . . since the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents. . . . Indeed, it is unclear whether the central theory behind *in rem* forfeiture, the fiction 'that the thing is primarily considered the offender,' *J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505, 511 (1921), can fully justify the immense scope of § 881(a)(7). Under this provision, 'large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred,' Brief for Respondents 20, are subject to forfeiture. It is difficult to see how such real property is necessarily in any sense 'guilty' of an offense, as could reasonably be argued of, for example, the distillery in *Dobbins's Distillery* v. *United States*, 96 U. S. 395 (1878), or the pirate vessel in *Harmony* v. *United States*, 2 How. 210 (1844). Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." *United*

mental proposition that all forfeitures must be accomplished within the constraints set by the Constitution. See, *e. g.*, *Austin* v. *United States*, 509 U. S. 602 (1993); *United States* v. *James Daniel Good Real Property*, 510 U. S. 43 (1993). This Term the Court has begun dismantling the protections it so recently erected. In *Bennis* v. *Michigan*, 516 U. S. 442 (1996), the Court held that officials may confiscate an innocent person's automobile. And today, for the first time, it upholds the forfeiture of a person's home. On the way to its surprising conclusion that the owner is not punished by the loss of his residence, the Court repeatedly professes its adherence to tradition and time-honored practice. As I discuss below, however, the decision shows a stunning disregard not only for modern precedents but for our older ones as well.

In the Court's view, the seminal case is *Various Items of Personal Property* v. *United States*, 282 U. S. 577 (1931), which approved the forfeiture of an illegal distillery by resort to the "legal fiction" that the distillery rather than its owner was being punished "as though it were conscious instead of inanimate and insentient." *Id.*, at 581. Starting from that fanciful premise, the Court was able to conclude that confiscating the property after the owner was prosecuted for the underlying violations of the revenue laws did not offend the Double Jeopardy Clause.

According to the Court, *Various Items* established a categorical rule that the Double Jeopardy Clause was "inapplicable to civil forfeiture actions." *Ante*, at 274. The Court asserts that this rule has received "remarkably consistent" application and was "reaffirmed" by a pair of cases in 1972 and 1984. *Ante*, at 278, 276. In reality, however, shortly after its announcement, *Various Items* simply disappeared from our jurisprudence. We cited that case in only two decisions over the next seven years, and never again in

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States v. *James Daniel Good Real Property*, 510 U. S. 43, 81–82 (1993) (opinion concurring in part and dissenting in part) (footnotes omitted).

nearly six decades. Neither of the two cases that supposedly "affirmed" *Various Items—One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972) *(per curiam)*, and *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984)—even mentioned it.

More important, neither of those cases endorsed the asserted categorical rule that civil forfeitures never give rise to double jeopardy rights. Instead, each carefully considered the nature of the particular forfeiture at issue, classifying it as either "punitive" or "remedial," before deciding whether it implicated double jeopardy. *Emerald Cut Stones* concerned a customs statute that authorized confiscation of certain merchandise, in that case jewelry, that had been smuggled into the United States. The Court explained that the purpose of the statute was to remove such items from circulation, and that the penalty amounted to a reasonable liquidated damages award to reimburse the Government for the costs of enforcement and investigation. In those respects, therefore, it constituted a "remedial rather than punitive sanctio[n]." 409 U. S., at 237. In *89 Firearms*, the Court explored in even greater detail the character of a federal statute that forfeited unregistered firearms. It reasoned that the sanction "further[ed] broad remedial aims" in preventing commerce in such weapons, and also covered a broader range of conduct than simply criminal behavior. 465 U. S., at 364. For those reasons, it was not properly characterized as a punitive sanction.

The majority, surprisingly, claims that *Austin* v. *United States*, 509 U. S. 602 (1993), "expressly recognized and approved" those decisions. *Ante*, at 286. But the Court creates the appearance that we endorsed its interpretation of *89 Firearms* and *Emerald Cut Stones* by quoting selectively from *Austin*. We actually stated the following:

> "The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, *but only in cases*

> *where the forfeiture could properly be characterized as remedial.* See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972); see generally *United States* v. *Halper*, 490 U. S. 435, 446–449 (1989) (Double Jeopardy Clause prohibits second sanction that may not fairly be characterized as remedial)." 509 U. S., at 608, n. 4 (emphasis added).

In reality, both cases rejected the monolithic view that all *in rem* civil forfeitures should be treated the same, and recognized the possibility that other types of forfeitures that could not "properly be characterized as remedial" might constitute "an additional penalty for the commission of a criminal act." 465 U. S., at 366.

That possibility was not merely speculative. The Court had already decided that other constitutional protections applied to forfeitures that had a punitive element. In *Boyd* v. *United States*, 116 U. S. 616 (1886), the Court held that compulsory production of an individual's private papers for use in a proceeding to forfeit his property for alleged fraud against the revenue laws violated both the Fourth Amendment and the Fifth Amendment's Self-Incrimination Clause. As the Court stated: "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal" and thus give rise to these constitutional safeguards. *Id.*, at 634.

We reaffirmed *Boyd* twice during the span of time between our decisions in *Various Items* and *89 Firearms*. In *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965), the Court unanimously repeated *Boyd*'s conclusion that "a forfeiture proceeding is quasi-criminal in character" and "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." The Court therefore held that the Fourth Amendment applied to a pro-

ceeding to forfeit an automobile used to transport illegally manufactured liquor. 380 U. S., at 700.

Even more significant is *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), in which the Court again held that the Fifth Amendment applied to forfeiture proceedings. *Coin & Currency* involved the confiscation of gambling money under a statute, quite similar to 21 U. S. C. § 881, providing that "'[i]t shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws . . . and no property rights shall exist in any such property.'" 401 U. S., at 716 (quoting 26 U. S. C. § 7302). The Court held that the Fifth Amendment barred the Government's attempt to introduce evidence of the defendant's failure to file required tax forms against him in the forfeiture proceeding. Following *Boyd*, the Court explained that the form of the proceeding as civil or criminal could not have any bearing on the rights that attached when the sanction was a penalty. "From the relevant constitutional standpoint, there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct." 401 U. S., at 718. In each case, the Court reasoned, the liability derives from the same offense of the owner; hence, "the Fifth Amendment applies with equal force." *Ibid.*

Emerald Cut Stones expressly recognized the continuing validity of *Coin & Currency* and *One 1958 Plymouth Sedan*. It distinguished the customs statute in that case because the forfeiture did not depend on the fact of a criminal offense or conviction. See 409 U. S., at 236, n. 6. See also *United States* v. *Ward*, 448 U. S. 242, 254 (1980) (discussing *Boyd*). That recognition is critical. For whatever its connection to the Excessive Fines Clause of the Eighth Amendment, the Double Jeopardy Clause is part of the same Amendment as the Self-Incrimination Clause, and ought to be interpreted

in pari materia.[3] By confining its holding to civil forfeitures fairly characterized as remedial, and by distinguishing cases that had applied the Fifth Amendment to other types of forfeitures, *Emerald Cut Stones* and *89 Firearms* recognized the possibility that the Double Jeopardy Clause might apply to certain punitive civil forfeiture proceedings. One of the mysteries of the Court's opinion is that although it claims that civil *in rem* forfeiture cannot be understood as punishment, it devotes Part II–C to examining the actual purposes of the forfeiture in these cases and "proving" that they are not punitive. If the Court truly adhered to the logic of its position, that entire section would be unnecessary.

Read properly, therefore, *89 Firearms* and *Emerald Cut Stones* are not inconsistent with, but set the stage for, the modern understanding of how the Double Jeopardy Clause applies in nominally civil proceedings. That understanding has been developed in a trio of recent decisions: *United States* v. *Halper*, 490 U. S. 435 (1989), *Austin* v. *United States*, 509 U. S. 602 (1993), and *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767 (1994). The Court of Appeals found that the combined effect of two of those decisions—*Halper* and *Austin*—established the proposition that forfeitures under 21 U. S. C. § 881(a)(7) implicated double jeopardy. This Court rejects that conclusion, asserting that none of these cases changed the "oft-affirmed rule" of *Various Items*. *Ante*, at 279.

It is the majority, however, that has "misread" *Halper*, *Austin*, and *Kurth Ranch* by artificially cabining each to a separate sphere, see *ante*, at 288, and treating the three as if they concerned unrelated subjects. In fact, all three were devoted to the common enterprise of giving meaning to the idea of "punishment," a concept that plays a central role in

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[3] If anything, the Double Jeopardy Clause ought to apply to a *broader* set of proceedings than the Self-Incrimination Clause. While the latter applies only in a "criminal case," the former concerns any type of "jeopardy," presumably a larger class of situations. See U. S. Const., Amdt. 5.

the jurisprudence of both the Excessive Fines Clause and the Double Jeopardy Clause. *Halper* laid down a general rule for applying the Double Jeopardy Clause to civil proceedings:

> "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U. S., at 448–449.

In the past seven years, we have applied that same rule to three types of sanctions: civil penalties, civil forfeitures, and taxes.

The first was the subject of *Halper* itself. The defendant had been convicted for submitting 65 false claims for reimbursement (seeking $12 for each, when the actual services rendered entitled him to only $3) to a Medicare provider, and sentenced to imprisonment for two years and a $5,000 fine. The Government then brought a civil action against him for the same offenses. The penalty for violating the civil false-claims statute consisted of double the Government's damages plus court costs and a fixed fine of $2,000 per false claim. See *id.*, at 438. Accordingly, the Government sought a penalty of $130,000, although the defendant's fraud had caused an actual loss of only $585. Applying the definition of "punishment" given above, the Court first held that the fixed $2,000 fine served a remedial purpose because it was designed to compensate the Government "roughly" for the costs of law enforcement and investigation. *Id.*, at 445. Despite finding that the fine was not by nature punitive, the

Court went on to consider whether the sanction "as applied in the individual case," *id.*, at 448, amounted to punishment. It answered that question in the affirmative, for the applied sanction created a "tremendous disparity" with the amount of harm the defendant actually caused. *Id.*, at 452. The Court explained that, as a rule, a fixed penalty that would otherwise serve remedial ends could still punish the defendant if the imposed amount was out of all proportion to the damage done.[4]

The second category of sanctions—civil forfeitures—was the subject of *Austin*. In that case, the Government sought to forfeit the petitioner's mobile home and auto body shop as instrumentalities of the drug trade under 21 U. S. C. §§ 881(a)(4) and (a)(7) because he had sold cocaine there. Applying *Halper*'s definition of punishment, see 509 U. S., at 610, 621, we held that §§ 881(a)(4) and (a)(7) must be considered to qualify as such, partly because forfeitures have historically been understood as punishment and more importantly because no remedial purpose underlay the sanction the statute created. Merely compensating the Government for its costs, as in *Halper*, could not justify the forfeiture scheme because "[t]he value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) . . . can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." 509 U. S., at 622, n. 14. Accordingly, we held that any forfeiture was subject to the constraints of the Excessive Fines Clause of the Eighth Amendment.

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[4] The Court stated the full rule as follows: "Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *United States* v. *Halper*, 490 U. S. 435, 449–450 (1989).

The Court expends a great deal of effort attempting to distinguish *Austin* away as purely an excessive fines case. The Court states, for example, that it is "difficult to see" how one would apply the "rule of *Halper*" to a civil forfeiture such as was present in *Austin*. *Ante*, at 283. But the Court conflates the two different rules that *Halper* announced. As discussed above, *Austin* expressly quoted *Halper* and followed its general rule that a sanction should be characterized as "punishment" if it serves any punitive end. See 509 U. S., at 610, 621. It relegated to a footnote *Halper*'s narrower rule—the one for the "rare case," which requires an accounting of the Government's damages and costs—because it had already decided that the statute was of a punitive character. 509 U. S., at 622, n. 14. That approach was perfectly appropriate. There is no need to determine whether a statute that is punitive by design has a punitive effect when applied in the individual case. *Halper* is entirely consistent with *Austin*, because it determined first that the sanction there generally did *not* have a punitive character before it considered whether some applications might be punitive nonetheless.[5]

The majority implies that *Austin*'s "categorical approach" is somehow suspect as an application of double jeopardy jurisprudence, *ante*, at 286–287, but *Kurth Ranch* definitively refutes that suggestion. The sanction there was a tax imposed on marijuana and applied to a taxpayer who had already been prosecuted for ownership of the drugs sought to be taxed. Again applying *Halper*'s definition of punishment, see 511 U. S., at 779–780, we considered the nature of the tax, focusing on several unusual features that distinguished it from ordinary revenue-raising provisions, and con-

[5] Even if *Austin* had not followed *Halper*'s rule for defining punishment, it would make little sense to say that forfeiture might be punishment "for the purposes of" the Excessive Fines Clause but not the Double Jeopardy Clause. It is difficult to imagine why the Framers of the two Amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offense.

cluded that it was motivated by a "penal and prohibitory intent." *Id.*, at 781 (internal quotation marks omitted).[6] On that basis, we held that imposition of the tax after criminal prosecution of the taxpayer violated double jeopardy. The approach taken was thus identical to that followed in *Austin*. By considering and rejecting each of the asserted "remedial" interests served by the sanction, we reasoned that the tax had an "unmistakable punitive character" that rendered it punishment in all of its applications. 511 U. S., at 783.

The claim that *Halper*'s "case-by-case" method is "impossible to apply" to forfeitures or taxes, *ante*, at 284, 285, thus misses the point. It is true that since fixed penalties can serve only one remedial end (compensation), it is easy to determine whether a particular fine is punitive in application. Forfeitures and taxes, generally speaking, may have a number of remedial rationales. But to decide if a sanction is punitive, one need only examine each claimed remedial interest and determine whether the sanction actually promotes it. Many of our cases have followed just such an approach, regardless of whether any nonpunitive purpose can be "quantif[ied]," *ante*, at 284. See, *e. g., Austin; One 1958 Plymouth Sedan*. The majority itself embarks on such an inquiry in Part II–C of its opinion. Furthermore, even in the context of forfeitures and taxes, nothing prevents a court from deciding that although a sanction is designed to be remedial, its application in a particular case is so extreme as to constitute punishment. *Austin*, 509 U. S., at 608, n. 4.[7]

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[6] Specifically, the tax was conditioned on the commission of a crime, 511 U. S., at 781, and it was levied on goods that the taxpayer did not own or possess at the time of imposition, *id.*, at 783.

[7] It is true, as the Court asserts, that a fine will only be considered "excessive" if it is disproportionate to any remedial goal. But *Austin* established that a forfeiture can also be excessive, although it could serve multiple remedial goals. Hence, I do not understand why the Court maintains that *Austin* did not prove that forfeitures are punitive. In order to count as a "fine" in the first place, a forfeiture must be capable of being punitive. A penalty that is not a "fine" cannot violate the Excessive Fines

In reaching the conclusion that the civil forfeiture at issue yielded punishment, the *Austin* Court surveyed the history of civil forfeitures at some length. That history is replete with expressions of the idea that forfeitures constitute punishment.[8] But it was not necessary in *Austin*, strictly speaking, to decide that all *in rem* forfeitures are punitive. As JUSTICE SCALIA emphasized in his separate opinion, it was only necessary to characterize the specific "*in rem* forfeiture in *this* case." *Id.*, at 626 (opinion concurring in part and concurring in judgment). The punitive nature of §§ 881(a)(4) and (a)(7) was accepted by every Member of the *Austin* Court. The majority offered several reasons for its holding. The applicable provisions expressly provided an "innocent owner" defense, indicating that culpability was a requirement for forfeiture. Further, the provisions tied forfeiture directly to the commission of narcotics offenses. *Id.*, at 620. Finally, the legislative history indicated that the provisions were necessary because traditional criminal sanctions were "'inadequate to deter or punish.'" *Ibid.* (quoting S. Rep. No. 98–225, p. 191 (1983)). In sum, it was unanimously agreed that "[s]tatutory forfeitures under § 881(a) are certainly *payment* (in kind), *to a sovereign* as *punishment* for an *offense*." 509 U. S., at 626–627 (SCALIA, J., concurring in part and concurring in judgment) (emphasis in original).[9]

Remarkably, the Court today stands *Austin* on its head—a decision rendered only three years ago, with unanimity on

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Clause, no matter how "excessive." See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989).

[8] See, *e. g.*, *Peisch* v. *Ware*, 4 Cranch 347, 364 (1808) (Marshall, C. J.) ("[T]he act punishes the owner with a forfeiture of the goods"); *J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505, 510–511 (1921) (the owner of an automobile confiscated for its use in transporting liquor during Prohibition is "'properly punished by such forfeiture'") (quoting 1 W. Blackstone, Commentaries *301).

[9] Just this Term, we have reiterated this conclusion. See *Libretti* v. *United States*, 516 U. S. 29, 39 (1995) ("[T]he *in rem* civil forfeiture authorized by 21 U. S. C. §§ 881(a)(4) and (a)(7) is punitive in nature").

the pertinent points—and concludes that § 881(a)(7) is remedial rather than punitive in character. Every reason *Austin* gave for treating § 881(a)(7) as punitive—the Court rejects or ignores. Every reason the Court provides for treating § 881(a)(7) as remedial—*Austin* rebuffed. The Court claims that its conclusion is consistent with decisions reviewing statutes "indistinguishable" "in most significant respects" from § 881(a)(7), *ante*, at 290, but ignores the fact that *Austin* reached the opposite conclusion as to the *identical* statute under review here.

First, the Court supposes that forfeiture of respondent's house is remedial in nature because it was an instrumentality of a drug crime. It is perfectly conceivable that certain kinds of instruments used in the commission of crimes could be forfeited for remedial purposes. Items whose principal use is illegal—for example, the distillery in *Various Items*—might be thus forfeitable. But it is difficult to understand how a house in which marijuana was found helped to substantially "facilitate" a narcotics offense, or how forfeiture of that house will meaningfully thwart the drug trade. In *Austin*, we rejected the argument that a mobile home and body shop were "instruments" of drug trafficking simply because marijuana was sold out of them. I see no basis for a distinction here.[10]

Second, the Court claims that the statute serves the purpose of deterrence, which helps to show that it is remedial rather than punitive in character. *Ante*, at 292. That statement cannot be squared with our precedents. *Halper* ex-

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[10] The Court also speculates that nuisance abatement may provide a remedial interest. *Ante*, at 290–291. The abatement theory was questionable enough in *Bennis* v. *Michigan*, 516 U. S. 442 (1996), where under the State's theory the same acts might or might not turn an ordinary automobile into a nuisance, depending on the neighborhood in which the car happened to be parked. See *id.*, at 464, n. 9 (STEVENS, J., dissenting). Here, there is no argument that Ursery's home constituted some kind of a nuisance.

pressly held, and *Austin* and *Kurth Ranch* reaffirmed, that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" for purposes of the Double Jeopardy Clause. 490 U. S., at 448. "'Retribution and deterrence are *not legitimate nonpunitive governmental objectives.*'" *Ibid.* (emphasis added) (quoting *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979)). To say otherwise is to renounce *Halper*'s central holding. If deterrence is a legitimate remedial rationale "distinct from" any punitive purpose, *ante*, at 292, then the $130,000 fine in *Halper* could not be condemned as excessive because it plainly served a powerful deterrent function. It was a *premise* of the Court's analysis in that case that deterrence could not justify a penal sanction. As in *Bennis* v. *Michigan*, where the Court first announced this new view of deterrence, it simply ignores *Halper* without explanation or comment. See 516 U. S., at 468–469 (STEVENS, J., dissenting).

For good measure, the Court also rejects two considerations that persuaded the majority in *Austin* to find 21 U. S. C. § 881(a)(7) a punitive statute. The Court first asserts that the statute contains no scienter requirement and property may be forfeited summarily if no one files claim to it. *Ante*, at 291–292 (citing 19 U. S. C. § 1609). Property that is not claimed, however, is considered abandoned; it proves nothing that the Government is able to forfeit property that no one owns. Any time the Government seeks to forfeit claimed property, it must prove that the claimant is culpable, for the statute contains an express "innocent owner" exception. Today the Court finds the structure of the statute irrelevant, but *Austin* said that the exemption for innocent owners "makes [the statute] look more like punishment." 509 U. S., at 619. In *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), the Court

found a forfeiture statute punitive on the basis of *discretionary* authority granted to the Secretary of the Treasury to remit property to innocent owners that was provided by a *different* statute.

Finally, the Court announces that the fact that the statute is "tied to criminal activity" is insufficient to render it punitive. *Ante,* at 292. *Austin* expressly relied on Congress' decision to "tie forfeiture directly to the commission of drug offenses" as evidence that it was intended to be punitive. 509 U. S., at 620.[11]

The recurrent theme of the Court's opinion is that there is some mystical difference between *in rem* and *in personam* proceedings, such that only the latter can give rise to double jeopardy concerns. The Court claims that "[s]ince at least *Various Items,*" we have drawn this distinction for purposes of applying relevant constitutional provisions. *Ante,* at 283. That statement, however, is incorrect. We have repeatedly rejected the idea that the nature of the court's jurisdiction has any bearing on the constitutional protections that apply at a proceeding before it. "From the relevant constitutional standpoint, there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct." *Coin & Currency,* 401 U. S., at 718. See also *One 1958 Plymouth Sedan,* 380 U. S., at 701, n. 11; *Boyd,* 116 U. S., at 638.[12] Most re-

[11] Apparently recognizing the difficulty of reconciling its analysis of § 881(a)(7) with *Austin*'s, the Court admits that the statute "perhaps ha[s] certain punitive aspects," but finds them outweighed by its "important nonpunitive goals." *Ante,* at 290. Again, that approach simply repudiates *Halper,* which defined as punishment for purposes of the Double Jeopardy Clause any sanction that "cannot fairly be said *solely* to serve a remedial purpose." 490 U. S., at 448 (emphasis added).

[12] "[A]lthough the owner of goods, sought to be forfeited by a proceeding *in rem,* is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a

cently, in our application of *Halper*'s definition of punishment, we stated that "[w]e do not understand the Government to rely separately on the technical distinction between proceedings *in rem* and proceedings *in personam*, but we note that any such reliance would be misplaced." *Austin*, 509 U. S., at 615, n. 9.[13]

The notion that the label attached to the proceeding is dispositive runs contrary to the trend of our recent cases. In *Halper* we stated that "the labels 'criminal' and 'civil' are not of paramount importance" in determining whether a proceeding punishes an individual. 490 U. S., at 447. In *Kurth Ranch* we held that the Double Jeopardy Clause applies to punitive proceedings even if they are labeled a tax. Indeed, in reaching that conclusion, we followed a 1931 decision that noted that a tax statute might be considered punitive for double jeopardy purposes.[14] It is thus far too late in the day to contend that the label placed on a punitive proceeding determines whether it is covered by the Double Jeopardy Clause.

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case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence." *Boyd*, 116 U. S., at 638.

[13] The Court suggests that the decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972), rested on the fact that the second penalty was "*in personam*," *ante*, at 276, but the opinion of the Court did not even mention that term. In *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984), the Court discussed the fact that the forfeiture was *in rem*, but only for the rather obvious point that Congress intended the proceeding to be "civil."

[14] "That case, *United States* v. *La Franca*, 282 U. S. 568 (1931), observed that the words 'tax' and 'penalty' 'are not interchangeable, one for the other' and that 'if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.' *Id.*, at 572. See also *Lipke* v. *Lederer*, 259 U. S. 557, 561 (1922) ('The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid')." *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 777, n. 15 (1994).

The pedantic distinction between *in rem* and *in personam* actions is ultimately only a cover for the real basis for the Court's decision: the idea that the property, not the owner, is being "punished" for offenses of which it is "guilty." Although the Court prefers not to rely on this notorious fiction too blatantly, its repeated citations to *Various Items* make clear that the Court believes respondent's home was "guilty" of the drug offenses with which he was charged. See *ante*, at 283. On that rationale, of course, the case is easy. The *owner* of the property is not being punished when the Government confiscates it, just the *property*. The same sleight-of-hand would have worked in *Austin*, too: The owner of the property is not being excessively fined, just the property itself. Despite the Government's heavy reliance on that fiction in *Austin*, we did not allow it to stand in the way of our holding that the seizure of property may punish the owner.[15]

Even if the point had not been settled by prior decisions, common sense would dictate the result in this case. There is simply no rational basis for characterizing the seizure of this respondent's home as anything other than punishment for his crime. The house was neither proceeds nor contraband and its value had no relation to the Government's authority to seize it. Under the controlling statute an essential predicate for the forfeiture was proof that respondent

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[15] Long ago the Court cast doubt on this fiction:

"But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited . . . . In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.'*

"* . . . Vaughan, C. J., in *Sheppard* v. *Gosnold*, Vaugh. 159, 172, approved by Ch. Baron Parker in *Mitchell qui tam* v. *Torup*, Parker, 227, 236." *Boyd* v. *United States*, 116 U. S., at 637, and n.

had used the property in connection with the commission of a crime. The forfeiture of this property was unquestionably "a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *United States* v. *Ward*, 448 U. S., at 254. As we unanimously recognized in *Halper*, formalistic distinctions that obscure the obvious practical consequences of governmental action disserve the "'humane interests'" protected by the Double Jeopardy Clause. 490 U. S., at 447, quoting *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 554 (1943) (Frankfurter, J., concurring). Fidelity to both reason and precedent dictates the conclusion that *this forfeiture* was "punishment" for purposes of the Double Jeopardy Clause.[16]

II

The Government also argues that the word "jeopardy" refers only to a criminal proceeding, and that our cases precluding two punishments for the same offense apply only to situations in which the first punishment was imposed after conviction of a crime. In this case the civil forfeiture proceeding antedated the filing of the criminal charge. Since the civil case was not a "jeopardy," the argument runs, the criminal case was the first, rather than the second, jeopardy. This argument is foreclosed by our decisions in *Halper* and *Kurth Ranch*.

Although the point was not expressly mentioned in either case, both holdings necessarily rested on the assumption that the civil proceeding in which the second punishment was imposed was a "jeopardy" within the meaning of the Fifth

[16] As I have emphasized, the determination that 21 U. S. C. § 881(a)(7) is a punitive statute is perfectly consistent with a conclusion that other types of sanctions are remedial. For example, I would expect that many types of administrative licensing sanctions are remedial in the relevant sense of our cases. See Comment, Administrative Driver's License Suspension: A Remedial Tool That is Not in Jeopardy, 45 Am. U. L. Rev. 1151 (1996) (arguing that suspension of a driver's license after conviction for drunken driving is a remedial sanction under the logic of *Halper*, *Austin*, and *Kurth Ranch*).

Amendment. Otherwise there would have been no basis for concluding that the defendants had been "twice put in jeopardy" as the text of the Clause forbids. The prohibition against two such proceedings cannot depend on the order in which they are filed. Cf. *Kurth Ranch*, 511 U. S., at 804 (SCALIA, J., dissenting) ("[I]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference").

III

The Government's third argument is that the civil forfeiture and the criminal proceeding did not involve the same offense. The Government relies principally on *Blockburger* v. *United States*, 284 U. S. 299 (1932), in which we held that for double jeopardy purposes two statutes define different offenses if "each provision requires proof of a fact which the other does not." *Id.*, at 304. The application of that test would avoid any double jeopardy objection to a forfeiture followed by a prosecution—or a prosecution followed by a forfeiture—whenever the seizure could be supported without proof that the defendant committed a crime and the conviction did not require proof that the forfeited property had been used illegally.

Thus, if instead of forfeiting Ursery's home the Government had decided to forfeit his neighbor's property where the marijuana was grown, the *Blockburger* rule would avoid any double jeopardy objection to either the forfeiture or respondent's prosecution. In that scenario, the forfeiture could be supported without proof that Ursery violated the law and Ursery could be convicted without proof that he harvested the marijuana on property owned by someone else.

The rule does, however, bar this conviction because the elements that the Government was required to allege and prove to sustain the forfeiture of Ursery's home under § 881(a)(7) included each of the elements of the offense for which he was later convicted. As in *Illinois* v. *Vitale*, 447 U. S. 410 (1980), and *Harris* v. *Oklahoma*, 433 U. S. 682

(1977) *(per curiam)*, the fact that the "greater" offense (here, the forfeiture) could have been proved by means of a different "lesser" offense does not negate the fact that in this instance it *was* proved by resort to the same elements as the criminal offense. This conclusion also accords with our oft-repeated understanding of the relationship between a civil forfeiture and the underlying offense. See, *e. g.*, *One 1958 Plymouth Sedan*, 380 U. S., at 701 ("[T]he forfeiture is clearly a penalty for the criminal offense"); *Boyd*, 116 U. S., at 634 (describing sanction as "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him"). Accordingly, under the analysis we unanimously applied most recently in *Rutledge* v. *United States*, 517 U. S. 292 (1996), the criminal charge was a lesser included offense of the forfeiture and therefore constituted a second jeopardy.

JUSTICE KENNEDY joins the Court's opinion and therefore ought to agree with the majority that civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause. In fact, however, he recognizes that "[f]orfeiture . . . punishes an owner by taking property involved in a crime." *Ante*, at 295. His real objection is that a forfeiture does not punish for the same offense as the underlying criminal conviction.

JUSTICE KENNEDY theorizes that civil forfeiture punishes for the misuse of property. *Ante*, at 294. It might be true that some forfeiture statutes are best described as creating a sanction for misuse, as opposed to (but perhaps in addition to) a sanction for the substantive criminal offense. But, again, this statute is not structured that way. Section 881(a)(7) incorporates the criminal offense itself as the predicate for the forfeiture. See 21 U. S. C. § 881(a)(7) (subjecting to forfeiture "[a]ll real property . . . which is used . . . to commit . . . a violation of this subchapter punishable by more than one year's imprisonment"). Furthermore, the innocent owner exemption in the same subsection provides that "no

property shall be forfeited under this paragraph . . . *by reason of any act or omission* established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Ibid.* (emphasis added). In *Austin*, we held that the exemption revealed a "congressional intent to punish only those involved in drug trafficking" because " 'the traditional criminal sanctions . . . are inadequate to deter or punish the enormously profitable trade in dangerous drugs.' " 509 U. S., at 619, 620 (quoting S. Rep. No. 98–225, at 191). See also 509 U. S., at 628 (SCALIA, J., concurring in part and concurring in judgment) (suggesting that proportionality of a forfeiture be measured by the relationship of the property to the underlying offense). Again, these statements accord with common sense: Forfeiting respondent's house punished him for the same narcotics violations as his criminal conviction.

IV

The final argument advanced by the Government is that the forfeiture and the criminal conviction should be treated as having occurred in the same proceeding because both were commenced before a final judgment was entered in either. Emphasizing the fact that the Double Jeopardy Clause, and particularly the prohibition against multiple punishments for the same offense, protects the defendant's legitimate expectation of finality in the original sentence, the Government maintains that such an expectation could not arise until after one proceeding was completed. Moreover, it argues, the civil and criminal sanctions "cannot be (and never have been) joined together in a single trial under our system of justice." Brief for United States 55.

This argument is unpersuasive because it is simply inaccurate to describe two separate proceedings as one.[17] I also cannot agree with the Government's view that there is any

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[17] In *Kurth Ranch* we explicitly noted that the tax assessment and the prosecution were "separate legal proceedings." 511 U. S., at 772.

procedural obstacle to including a punitive forfeiture in the final judgment entered in a criminal case. The sentencing proceeding does not commence until after the defendant has been found guilty, and I do not see why that proceeding should not encompass all of the punitive sanctions that are warranted by the conviction. Indeed, a draft of a proposed amendment to the Federal Rules of Criminal Procedure envisions precisely that procedure. See Fed. Rule Crim. Proc. 32(d)(2) (eff. Dec. 1, 1996).[18] If, as we have already determined, the "civil" forfeitures pursuant to § 881(a)(7) are in fact punitive, a single judgment encompassing the entire punishment for the defendant's offense is precisely what the Double Jeopardy Clause requires. Congress' decision to create novel and additional penalties should not be permitted to eviscerate the protection against governmental overreaching embodied in the Double Jeopardy Clause. That protection has far deeper roots than the relatively recent enactments that have so dramatically expanded the sovereign's power to forfeit private property.

* * *

One final example may illustrate the depth of my concern that the Court's treatment of our cases has cut deeply into a guarantee deemed fundamental by the Founders. The Court relies heavily on a few early decisions that involved the forfeiture of vessels whose entire mission was unlawful and on the Prohibition-era precedent sustaining the forfeiture of a distillery—a property that served no purpose other than the manufacture of illegal spirits. Notably none of those early cases involved the forfeiture of a home as a form

[18] According to the Rule, once there is a finding that property is subject to a criminal forfeiture, the court may enter a preliminary forfeiture order. The order also authorizes the Attorney General to seize the property, conduct any necessary discovery, and begin proceedings to protect the rights of third parties. The order of forfeiture becomes a part of the sentence and is included in the judgment.

of punishment for misconduct that occurred therein. Consider how drastic the remedy would have been if Congress in 1931 had authorized the forfeiture of every home in which alcoholic beverages were consumed. Under the Court's reasoning, I fear that the label "civil," or perhaps "*in rem*," would have been sufficient to avoid characterizing such forfeitures as "punitive" for purposes of the Double Jeopardy Clause. Our recent decisions in *Halper*, *Austin*, and *Kurth Ranch* dictate a far different conclusion. I remain persuaded that those cases were correctly decided and should be followed today.

Accordingly, I respectfully dissent from the judgment in No. 95–345.

Syllabus

LEWIS *v.* UNITED STATES

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

No. 95–6465. Argued April 23, 1996—Decided June 24, 1996

Petitioner was charged with two counts of obstructing the mail, each charge carrying a maximum authorized prison sentence of six months. He requested a jury, but the Magistrate Judge ordered a bench trial, explaining that because she would not sentence him to more than six months' imprisonment, he was not entitled to a jury trial. The District Court affirmed. In affirming, the Court of Appeals noted that the Sixth Amendment jury trial right pertains only to those offenses for which the legislature has authorized a maximum penalty of over six months' imprisonment, and that because each offense charged here was petty in character, the fact that petitioner was facing more than six months' imprisonment in the aggregate did not entitle him to a jury trial. The court explained in dictum that because the offense's characterization as petty or serious determined the right to a jury trial, not the sentence faced, a trial judge's self-imposed limitation on sentencing could not deprive a defendant of that right.

Held:

1. A defendant who is prosecuted in a single proceeding for multiple petty offenses does not have a Sixth Amendment right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months. The right to a jury trial is reserved for defendants accused of serious offenses and does not extend to petty offenses. *Duncan* v. *Louisiana*, 391 U. S. 145, 159. The most relevant criterion with which to assess the seriousness of an offense is the legislature's judgment of the offense's character, primarily as expressed in the maximum authorized prison term. An offense carrying a maximum term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that it considered the offense serious. *E. g.*, *Blanton* v. *North Las Vegas*, 489 U. S. 538, 543. Here, by setting the maximum prison term at six months, Congress categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of a petty offense, and therefore faced an aggregate potential prison term greater than six months, does not change Congress' judgment of the particular offense's gravity, nor does it transform the petty offense into a serious one, to which the

jury trial right would apply. *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 511, and *Taylor* v. *Hayes*, 418 U. S. 488, distinguished. Pp. 325–330.

2. Because petitioner is not entitled to a jury trial, the Court does not reach the question whether a judge's self-imposed limitation on sentencing may affect the jury trial right. P. 330.

65 F. 3d 252, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 330. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 339.

Steven M. Statsinger argued the cause for petitioner. With him on the briefs were *Henriette D. Hoffman* and *David A. Lewis*.

Cornelia T. L. Pillard argued the cause for the United States. On the brief were *Solicitor General Days*, *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, *Richard P. Bress*, and *Louis M. Fischer*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether a defendant who is prosecuted in a single proceeding for multiple petty offenses has a constitutional right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months. We are also asked to decide whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

We conclude that no jury trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth

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**David A. Reiser*, *John Vanderstar*, and *Jeffrey B. Coopersmith* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging reversal.

Christopher Warnock filed a brief for the Jury Trial Group as *amicus curiae*.

Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged. Because we decide that no jury trial right exists where a defendant is charged with multiple petty offenses, we do not reach the second question.

I

Petitioner Ray Lewis was a mail handler for the United States Postal Service. One day, postal inspectors saw him open several pieces of mail and pocket the contents. The next day, the inspectors routed "test" mail, containing marked currency, through petitioner's station. After seeing petitioner open the mail and remove the currency, the inspectors arrested him. Petitioner was charged with two counts of obstructing the mail, in violation of 18 U. S. C. § 1701. Each count carried a maximum authorized prison sentence of six months. Petitioner requested a jury, but the Magistrate Judge granted the Government's motion for a bench trial. She explained that because she would not, under any circumstances, sentence petitioner to more than six months' imprisonment, he was not entitled to a jury trial.

Petitioner sought review of the denial of a jury trial, and the District Court affirmed. Petitioner appealed, and the Court of Appeals for the Second Circuit affirmed. 65 F. 3d 252 (1995). The court noted that the Sixth Amendment jury trial right pertains only to serious offenses, that is, those for which the legislature has authorized a maximum penalty of over six months' imprisonment. The court then addressed the question whether a defendant facing more than six months' imprisonment in the aggregate for multiple petty offenses is nevertheless entitled to a jury trial. The Court of Appeals concluded that, for determination of the right to a jury trial, the proper focus is on the legislature's determination regarding the character of the offense, as indicated by maximum penalty authorized, not on the length of

the maximum aggregate sentence faced. *Id.*, at 254–255. Because each offense charged here was petty in character, the court concluded that petitioner was not entitled to a jury trial.

The court explained in dictum that because the character of the offense as petty or serious determined the right to a jury trial, not the sentence faced, a trial judge's self-imposed limitation on sentencing could not deprive a defendant of the right to a jury trial. *Id.*, at 255–256.

We granted certiorari, 516 U. S. 1088 (1996), to resolve a conflict in the Courts of Appeals over whether a defendant prosecuted in a single proceeding for multiple petty offenses has a constitutional right to a jury trial, where the aggregate sentence authorized for the offenses exceeds six months' imprisonment, and whether such jury trial right can be eliminated by a judge's pretrial commitment that the aggregate sentence imposed will not exceed six months. See *United States* v. *Coppins*, 953 F. 2d 86 (CA4 1991); *United States* v. *Bencheck*, 926 F. 2d 1512 (CA10 1991); *Rife* v. *Godbehere*, 814 F. 2d 563 (CA9 1987).

II

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." It is well established that the Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan* v. *Louisiana*, 391 U. S. 145, 159 (1968).

To determine whether an offense is properly characterized as "petty," courts at one time looked to the nature of the offense and whether it was triable by a jury at common law. Such determinations became difficult, because many statutory offenses lack common-law antecedents. *Blanton* v.

North Las Vegas, 489 U. S. 538, 541, and n. 5 (1989). Therefore, more recently, we have instead sought "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States*, 395 U. S. 147, 148 (1969); accord, *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937). Now, to determine whether an offense is petty, we consider the maximum penalty attached to the offense. This criterion is considered the most relevant with which to assess the character of an offense, because it reveals the legislature's judgment about the offense's severity. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task . . . ." *Blanton*, 489 U. S., at 541 (internal quotation marks omitted). In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized. While penalties such as probation or a fine may infringe on a defendant's freedom, the deprivation of liberty imposed by imprisonment makes that penalty the best indicator of whether the legislature considered an offense to be "petty" or "serious." *Id.*, at 542. An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious. *Id.*, at 543; *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 512 (1974).

Here, the maximum authorized penalty for obstruction of mail is six months' imprisonment—a penalty that presumptively places the offense in the "petty" category. We face the question whether petitioner is nevertheless entitled to a jury trial, because he was tried in a single proceeding for two counts of the petty offense so that the potential aggregated penalty is 12 months' imprisonment.

Petitioner argues that, where a defendant is charged with multiple petty offenses in a single prosecution, the Sixth Amendment requires that the aggregate potential penalty be the basis for determining whether a jury trial is required.

Although each offense charged here was petty, petitioner faced a potential penalty of more than six months' imprisonment; and, of course, if any offense charged had authorized more than six months' imprisonment, he would have been entitled to a jury trial. The Court must look to the aggregate potential prison term to determine the existence of the jury trial right, petitioner contends, not to the "petty" character of the offenses charged.

We disagree. The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. As set forth above, we determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply. We note that there is precedent at common law that a jury trial was not provided to a defendant charged with multiple petty offenses. See, *e. g.*, *Queen* v. *Matthews*, 10 Mod. 26, 88 Eng. Rep. 609 (Q. B. 1712); *King* v. *Swallow*, 8 T. R. 285, 101 Eng. Rep. 1392 (K. B. 1799).

Petitioner nevertheless insists that a defendant is entitled to a jury trial whenever he faces a deprivation of liberty for a period exceeding six months, a proposition for which he cites our precedent establishing the six-months' prison sentence as the presumptive cutoff for determining whether an offense is "petty" or "serious." To be sure, in the cases in which we sought to determine the line between "petty" and "serious" for Sixth Amendment purposes, we considered the severity of the authorized deprivation of liberty as an indicator of the legislature's appraisal of the offense. See *Blanton*, *supra*, at 542–543; *Baldwin* v. *New York*, 399 U. S. 66,

68–69 (1970) (plurality opinion). But it is now settled that a legislature's determination that an offense carries a maximum prison term of six months or less indicates its view that an offense is "petty." *Blanton*, *supra*, at 543. Where we have a judgment by the legislature that an *offense* is "petty," we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense. The maximum authorized penalty provides an "objective indicatio[n] of the seriousness with which society regards the offense," *Frank*, 395 U. S., at 148, and it is that indication that is used to determine whether a jury trial is required, not the particularities of an individual case. Here, the penalty authorized by Congress manifests its judgment that the offense is petty, and the term of imprisonment faced by petitioner by virtue of the second count does not alter that fact.

Petitioner directs our attention to *Codispoti* for support for the assertion that the "aggregation of multiple petty offenses renders a prosecution serious for jury trial purposes." Brief for Petitioner 18. *Codispoti* is inapposite. There, defendants were each convicted at a single, nonjury trial for several charges of criminal contempt. The Court was unable to determine the legislature's judgment of the character of that offense, however, because the legislature had not set a specific penalty for criminal contempt. In such a situation, where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense. *Codispoti*, *supra*, at 511; *Frank*, *supra*, at 149. Here, in contrast, we need not look to the punishment actually imposed, because we are able to discern Congress' judgment of the character of the offense.

Furthermore, *Codispoti* emphasized the special concerns raised by the criminal contempt context. Contempt "often strikes at the most vulnerable and human qualities of a judge's temperament. Even where the contempt is not a di-

rect insult to the court . . . it frequently represents a rejection of judicial authority, or an interference with the judicial process . . . ." *Codispoti*, 418 U. S., at 516 (internal quotation marks omitted); see also *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465–466 (1971). In the face of courtroom disruption, a judge may have difficulty maintaining the detachment necessary for fair adjudication; at the same time, it is a judge who "determines which and how many acts of contempt the citation will cover," "determine[s] guilt or innocence absent a jury," and "impose[s] the sentence." *Codispoti*, 418 U. S., at 515. Therefore, *Codispoti* concluded that the concentration of power in the judge in the often heated contempt context presented the "very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." *Ibid.* The benefit of a jury trial, "'as a protection against the arbitrary exercise of official power,'" was deemed particularly important in that context. *Id.*, at 516 (quoting *Bloom* v. *Illinois*, 391 U. S. 194, 202 (1968)).

The absence of a legislative judgment about the offense's seriousness, coupled with the unique concerns presented in a criminal contempt case, persuaded us in *Codispoti* that, in those circumstances, the jury trial right should be determined by the aggregate penalties actually imposed. Codispoti was held to be entitled to a jury trial, because the sentence actually imposed on him for criminal contempt exceeded six months. By comparison, in *Taylor* v. *Hayes*, 418 U. S. 488 (1974), which similarly involved a defendant convicted of criminal contempt in a jurisdiction where the legislature had not specified a penalty, we determined that the defendant was not entitled to a jury trial, because the sentence actually imposed for criminal contempt did not exceed six months. Contrary to JUSTICE KENNEDY's argument, see *post*, at 331–334, 338, *Codispoti* and *Taylor* do not stand for the sweeping proposition that, outside their narrow context, the jury trial right is determined by the aggregate penalties faced by a defendant.

Certainly the aggregate potential penalty faced by petitioner is of serious importance to him. But to determine whether an offense is serious for Sixth Amendment purposes, we look to the legislature's judgment, as evidenced by the maximum penalty authorized. Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply. As petitioner acknowledges, even if he were to prevail, the Government could properly circumvent the jury trial right by charging the counts in separate informations and trying them separately.

The Constitution's guarantee of the right to a jury trial extends only to serious offenses, and petitioner was not charged with a serious offense. That he was tried for two counts of a petty offense, and therefore faced an aggregate potential term of imprisonment of more than six months, does not change the fact that the Legislature deemed this offense petty. Petitioner is not entitled to a jury trial.

Because petitioner is not entitled to a jury trial, we need not reach the question whether a judge's self-imposed limitation on sentencing may affect the jury trial right.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE BREYER joins, concurring in the judgment.

This petitioner had no constitutional right to a jury trial because from the outset it was settled that he could be sentenced to no more than six months' imprisonment for his combined petty offenses. The particular outcome, however, should not obscure the greater consequence of today's unfortunate decision. The Court holds that a criminal defendant may be convicted of innumerable offenses in one proceeding and sentenced to any number of years' imprisonment, all without benefit of a jury trial, so long as no one of the

offenses considered alone is punishable by more than six months in prison. The holding both in its doctrinal formulation and in its practical effect is one of the most serious incursions on the right to jury trial in the Court's history, and it cannot be squared with our precedents. The Sixth Amendment guarantees a jury trial to a defendant charged with a serious crime. *Duncan* v. *Louisiana*, 391 U. S. 145, 159 (1968). Serious crimes, for purposes of the Sixth Amendment, are defined to include any offense which carries a maximum penalty of more than six months in prison; the right to jury trial attaches to those crimes regardless of the sentence in fact imposed. *Id.*, at 159–160. This doctrine is not questioned here, but it does not define the outer limits of the right to trial by jury. Our cases establish a further proposition: The right to jury trial extends as well to a defendant who is sentenced in one proceeding to more than six months' imprisonment. *Codispoti* v. *Pennsylvania*, 418 U. S. 506 (1974); *Taylor* v. *Hayes*, 418 U. S. 488 (1974). To be more specific, a defendant is entitled to a jury if tried in a single proceeding for more than one petty offense when the combined sentences will exceed six months' imprisonment; taken together, the crimes then are considered serious for constitutional purposes, even if each is petty by itself, *Codispoti* v. *Pennsylvania*, *supra*, at 517.

The defendants in *Codispoti* and *Taylor* had been convicted of criminal contempt without juries in States where the legislatures had not set a maximum penalty for the crime. Taylor was convicted of nine separate contempts and sentenced to six months in prison. The Court held he was not entitled to a jury trial. Since the total sentence was only six months' imprisonment, the "eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required." *Taylor* v. *Hayes*, *supra*, at 496. Codispoti, by contrast, was convicted of seven contempts, and he was sentenced to six terms of six months' imprisonment and one term of three months'

imprisonment, each to run consecutively—a total of 39 months. We held he was entitled to a trial by jury because his aggregate sentence exceeded six months. In *Codispoti*, Pennsylvania made the same argument the United States makes today. It said no jury trial is required if the maximum punishment for each offense does not exceed six months in prison. We rejected the claim, saying:

> "Here the contempts . . . were tried seriatim in one proceeding, and the trial judge not only imposed a separate sentence for each contempt but also determined that the individual sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term to be served beyond that allowable for a petty criminal offense. As a result of this single proceeding, Codispoti was sentenced to three years and three months for his seven contemptuous acts . . . . In terms of the sentence imposed, which was obviously several times more than six months, [Codispoti] was tried for what was equivalent to a serious offense and was entitled to a jury trial.
>
> "We find unavailing respondent's contrary argument that [Codispoti's] contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury. Notwithstanding respondent's characterization of the proceeding, the salient fact remains that the contempts arose from a single trial, were charged by a single judge, and were tried in a single proceeding. The individual sentences imposed were then aggregated, one sentence taking account of the others and not beginning until the immediately preceding sentence had expired." *Codispoti* v. *Pennsylvania*, *supra*, at 516–517.

The reasons the Court offers to distinguish these cases are not convincing. The Court first suggests *Codispoti*'s holding

turned on the absence of a statutory maximum sentence for criminal contempt. *Ante*, at 328. The absence of a statutory maximum sentence, however, has nothing whatever to do with whether a court must aggregate the penalties that are in fact imposed for each crime. Indeed, we know the open-ended penalty to which Codispoti was subject was not the reason he was entitled a jury trial because *Taylor*, decided the same day, held that a defendant who was subject to the same kind of open-ended sentencing was not entitled to trial by jury because the sentence he received did not in fact exceed six months. Taken together, *Codispoti* and *Taylor* stand for the proposition the Court now rejects: Sentences for petty offenses must be aggregated in determining whether a defendant is entitled to a jury trial. Cf. *State* v. *McCarroll*, 337 So. 2d 475, 480 (La. 1976) (concluding *Codispoti* compelled it to overrule *Monroe* v. *Wilhite*, 233 So. 2d 535 (La.), cert. denied, 400 U. S. 910 (1970), which had held the Sixth Amendment did not require aggregation of penalties for petty offenses to determine whether a defendant is entitled to a jury trial).

The Court next suggests *Codispoti*'s holding was based on "the special concerns raised by the criminal contempt context." *Ante*, at 328. The *Codispoti* Court was indeed cognizant of the need "to maintain order in the courtroom and the integrity of the trial process," 418 U. S., at 513, and so approved summary conviction and sentencing for criminal contempt, "where the necessity of circumstances warrants," *id.*, at 514. The Court made clear that under those circumstances, a judge may sentence a defendant to more than six months' imprisonment for more than one contempt without empaneling a jury. *Id.*, at 514–515. The Court went on to hold, however, that when the judge postpones the contempt trial until after the immediate proceedings have concluded, the "ordinary rudiments of due process" apply. *Id.*, at 515. The "ordinary" rule required aggregation of penal-

ties, and because Codispoti's aggregated penalties exceeded six months' imprisonment, entitled him to a jury trial.

In authorizing retroactive consideration of the punishment a defendant receives, the holdings of *Codispoti* and *Taylor* must not be confused with the line of cases entitling a defendant to a jury trial if he is charged with a crime punishable by more than six months' imprisonment, regardless of the sentence he in fact receives. The two lines of cases are consistent. Crimes punishable by sentences of more than six months are deemed by the community's social and ethical judgments to be serious. See *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937). Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury. See J. Proffatt, Trial by Jury 149 (1877) (jury trial cannot be denied to a defendant subject to "punishment which would render him infamous [or] affix to him the ignominy of a criminal"). This rationale does not entitle a defendant to trial by jury if he is charged only with petty offenses; even if they could result in a long sentence when taken together, convictions for petty offenses do not carry the same stigma as convictions for serious crimes.

The imposition of stigma, however, is not the only or even the primary consequence a jury trial serves to constrain. As *Codispoti* recognizes, and as ought to be evident, the Sixth Amendment also serves the different and more practical purpose of preventing a court from effecting a most serious deprivation of liberty—ordering a defendant to prison for a substantial period of time—without the government's persuading a jury he belongs there. A deprivation of liberty so significant may be exacted if a defendant faces punishment for a series of crimes, each of which can be punished by no more than six months' imprisonment. The stakes for a defendant may then amount in the aggregate to many years in prison, in which case he must be entitled to interpose a jury between himself and the government. If the trial court

rules at the outset that no more than six months' imprisonment will be imposed for the combined petty offenses, however, the liberty the jury serves to protect will not be endangered, and there is no corresponding right to jury trial.

Although *Codispoti* and *Taylor* are binding precedents, my conclusion rests also on a more fundamental point, one the Court refuses to confront: The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State. Among the most ominous of those is the power to imprison. Blackstone expressed this principle when he described the right to trial by jury as a "strong . . . barrier . . . between the liberties of the people and the prerogative of the crown." 4 W. Blackstone, Commentaries *349–*350. See also W. Forsyth, History of Trial by Jury 426 (1852) ("[I]t would be difficult to conceive a better security than this right affords against any exercise of arbitrary violence on the part of the crown or a government acting in the name of the crown. No matter how ardent may be its wish to destroy or crush an obnoxious opponent, there can be no real danger from its menaces or acts so long as the party attacked can take refuge in a jury fairly and indifferently chosen"). In more recent times we have said the right to jury trial "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U. S., at 155. Providing a defendant with the right to be tried by a jury gives "him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.*, at 156. These considerations all are present when a judge in a single case sends a defendant to prison for years, whether the sentence is the result of one serious offense or several petty offenses.

On the Court's view of the case, however, there is no limit to the length of the sentence a judge can impose on a defendant without entitling him to a jury, so long as the prosecutor

carves up the charges into segments punishable by no more than six months apiece. Prosecutors have broad discretion in framing charges, see *Ball* v. *United States*, 470 U. S. 856, 859 (1985), for criminal conduct often does not arrange itself in neat categories. In many cases, a prosecutor can choose to charge a defendant with multiple petty offenses rather than a single serious offense, and so prevent him under today's holding from obtaining a trial by jury while still obtaining the same punishment. Cf. *People* v. *Estevez*, 163 Misc. 2d 839, 847, 622 N. Y. S. 2d 870, 876 (Crim. Ct. 1995) ("The People cannot have it both ways. They cannot in good faith seek consolidation of several B misdemeanors, which have been reduced from Class A misdemeanors, and then after conviction of more than two offenses seek consecutive sentences which would expose the defendant to over six months' imprisonment while at the same time deny the defendant the right to a jury trial").

The Court does not aid its position when it notes, with seeming approval, the Government's troubling suggestion that a committed prosecutor could evade the rule here proposed by bringing a series of prosecutions in separate proceedings, each for an offense punishable by no more than six months in prison. *Ante*, at 330. Were a prosecutor to take so serious a view of a defendant's conduct as to justify the burden of separate prosecutions, I should think the case an urgent example of when a jury is most needed if the offenses are consolidated. And if a defendant is subject to repeated bench trials because of a prosecutor's scheme to confine him in jail for years without benefit of a jury trial, at least he will be provided certain safeguards as a result. The prosecution's witnesses, and its theory of the case, will be tested more than once; the defendant will have repeated opportunities to convince the judge, or more than one judge, on the merits; and quite apart from questions of included offenses, the government may be barred by collateral estoppel if a fact is found in favor of the defendant and is dispositive

in later trials, see *Ashe* v. *Swenson*, 397 U. S. 436 (1970). Finally, the prosecutor will have to justify, at least to the voters, this peculiar exercise of discretion. In short, if a prosecutor seeks to achieve a result forbidden in one trial by the expedient of pursuing many, the process itself will constrain the prosecutor and protect the defendant in important ways. The Court's holding, of course, makes it easier rather than more difficult for a government to evade the constraints of the Sixth Amendment when it seeks to lock up a defendant for a long time.

The significance of the Court's decision quite transcends the peculations of Ray Lewis, the petitioner here, who twice filched from the mails. The decision affects more than repeat violators of traffic laws, persons accused of public drunkenness, persons who persist in breaches of the peace, and the wide range of eccentrics capable of disturbing the quiet enjoyment of life by others. Just as alarming is the threat the Court's holding poses to millions of persons in agriculture, manufacturing, and trade who must comply with minute administrative regulations, many of them carrying a jail term of six months or less. Violations of these sorts of rules often involve repeated, discrete acts which can result in potential liability of years of imprisonment. See, *e. g.*, 16 U. S. C. § 707 (violation of migratory bird treaties, laws, and regulations); 29 U. S. C. § 216 (penalties under Fair Labor Standards Act); 36 CFR § 1.3 (1995) (violation of National Park Service regulations); *id.*, § 261.1b (violation of Forest Service prohibitions); *id.*, § 327.25 (violation of Army Corps of Engineers water resource development project regulations); 43 CFR § 8351.1–1(b) (1995) (violation of Bureau of Land management regulations under National Trails System Act of 1968). Still, under the Court's holding it makes no difference whether a defendant is sentenced to a year in prison or for that matter to 20 years: As long as no single violation charged is punishable by more than six months, the defendant has no right to a jury.

The petitioner errs in the opposite direction. He argues a defendant is entitled to a jury trial whenever the penalties for the crimes charged combine to exceed six months' imprisonment, even if the trial judge rules that no more than six months' imprisonment will be imposed. We rejected this position in *Taylor*, however, and rightly so. A defendant charged with multiple petty offenses does not face the societal disapprobation attaching to conviction of a serious crime, and, so long as the trial judge rules at the outset that no more than six months' imprisonment will be imposed, the defendant does not face a serious deprivation of liberty. A judge who so rules is not withdrawing from a defendant a constitutional right to which he is entitled, as petitioner claims; the defendant is not entitled to the right to begin with if there is no potential for more than six months' imprisonment. The judge's statement has no independent force but only clarifies what would have been the law in its absence. *Codispoti* holds that a judge cannot impose a sentence exceeding six months' imprisonment for multiple petty offenses without conducting a jury trial, regardless of whether the judge announces that fact from bench.

Amici in support of petitioner say it is inappropriate for judges to make these kinds of sentencing decisions before trial. The Court approved just this practice, however, in *Scott* v. *Illinois*, 440 U. S. 367 (1979), holding the Sixth Amendment does not require a judge to appoint counsel for a criminal defendant in a misdemeanor case if the judge will not sentence the defendant to any jail time. So too, Federal Rule of Criminal Procedure 58(a)(2) authorizes district courts not to apply the Federal Rules of Criminal Procedure in petty offense prosecutions for which no sentence of imprisonment will be imposed. The rules contemplate the determination being made before trial. Fed. Rule Crim. Proc. 58(a)(3).

Petitioner's proposal would impose an enormous burden on an already beleaguered criminal justice system by in-

creasing to a dramatic extent the number of required jury trials. There are thousands of instances where minor offenses are tried before a judge, and we would err on the other side of sensible interpretation were we to hold that combining petty offenses in a single proceeding mandates a jury trial even when all possibility for a sentence longer than six months has been foreclosed.

* * *

When a defendant's liberty is put at great risk in a trial, he is entitled to have the trial conducted to a jury. This principle lies at the heart of the Sixth Amendment. The Court does grave injury to the Amendment by allowing a defendant to suffer a prison term of any length after a single trial before a single judge and without the protection of a jury. I join only the Court's judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The Sixth Amendment provides that the accused is entitled to trial by an impartial jury "[i]n all criminal prosecutions." As JUSTICE KENNEDY persuasively explains, the "primary purpose of the jury in our legal system is to stand between the accused and the powers of the State." *Ante*, at 335. The majority, relying exclusively on cases in which the defendant was tried for a single offense, extends a rule designed with those cases in mind to the wholly dissimilar circumstance in which the prosecution concerns multiple offenses. I agree with JUSTICE KENNEDY to the extent he would hold that a prosecution which exposes the accused to a sentence of imprisonment longer than six months, whether for a single offense or for a series of offenses, is sufficiently serious to confer on the defendant the right to demand a jury. See *ante*, at 335–337.

Unlike JUSTICE KENNEDY, however, I believe that the right to a jury trial attaches when the prosecution begins.

I do not quarrel with the established view that only defendants whose alleged misconduct is deemed serious by the legislature are entitled to be judged by a jury. But in my opinion, the legislature's determination of the severity of the charges against a defendant is properly measured by the maximum sentence authorized for the prosecution as a whole. The text of the Sixth Amendment supports this interpretation by referring expressly to "criminal *prosecutions*."

Nothing in our prior precedents conflicts with this view. True, some of our past cases (the ones on which the majority relies) have referred to an "offense" rather than a "prosecution." See, *e. g.*, *Blanton* v. *North Las Vegas*, 489 U. S. 538, 541 (1989); *Frank* v. *United States*, 395 U. S. 147, 148 (1969). But the words were effectively interchangeable in those cases because the prosecutions at issue concerned only one offense. The contempt cases, which do involve multiple offenses, demonstrate that aggregation—that is, deciding whether the defendant has a right to a jury trial on the basis of the prosecution rather than the individual offenses—is appropriate.

The majority attempts to distinguish *Codispoti* v. *Pennsylvania*, 418 U. S. 506 (1974), by suggesting that the Court's decision in that case turned on the absence of any statutory measure of severity. *Ante*, at 328. That observation is certainly correct to a point: The contempt cases are special because the sentence actually imposed provides the only available yardstick by which to judge compliance with the command of the Sixth Amendment. But that unique aspect of the cases does not speak to the aggregation question. Having determined that the defendants in *Codispoti* were sentenced to no more than six months for any individual contempt, it would follow from the rule the Court announces today that a jury trial was unnecessary. Yet we reversed and remanded, holding that "each contemnor was tried for

what was *equivalent* to a serious offense and was [therefore] entitled to a jury trial." 418 U. S., at 517 (emphasis added).*

JUSTICE KENNEDY reads a second contempt case, *Taylor* v. *Hayes*, 418 U. S. 488 (1974), as standing for the proposition that a judge may defeat the jury trial right by promising a short sentence. He is mistaken. The dispositive fact in *Taylor* was not that the prison term imposed was only six months but rather that the actual sentence, acting as a proxy for the legislative judgment, demonstrated that "the State itself has determined that the contempt is not so serious as to warrant more than a six-month sentence." *Id.*, at 496. In this case, by contrast, we have an explicit statutory expression of the legislative judgment that this prosecution is serious—the two offenses charged are punishable by a maximum prison sentence of 12 months.

All agree that a judge may not strip a defendant of the right to a jury trial for a serious crime by promising a sentence of six months or less. This is so because "[o]pprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed," *ante*, at 334 (KENNEDY, J., concurring in judgment). In my view, the same rule must apply to prosecutions involving multiple offenses which are serious by virtue of their aggregate possible sentence. I see no basis for assuming that the dishonor associated with multiple convictions for petty offenses is less than the dishonor associated with conviction of a single serious crime. Because the right attaches at the moment of prosecution, a judge may not deprive a defendant of a jury trial by making a pretrial determination that the crimes charged will not warrant a sentence exceeding six months.

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*The majority's speculation that the Court's holding in *Codispoti* was limited to criminal contempt cases, *ante*, at 328–329, is persuasively answered by JUSTICE KENNEDY. See *ante*, at 333–334 (opinion concurring in judgment).

Petitioner is entitled to a jury trial because he was charged with offenses carrying a statutory maximum prison sentence of more than six months. I therefore would reverse the judgment of the Court of Appeals and, for that reason, I respectfully dissent.

Syllabus

LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CASEY ET AL.

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

No. 94–1511. Argued November 29, 1995—Decided June 24, 1996

Respondents, who are inmates of various prisons operated by the Arizona Department of Corrections (ADOC), brought a class action against petitioners, ADOC officials, alleging that petitioners were furnishing them with inadequate legal research facilities and thereby depriving them of their right of access to the courts, in violation of *Bounds* v. *Smith*, 430 U. S. 817. The District Court found petitioners to be in violation of *Bounds* and issued an injunction mandating detailed, systemwide changes in ADOC's prison law libraries and in its legal assistance programs. The Ninth Circuit affirmed both the finding of a *Bounds* violation and the injunction's major terms.

Held: The success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and the District Court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid. Pp. 348–364.

(a) *Bounds* did not create an abstract, freestanding right to a law library or legal assistance; rather, the right that *Bounds* acknowledged was the right of *access to the courts.* *E. g.*, 430 U. S., at 817, 821, 828. Thus, to establish a *Bounds* violation, the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library or legal assistance program have hindered, or are presently hindering, his efforts to pursue a nonfrivolous legal claim. This requirement derives ultimately from the doctrine of standing. Although *Bounds* made no mention of an actual injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. Pp. 349–353.

(b) Statements in *Bounds* suggesting that prison authorities must also enable the prisoner to *discover* grievances, and to *litigate effectively* once in court, 430 U. S., at 825–826, and n. 14, have no antecedent in this Court's pre-*Bounds* cases, and are now disclaimed. Moreover, *Bounds* does not guarantee inmates the wherewithal to file any and every type of legal claim, but requires only that they be provided with the tools to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Pp. 354–355.

Syllabus

(c) The District Court identified only two instances of actual injury: It found that ADOC's failures with respect to illiterate prisoners had resulted in the dismissal with prejudice of inmate Bartholic's lawsuit and the inability of inmate Harris to file a legal action. Pp. 356–357.

(d) These findings as to injury do not support the systemwide injunction ordered by the District Court. The remedy must be limited to the inadequacy that produced the injury in fact that the plaintiff has established; that this is a class action changes nothing, for even named plaintiffs in a class action must show that they personally have been injured, see, *e. g.*, *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20. Only one named plaintiff, Bartholic, was found to have suffered actual injury—as a result of ADOC's failure to provide the special services he would have needed, in light of his particular disability (illiteracy), to avoid dismissal of his case. Eliminated from the proper scope of the injunction, therefore, are provisions directed at special services or facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. Furthermore, the inadequacy that caused actual injury to illiterate inmates Bartholic and Harris was not sufficiently widespread to justify systemwide relief. There is no finding, and no evidence discernible from the record, that in ADOC prisons other than those occupied by Bartholic and Harris illiterate inmates cannot obtain the minimal help necessary to file legal claims. Pp. 357–360.

(e) There are further reasons why the order here cannot stand. In concluding that ADOC's restrictions on lockdown inmates were unjustified, the District Court failed to accord the judgment of prison authorities the substantial deference required by cases such as *Turner* v. *Safley*, 482 U. S. 78, 89. The court also failed to leave with prison officials the primary responsibility for devising a remedy. Compare *Preiser* v. *Rodriguez*, 411 U. S. 475, 492. The result of this improper procedure was an inordinately intrusive order. Pp. 361–363.

43 F. 3d 1261, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and in Parts I and III of which SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 364. SOUTER, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 393. STEVENS, J., filed a dissenting opinion, *post*, p. 404.

Counsel

Grant Woods, Attorney General of Arizona, argued the cause for petitioners. With him on the briefs were *Daniel P. Struck*, *David C. Lewis*, *Eileen J. Dennis*, *Rex E. Lee*, *Carter G. Phillips*, *Mark D. Hopson*, *C. Tim Delaney*, *Rebecca White Berch*, and *Thomas J. Dennis*.

Elizabeth Alexander argued the cause for respondents. With her on the brief were *Ayesha Khan*, *Margaret Winter*, *Alvin J. Bronstein*, *Alice L. Bendheim*, and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel Lungren*, Attorney General of California, *Peter J. Siggins*, Senior Assistant Attorney General, *Morris Lenk*, Senior Supervising Attorney General, and *Karl S. Mayer* and *Bruce M. Slavin*, Deputy Attorneys General, by *Garland Pinkston, Jr.*, Acting Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Pamela Carter* of Indiana, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joe Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Betty Montgomery* of Ohio, *Theodore R. Kulongoski* of Oregon, *Walter W. Cohen* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles W. Burson* of Tennessee, *Jan Graham* of Utah, *James S. Gilmore III* of Virginia, *Christine O. Gregoire* of Washington, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming; for the National Conference of State Legislatures et al. by *Richard Ruda* and *Charles Rothfeld;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the Washington Legal Foundation et al. by *Charles J. Cooper*, *Michael A. Carvin*, *Michael W. Kirk*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Days*, *Assistant Attorney General Patrick*, *Deputy Solicitor General Bender*, *Alan Jenkins*, *Steven H. Rosenbaum*, *Louise A. Lerner*, and *Rebecca K. Troth;* for the Legal Aid Bureau, Inc., by *Stuart R. Cohen* and *Jeffery C. Taylor;* for the Mexican American Legal

JUSTICE SCALIA delivered the opinion of the Court.

In *Bounds* v. *Smith*, 430 U. S. 817 (1977), we held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.*, at 828. Petitioners, who are officials of the Arizona Department of Corrections (ADOC), contend that the United States District Court for the District of Arizona erred in finding them in violation of *Bounds*, and that the court's remedial order exceeded lawful authority.

I

Respondents are 22 inmates of various prisons operated by ADOC. In January 1990, they filed this class action "on behalf of all adult prisoners who are or will be incarcerated by the State of Arizona Department of Corrections," App. 22, alleging that petitioners were "depriving [respondents] of their rights of access to the courts and counsel protected by the First, Sixth, and Fourteenth Amendments," *id.*, at 34. Following a 3-month bench trial, the District Court ruled in favor of respondents, finding that "[p]risoners have a constitutional right of access to the courts that is adequate, effective and meaningful," 834 F. Supp. 1553, 1566 (1992), citing *Bounds*, *supra*, at 822, and that "[ADOC's] system fails to comply with constitutional standards," 834 F. Supp., at 1569. The court identified a variety of shortcomings of the ADOC system, in matters ranging from the training of library staff, to the updating of legal materials, to the availability of photocopying services. In addition to these gen-

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Defense and Educational Fund et al. by *David Fernandez* and *Michael R. Cole;* for North Carolina Prisoner Legal Services, Inc., by *Richard E. Giroux;* for Prison Legal Services of Michigan by *Sandra L. Girard;* and for Prisoners in Northern California by *Sanford Jay Rosen*, *Amitai Schwartz*, and *Donald Specter.*

eral findings, the court found that two groups of inmates were particularly affected by the system's inadequacies: "[l]ockdown prisoners" (inmates segregated from the general prison population for disciplinary or security reasons), who "are routinely denied physical access to the law library" and "experience severe interference with their access to the courts," *id.*, at 1556; and illiterate or non-English-speaking inmates, who do not receive adequate legal assistance, *id.*, at 1558.

Having thus found liability, the court appointed a Special Master "to investigate and report about" the appropriate relief—that is (in the court's view), "how best to accomplish the goal of constitutionally adequate inmate access to the courts." App. to Pet. for Cert. 87a. Following eight months of investigation, and some degree of consultation with both parties, the Special Master lodged with the court a proposed permanent injunction, which the court proceeded to adopt, substantially unchanged. The 25-page injunctive order, see *id.*, at 61a–85a, mandated sweeping changes designed to ensure that ADOC would "provide meaningful access to the Courts for all present and future prisoners," *id.*, at 61a. It specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the Special Master but funded by ADOC), and similar matters. *Id.*, at 61a, 67a, 71a. The injunction addressed the court's concern for lockdown prisoners by ordering that "ADOC prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library," except that such visits "may be postponed on an individual basis because of the prisoner's documented inability to use the law library without creating

a threat to safety or security, or a physical condition if determined by medical personnel to prevent library use." *Id.*, at 61a. With respect to illiterate and non-English-speaking inmates, the injunction declared that they were entitled to "direct assistance" from lawyers, paralegals, or "a sufficient number of at least minimally trained prisoner Legal Assistants"; it enjoined ADOC that "[p]articular steps must be taken to locate and train bilingual prisoners to be Legal Assistants." *Id.*, at 69a–70a.

Petitioners sought review in the Court of Appeals for the Ninth Circuit, which refused to grant a stay prior to argument. We then stayed the injunction pending filing and disposition of a petition for a writ of certiorari. 511 U. S. 1066 (1994). Several months later, the Ninth Circuit affirmed both the finding of a *Bounds* violation and, with minor exceptions not important here, the terms of the injunction. 43 F. 3d 1261 (1994). We granted certiorari, 514 U. S. 1126 (1995).

II

Although petitioners present only one question for review, namely, whether the District Court's order "exceeds the constitutional requirements set forth in *Bounds*," Brief for Petitioners (i), they raise several distinct challenges, including renewed attacks on the court's findings of *Bounds* violations with respect to illiterate, non-English-speaking, and lockdown prisoners, and on the breadth of the injunction. But their most fundamental contention is that the District Court's findings of injury were inadequate to justify the finding of *systemwide* injury and hence the granting of systemwide relief. This argument has two related components. First, petitioners claim that in order to establish a violation of *Bounds*, an inmate must show that the alleged inadequacies of a prison's library facilities or legal assistance program caused him "actual injury"—that is, "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim."

Brief for Petitioners 30.[1] Second, they claim that the District Court did not find enough instances of actual injury to warrant systemwide relief. We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid.

A

The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. See *Allen* v. *Wright*, 468 U. S. 737, 750–752 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471–476 (1982). It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

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[1] Respondents contend that petitioners failed properly to present their "actual injury" argument to the Court of Appeals. Brief for Respondents 25–26. Our review of petitioners' briefs before that court leads us to conclude otherwise, and in any event, as we shall discuss, the point relates to standing, which is jurisdictional and not subject to waiver. See *United States* v. *Hays*, 515 U. S. 737, 742 (1995); *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990). JUSTICE SOUTER recognizes the jurisdictional nature of this point, *post*, at 394, which is difficult to reconcile with his view that we should not "reach out to address" it, *ibid.*

Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If—to take another example from prison life—a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, see *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976), simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

The foregoing analysis would not be pertinent here if, as respondents seem to assume, the right at issue—the right to which the actual or threatened harm must pertain—were the right to a law library or to legal assistance. But *Bounds* established no such right, any more than *Estelle* established a right to a prison hospital. The right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*. *E. g.*, *Bounds*, 430 U. S., at 817, 821, 828. In the cases to which *Bounds* traced its roots, we had protected that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents, *e. g.*, *Johnson* v. *Avery*, 393 U. S. 483, 484, 489–490 (1969), or file them, *e. g.*, *Ex parte Hull*, 312 U. S. 546, 547–549 (1941), and by requiring state courts to waive filing fees, *e. g.*, *Burns* v. *Ohio*, 360 U. S. 252, 258 (1959), or transcript fees, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956), for indigent inmates. *Bounds* focused on the same entitlement of access to the courts. Although it affirmed a court order

requiring North Carolina to make law library facilities available to inmates, it stressed that that was merely "one constitutionally acceptable method to assure meaningful access to the courts," and that "our decision here . . . does not foreclose alternative means to achieve that goal." 430 U. S., at 830. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.*, at 825.

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," *id.*, at 823 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Although *Bounds* itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the 35-year line of access-to-courts cases on which *Bounds* relied, see *id.*,

at 821–825.[2] Moreover, the assumption of an actual-injury requirement seems to us implicit in the opinion's statement that "we encourage local experimentation" in various methods of assuring access to the courts. *Id.*, at 832. One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms such as those that contained the original complaints in two of the more significant inmate-initiated cases in recent years, *Sandin* v. *Conner*, 515 U. S. 472 (1995), and *Hudson* v. *McMillian*, 503 U. S. 1 (1992)—forms that asked the inmates to provide only the facts and not to attempt any legal analysis. We hardly think that what we meant by "experimenting" with such an alternative was simply announcing it, whereupon suit would immediately lie to declare it theoretically inadequate and bring the experiment to a close. We think we envisioned, instead, that the new

[2] JUSTICE STEVENS suggests that *Ex parte Hull*, 312 U. S. 546 (1941), establishes that even a lost *frivolous* claim establishes standing to complain of a denial of access to courts, see *post*, at 408–409. As an initial matter, that is quite impossible, since standing was neither challenged nor discussed in that case, and we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect. See, *e. g.*, *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 97 (1994); *United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C. J.) (statement at oral argument). On the merits, however, it is simply not true that the prisoner's claim in *Hull* was frivolous. We rejected it because it had been procedurally defaulted by, *inter alia*, failure to object at trial and failure to include a transcript with the petition, 312 U. S., at 551. If all procedurally defaulted claims were frivolous, Rule 11 business would be brisk indeed. JUSTICE STEVENS's assertion that "we held that the smuggled petition had insufficient merit even to require an answer from the State," *post*, at 408–409, is misleading. The attorney general of Michigan appeared in the case, and our opinion discussed the merits of the claim at some length, see 312 U. S., at 549–551. The posture of the case was such, however, that we treated the claim "as a motion for leave to file a petition for writ of habeas corpus," *id.*, at 550; after analyzing petitioner's case, we found it "insufficient to compel *an order requiring the warden to answer*," *id.*, at 551 (emphasis added). That is not remotely equivalent to finding that the underlying claim was frivolous.

program would remain in place at least until some inmate could demonstrate that a nonfrivolous[3] legal claim had been frustrated or was being impeded.[4]

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[3] JUSTICE SOUTER believes that *Bounds* v. *Smith*, 430 U. S. 817 (1977), guarantees prison inmates the right to present frivolous claims—the determination of which suffices to confer standing, he says, because it assumes that the dispute "'will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,'" *post*, at 398–399, quoting *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968). This would perhaps have seemed like good law at the time of *Flast*, but our later opinions have made it explicitly clear that *Flast* erred in assuming that assurance of "serious and adversarial treatment" was the only value protected by standing. See, *e. g.*, *United States* v. *Richardson*, 418 U. S. 166, 176–180 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 220–223 (1974). *Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the "actual injury" requirement comes from. Not everyone who can point to some "concrete" act and is "adverse" can call in the courts to examine the propriety of executive action, but only someone who has been *actually injured.* Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value—arguable claims are settled, bought, and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions.

[4] JUSTICE SOUTER suggests that he would waive this actual-injury requirement in cases "involving substantial, systemic deprivation of access to court"—that is, in cases involving "'a direct, substantial and continuous . . . limit on legal materials,'" "total denial of access to a library," or "'[a]n *absolute* deprivation of access to *all* legal materials,'" *post*, at 401, and 400, n. 2. That view rests upon the expansive understanding of *Bounds* that we have repudiated. Unless prisoners have a freestanding right to libraries, a showing of the sort JUSTICE SOUTER describes would establish no *relevant* injury in fact, *i. e.*, injury-in-fact *caused by the violation of legal right.* See *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). Denial of access to the courts could not possibly cause the harm of inadequate libraries, but only the harm of lost, rejected, or impeded legal claims.

Of course, JUSTICE SOUTER's proposed exception is unlikely to be of much real-world significance in any event. Where the situation is so extreme as to constitute "an *absolute* deprivation of access to *all* legal

It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present, see, *e. g.*, *Ex parte Hull*, 312 U. S., at 547–548; *Griffin* v. *Illinois*, 351 U. S., at 13–16; *Johnson* v. *Avery*, 393 U. S., at 489. These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. See *Bounds*, 430 U. S., at 825–826, and n. 14. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them. To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.

Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated, see *Douglas* v. *California*, 372 U. S. 353, 354 (1963); *Burns* v. *Ohio*, 360 U. S., at 253, 258; *Griffin* v. *Illinois*, *supra*, at 13, 18; *Cochran* v. *Kansas*, 316 U. S. 255, 256 (1942), or habeas petitions, see *Johnson* v. *Avery*, *supra*, at 489; *Smith* v. *Bennett*, 365 U. S. 708, 709–710 (1961); *Ex parte Hull*, *supra*, at 547–548. In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), we extended this universe of relevant claims only slightly, to "civil rights actions"—*i. e.*, actions under 42 U. S. C. § 1983 to vindicate "basic constitutional rights." 418 U. S., at 579. Significantly, we felt compelled to justify even this slight extension of the right of access to the courts, stressing that "the demarcation line between civil rights actions and ha-

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materials," finding a prisoner with a claim affected by this extremity will probably be easier than proving the extremity.

beas petitions is not always clear," and that "[i]t is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ." *Ibid.* The prison law library imposed in *Bounds* itself was far from an all-subject facility. In rejecting the contention that the State's proposed collection was inadequate, the District Court there said:

> "This Court does not feel inmates need the entire U. S. Code Annotated. Most of that code deals with federal laws and regulations that would never involve a state prisoner. . . .
>
> "It is also the opinion of this Court that the cost of N. C. Digest and Modern Federal Practice Digest will surpass the usefulness of these research aids. They cover mostly areas not of concern to inmates."[5] Supplemental App. to Pet. for Cert. in *Bounds* v. *Smith*, O. T. 1976, No. 75–915, p. 18.

In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

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[5] The District Court order in this case, by contrast, required ADOC to stock each library with, *inter alia*, the Arizona Digest, the Modern Federal Practice Digest, Corpus Juris Secundum, and a full set of the United States Code Annotated, and to provide a 30–40 hour videotaped legal research course covering "relevant tort and civil law, including immigration and family issues." App. to Pet. for Cert. 69a, 71a; 834 F. Supp. 1553, 1561–1562 (Ariz. 1992).

B

Here the District Court identified only two instances of actual injury. In describing ADOC's failures with respect to illiterate and non-English-speaking prisoners, it found that "[a]s a result of the inability to receive adequate legal assistance, prisoners who are slow readers have had their cases dismissed with prejudice," and that "[o]ther prisoners have been unable to file legal actions." 834 F. Supp., at 1558. Although the use of the plural suggests that several prisoners sustained these actual harms, the court identified only one prisoner in each instance. *Id.*, at 1558, nn. 37 (lawsuit of inmate Bartholic dismissed with prejudice), 38 (inmate Harris unable to file a legal action).

Petitioners contend that "any lack of access experienced by these two inmates is not attributable to unconstitutional State policies," because ADOC "has met its constitutional obligations." Brief for Petitioners 32, n. 22. The claim appears to be that all inmates, including the illiterate and non-English speaking, have a right to nothing more than "physical access to excellent libraries, *plus* help from legal assistants and law clerks." *Id.*, at 35. This misreads *Bounds*, which as we have said guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish "*adequate* law libraries or *adequate* assistance from persons trained in the law," *Bounds*, 430 U. S., at 828 (emphasis added). Of course, we leave it to prison officials to determine how best to ensure that inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. But it is

that capability, rather than the capability of turning pages in a law library, that is the touchstone.

C

Having rejected petitioners' argument that the injuries suffered by Bartholic and Harris do not count, we turn to the question whether those injuries, and the other findings of the District Court, support the injunction ordered in this case. The actual-injury requirement would hardly serve the purpose we have described above—of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established. See *Missouri* v. *Jenkins*, 515 U. S. 70, 88, 89 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation" (citation and internal quotation marks omitted)).

This is no less true with respect to class actions than with respect to other suits. "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976), quoting *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation, with respect to various alleged inadequacies in the prison system, including failure to provide adequate legal assistance to non-English-speaking inmates and lockdown prisoners. That point is irrelevant now, however, for we are beyond the pleading stage.

> "Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992) (citations and internal quotation marks omitted).

After the trial in this case, the court found actual injury on the part of only one named plaintiff, Bartholic; and the cause of that injury—the inadequacy which the suit empowered the court to remedy—was failure of the prison to provide the special services that Bartholic would have needed, in light of his illiteracy, to avoid dismissal of his case. At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. If inadequacies of this character exist, they have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation.[6]

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[6] JUSTICE STEVENS concludes, in gross, that Bartholic's and Harris's injuries are "sufficient to satisfy any constitutional [standing] concerns," *post*, at 408. But standing is not dispensed in gross. If the right to complain

As to remediation of the inadequacy that caused Bartholic's injury, a further question remains: Was that inadequacy widespread enough to justify systemwide relief? The only findings supporting the proposition that, in all of ADOC's facilities, an illiterate inmate wishing to file a claim would be unable to receive the assistance necessary to do so were (1) the finding with respect to Bartholic, at the Florence facility, and (2) the finding that Harris, while incarcerated at Perryville, had once been "unable to file [a] legal actio[n]." 834 F. Supp., at 1558. These two instances were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief. See *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 417 (1977) ("[I]nstead of tailoring a remedy commensurate with the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope"); *id.*, at 420 ("[O]nly if there has been a systemwide impact may there be a systemwide remedy");

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of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum* v. *Yaretsky*, 457 U. S. 991, 999 (1982). As even JUSTICE SOUTER concedes, the inability of respondents to produce *any* evidence of actual injury to other than *illiterate* inmates (Bartholic and Harris) "dispose[s] of the challenge to remedial orders insofar as they touch non-English speakers and lockdown prisoners." *Post*, at 395.

Contrary to JUSTICE STEVENS's suggestion, see *post*, at 408, n. 4, our holding that respondents lacked standing to complain of injuries to non-English speakers and lockdown prisoners does *not* amount to "a conclusion that the class was improper." The standing determination is quite separate from certification of the class. Again, *Blum* proves the point: In that case, we held that a class of "'all residents of skilled nursing and health related nursing facilities in New York State who are recipients of Medicaid benefits'" lacked standing to challenge transfers to higher levels of care, even though they had standing to challenge discharges and transfers to lower levels; but we did not disturb the class definition. See 457 U. S., at 997, n. 11, 999–1002.

Califano v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class").

To be sure, the District Court also noted that "the trial testimony . . . indicated that there are prisoners who are unable to research the law because of their functional illiteracy," 834 F. Supp., at 1558. As we have discussed, however, the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts—a more limited capability that can be produced by a much more limited degree of legal assistance. Apart from the dismissal of Bartholic's claim with prejudice, and Harris's inability to file his claim, there is no finding, and as far as we can discern from the record no evidence, that in Arizona prisons illiterate prisoners cannot obtain the minimal help necessary to file particular claims that they wish to bring before the courts. The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper.[7]

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[7] Our holding regarding the inappropriateness of systemwide relief for illiterate inmates does not rest upon the application of standing rules, but rather, like JUSTICE SOUTER's conclusion, upon "the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system," *post*, at 397. In one respect, however, JUSTICE SOUTER's view of this issue differs from ours. He believes that systemwide relief would have been appropriate "[h]ad the findings shown libraries in shambles throughout the prison system," *ibid.* That is consistent with his view, which we have rejected, that lack of access to adequate library facilities qualifies as relevant injury in fact, see n. 4, *supra.*

Contrary to JUSTICE SOUTER's assertion, *post*, at 397, the issue of systemwide relief has nothing to do with the law governing class actions. *Whether or not* a class of plaintiffs with frustrated nonfrivolous claims *exists*, and no matter how *extensive* this class may be, unless it was established that violations with respect to that class occurred in all institutions of Arizona's system, there was no basis for a remedial decree imposed

III

There are further reasons why the order here cannot stand. We held in *Turner* v. *Safley*, 482 U. S. 78 (1987), that a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Id.*, at 89. Such a deferential standard is necessary, we explained,

> "if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.' Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Ibid.* (citation omitted), quoting *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 128 (1977).

These are the same concerns that led us to encourage "local experimentation" in *Bounds*, see *supra*, at 352, and we think it quite obvious that *Bounds* and *Turner* must be read *in pari materia*.

The District Court here failed to accord adequate deference to the judgment of the prison authorities in at least three significant respects. First, the court concluded that ADOC's restrictions on lockdown prisoners' access to law libraries were unjustified. *Turner*'s principle of deference has special force with regard to that issue, since the inmates in lockdown include "the most dangerous and violent prisoners in the Arizona prison system," and other inmates presenting special disciplinary and security concerns. Brief for Petitioners 5. The District Court made much of the fact

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upon all those institutions. However inadequate the library facilities may be as a theoretical matter, various prisons may have other means (active assistance from "jailhouse lawyers," complaint forms, etc.) that suffice to prevent the legal harm of denial of access to the courts. Courts have no power to presume and remediate harm that has not been established.

that lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, 834 F. Supp., at 1557, and n. 23, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury (which, of course, the District Court did not find here).

Second, the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive. There is no need to belabor this point. One need only read the order, see App. to Pet. for Cert. 61a–85a, to appreciate that it is the *ne plus ultra* of what our opinions have lamented as a court's "in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations." *Bell* v. *Wolfish*, 441 U. S. 520, 562 (1979).

Finally, the order was developed through a process that failed to give adequate consideration to the views of state prison authorities. We have said that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser* v. *Rodriguez*, 411 U. S. 475, 492 (1973). For an illustration of the proper procedure in a case such as this, we need look no further than *Bounds* itself. There, after granting summary judgment for the inmates, the District Court refrained from "'dictat[ing] precisely what course the State should follow.'" *Bounds*, 430 U. S., at 818. Rather, recognizing that "determining the 'appropriate relief to be ordered . . . presents a difficult problem,'" the court "'charge[d] the Department of Correction with the task of devising a Constitutionally sound program' to assure inmate access to the courts." *Id.*, at 818–819. The State responded with a proposal, which the District Court ultimately approved with minor changes, after considering ob-

jections raised by the inmates. *Id.*, at 819–820. We praised this procedure, observing that the court had "scrupulously respected the limits on [its] role," by "not . . . thrust[ing] itself into prison administration" and instead permitting "[p]rison administrators [to] exercis[e] wide discretion within the bounds of constitutional requirements." *Id.*, at 832–833.

As *Bounds* was an exemplar of what should be done, this case is a model of what should not. The District Court totally failed to heed the admonition of *Preiser*. Having found a violation of the right of access to the courts, it conferred upon its special master, a law professor from Flushing, New York, rather than upon ADOC officials, the responsibility for devising a remedial plan. To make matters worse, it severely limited the remedies that the master could choose. Because, in the court's view, its order in an earlier access-to-courts case (an order that adopted the recommendations of the same special master) had "resolved successfully" most of the issues involved in this litigation, the court instructed that as to those issues it would implement the earlier order statewide, "with any modifications that the parties and Special Master determine are necessary due to the particular circumstances of the prison facility." App. to Pet. for Cert. 88a (footnote omitted). This will not do. The State was entitled to far more than an opportunity for rebuttal, and on that ground alone this order would have to be set aside.[8]

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[8] JUSTICE STEVENS believes that the State of Arizona "is most to blame for the objectionable character of the final [injunctive] order," *post*, at 411, for two reasons: First, because of its lack of cooperation in prison litigation three to five years earlier before the same judge, see *Gluth* v. *Kangas*, 773 F. Supp. 1309 (Ariz. 1988). But the rule that federal courts must "giv[e] the States the first opportunity to correct the errors made in the internal administration of their prisons," *Preiser* v. *Rodriguez*, 411 U. S. 475, 492 (1973), is not to be set aside when a judge decides that a State was insufficiently cooperative in *a different, earlier case.* There was no indication of obstructive tactics by the State in the present case, from which one ought to have concluded that the State had learned its lesson. Second,

* * *

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Constitution charges federal judges with deciding cases and controversies, not with running state prisons. Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree. This case is a textbook example. Dissatisfied with the quality of the law libraries and the legal assistance at Arizona's correctional institutions, the District Court imposed a statewide decree on the Arizona Department of Corrections (ADOC), dictating in excruciatingly minute detail a program to assist inmates in the filing of lawsuits—right down to permissible noise levels in library reading rooms. Such gross overreaching by a federal district court simply cannot be tolerated in our federal system. Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.

JUSTICE STEVENS contends that the State failed vigorously to oppose application of the *Gluth* methodology to the present litigation. But surely there was no reasonable doubt that the State objected to that methodology. JUSTICE STEVENS demands from the State, we think, an unattainable degree of courage and foolishness in insisting that, having been punished for its recalcitrance in the earlier case by the imposition of the *Gluth* methodology, it antagonize the District Court further by "zealously" insisting that that methodology, recently vindicated on appeal, must be abandoned. It sufficed, we think, for the State to submit for the record at every turn that "Defendants' objections and suggestions for modifications shall not be deemed a waiver of these Defendants' right to appeal prior rulings and orders of this Court or appeal from the subsequent final Order setting forth the injunctive relief regarding legal access issues," see, *e. g.*, App. 221, 225, 231, 239, 243.

Of course, prison officials must maintain their facilities consistent with the restrictions and obligations imposed by the Constitution. In *Bounds* v. *Smith*, 430 U. S. 817 (1977), we recognized as part of the State's constitutional obligations a duty to provide prison inmates with law libraries or other legal assistance at state expense, an obligation we described as part of a loosely defined "right of access to the courts" enjoyed by prisoners. While the Constitution may guarantee state inmates an opportunity to bring suit to vindicate their federal constitutional rights, I find no basis in the Constitution—and *Bounds* cited none—for the right to have the government finance the endeavor.

I join the majority opinion because it places sensible and much-needed limitations on the seemingly limitless right to assistance created in *Bounds* and because it clarifies the scope of the federal courts' authority to subject state prisons to remedial decrees. I write separately to make clear my doubts about the validity of *Bounds* and to reiterate my observation in *Missouri* v. *Jenkins*, 515 U. S. 70 (1995), that the federal judiciary has for the last half century been exercising "equitable" powers and issuing structural decrees entirely out of line with its constitutional mandate.

I

A

This case is not about a right of "access to the courts." There is no proof that Arizona has prevented even a single inmate from filing a civil rights lawsuit or submitting a petition for a writ of habeas corpus. Instead, this case is about the extent to which the Constitution requires a State to finance or otherwise assist a prisoner's efforts to bring suit against the State and its officials.

In *Bounds* v. *Smith*, *supra*, we recognized for the first time a "fundamental constitutional right" of all inmates to have the State "assist [them] in the preparation and filing of meaningful legal papers." *Id.*, at 828. We were not explicit

as to the forms the State's assistance must take, but we did hold that, at a minimum, States must furnish prisoners "with adequate law libraries or adequate assistance from persons trained in the law." *Ibid.* Although our cases prior to *Bounds* occasionally referenced a constitutional right of access to the courts, we had never before recognized a free-standing constitutional right that requires the States to "shoulder affirmative obligations," *id.*, at 824, in order to "insure that inmate access to the courts is adequate, effective, and meaningful," *id.*, at 822.

Recognition of such broad and novel principles of constitutional law are rare enough under our system of law that I would have expected the *Bounds* Court to explain at length the constitutional basis for the right to state-provided legal materials and legal assistance. But the majority opinion in *Bounds* failed to identify a single provision of the Constitution to support the right created in that case, a fact that did not go unnoticed in strong dissents by Chief Justice Burger and then-JUSTICE REHNQUIST. See *id.*, at 833–834 (opinion of Burger, C. J.) ("The Court leaves us unenlightened as to the source of the 'right of access to the courts' which it perceives or of the requirement that States 'foot the bill' for assuring such access for prisoners who want to act as legal researchers and brief writers"); *id.*, at 840 (opinion of REHNQUIST, J.) ("[T]he 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived"). The dissents' calls for an explanation as to which provision of the Constitution guarantees prisoners a right to consult a law library or a legal assistant, however, went unanswered. This is perhaps not surprising: Just three years before *Bounds* was decided we admitted that the "[t]he precise rationale" for many of the "access to the courts" cases on which *Bounds* relied had "never been explicitly stated," and that no Clause that had thus far been advanced "by itself provides

an entirely satisfactory basis for the result reached." *Ross* v. *Moffitt*, 417 U. S. 600, 608–609 (1974).

The weakness in the Court's constitutional analysis in *Bounds* is punctuated by our inability, in the 20 years since, to agree upon the constitutional source of the supposed right. We have described the right articulated in *Bounds* as a "consequence" of due process, *Murray* v. *Giarratano*, 492 U. S. 1, 11, n. 6 (1989) (plurality opinion) (citing *Procunier* v. *Martinez*, 416 U. S. 396, 419 (1974)), as an "aspect" of equal protection, 492 U. S., at 11, n. 6 (citation omitted), or as an "equal protection guarantee," *Pennsylvania* v. *Finley*, 481 U. S. 551, 557 (1987). In no instance, however, have we engaged in rigorous constitutional analysis of the basis for the asserted right. Thus, even as we endeavor to address the question presented in this case—whether the District Court's order "exceeds the constitutional requirements set forth in *Bounds*," Pet. for Cert. i—we do so without knowing which Amendment to the Constitution governs our inquiry.

It goes without saying that we ordinarily require more exactitude when evaluating asserted constitutional rights. "As a general matter, the Court has always been reluctant" to extend constitutional protection to "unchartered area[s]," where the "guideposts for responsible decisionmaking . . . are scarce and open-ended." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.

B

In lieu of constitutional text, history, or tradition, *Bounds* turned primarily to precedent in recognizing the right to state assistance in the researching and filing of prisoner

claims. Our cases, however, had never recognized a right of the kind articulated in *Bounds*, and, in my opinion, could not reasonably have been read to support such a right. Prior to *Bounds*, two lines of cases dominated our so-called "access to the courts" jurisprudence. One of these lines, rooted largely in principles of equal protection, invalidated state filing and transcript fees and imposed limited affirmative obligations on the States to ensure that their criminal procedures did not discriminate on the basis of poverty. These cases recognized a right to *equal* access, and any affirmative obligations imposed (*e. g.*, a free transcript or counsel on a first appeal as of right) were strictly limited to ensuring equality of access, not access in its own right. In a second line of cases, we invalidated state prison regulations that restricted or effectively prohibited inmates from filing habeas corpus petitions or civil rights lawsuits in federal court to vindicate federally protected rights. While the cases in this line did guarantee a certain amount of access to the federal courts, they imposed no affirmative obligations on the States to facilitate access, and held only that States may not "abridge or impair" prisoners' efforts to petition a federal court for vindication of federal rights. *Ex parte Hull*, 312 U. S. 546, 549 (1941). Without pausing to consider either the reasoning behind, or the constitutional basis for, each of these independent lines of case law, the Court in *Bounds* engaged in a loose and selective reading of our precedents as it created a freestanding and novel right to state-supported legal assistance. Despite the Court's purported reliance on prior cases, *Bounds* in fact represented a major departure both from precedent and historical practice.

1

In a series of cases beginning with *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the Court invalidated state rules that required indigent criminal defendants to pay for trial transcripts or to pay other fees necessary to have their appeals

or habeas corpus petitions heard. According to the *Bounds* Court, these decisions "struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful." 430 U. S., at 822. This is inaccurate. Notwithstanding the suggestion in *Bounds*, our transcript and fee cases did *not* establish a freestanding right of access to the courts, meaningful or otherwise.

In *Griffin*, for instance, we invalidated an Illinois rule that charged criminal defendants a fee for a trial transcript necessary to secure full direct appellate review of a criminal conviction. See 351 U. S., at 13–14; *id.*, at 22 (Frankfurter, J., concurring in judgment). See also *Ross* v. *Moffitt*, *supra*, at 605–606. Though we held the fee to be unconstitutional, our decision did not turn on the effectiveness or adequacy of the access afforded to criminal defendants generally. We were quite explicit in reaffirming the century-old principle that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review *at all*." *Griffin*, *supra*, at 18 (emphasis added) (citing *McKane* v. *Durston*, 153 U. S. 684, 687–688 (1894)). Indeed, the Court in *Griffin* was unanimous on this point. See 351 U. S., at 21 (Frankfurter, J., concurring in judgment) ("[I]t is now settled that due process of law does not require a State to afford review of criminal judgments"); *id.*, at 27 (Burton, J., dissenting) ("Illinois, as the majority admit, could thus deny an appeal altogether in a criminal case without denying due process of law"); *id.*, at 36 (Harlan, J., dissenting) ("The majority of the Court concedes that the Fourteenth Amendment does not require the States to provide for any kind of appellate review").[1] In light of the *Griffin* Court's unanimous

[1] We reaffirmed this principle almost two decades later, and just three years before *Bounds* v. *Smith*, 430 U. S. 817 (1977), in *Ross* v. *Moffitt*, 417 U. S. 600 (1974), where we observed that *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and "[s]ucceeding cases invalidated . . . financial barriers to the appellate process, at the same time reaffirming the traditional principle

pronouncement that a State is not constitutionally required to provide *any* court access to criminals who wish to challenge their convictions, the *Bounds* Court's description of *Griffin* as ensuring "'adequate and effective appellate review,'" 430 U. S., at 822 (quoting *Griffin*, *supra*, at 20), is unsustainable.

Instead, *Griffin* rested on the quite different principle that, while a State is not obliged to provide appeals in criminal cases, the review a State chooses to afford must not be administered in a way that excludes indigents from the appellate process solely on account of their poverty. There is no mistaking the principle that motivated *Griffin:*

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . [A]t all stages of the proceedings the Due Process and Equal Protection Clauses protect [indigent persons] from invidious discriminations. . . .
>
> ". . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U. S., at 18–19 (plurality opinion) (citation omitted).

Justice Frankfurter, who provided the fifth vote for the majority, confirmed in a separate writing that it was invidious discrimination, and not the denial of adequate, effective, or meaningful access to the courts, that rendered the Illinois regulation unconstitutional: "[W]hen a State deems it wise

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that a State is not obliged to provide any appeal at all for criminal defendants." 417 U. S., at 606 (citing *McKane* v. *Durston*, 153 U. S. 684 (1894)). See also 417 U. S., at 611.

and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review . . . ." *Id.*, at 23 (opinion concurring in judgment). Thus, contrary to the characterization in *Bounds*, *Griffin* stands not for the proposition that all inmates are entitled to adequate appellate review of their criminal convictions, but for the more modest rule that, if the State chooses to afford appellate review, it "can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, *supra*, at 17 (plurality opinion).[2]

If we left any doubt as to the basis of our decision in *Griffin*, we eliminated it two decades later in *Douglas* v. *California*, 372 U. S. 353 (1963), where we held for the first time that States must provide assistance of counsel on a first appeal as of right for all indigent defendants. Like *Griffin*, *Douglas* turned not on a right of access *per se*, but rather on the right not to be denied, on the basis of poverty, access afforded to others. We did not say in *Douglas* that indigents have a right to a "meaningful appeal" that could not be realized absent appointed counsel. Cf. *Bounds*, 430 U. S., at 823.

[2] This is what Justice Brennan came to call the "*Griffin* equality principle," *United States* v. *MacCollom*, 426 U. S. 317, 331 (1976) (dissenting opinion), and it provided the rationale for a string of decisions that struck down a variety of state transcript and filing fees as applied to indigent prisoners. *Bounds* cited a number of these cases in support of the right to "adequate, effective and meaningful" access to the courts. See 430 U. S., at 822, and n. 8. But none of the transcript and fee cases on which *Bounds* relied were premised on a substantive standard of court access. Rather, like *Griffin*, these cases were primarily concerned with invidious discrimination on the basis of wealth. See, *e. g.*, *Smith* v. *Bennett*, 365 U. S. 708, 709 (1961) ("[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws"); *Gardner* v. *California*, 393 U. S. 367, 370–371 (1969) ("[I]n the context of California's habeas corpus procedure denial of a transcript to an indigent marks the same invidious discrimination which we held impermissible in . . . *Griffin*").

What we did say is that, in the absence of state-provided counsel, "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counse[l] . . . while the indigent . . . is forced to shift for himself." *Douglas*, *supra*, at 357–358. Just as in *Griffin*, where "we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty," *Douglas*, 372 U. S., at 355, the evil motivating our decision in *Douglas* was "discrimination against the indigent," *ibid.*[3]

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[3] There is some discussion of due process by the plurality in *Griffin*, see 351 U. S., at 17–18, and a passing reference to "fair procedure" in *Douglas*, 372 U. S., at 357. These unexplained references to due process, made in the course of equal protection analyses, provide an insufficient basis for concluding that the regulations challenged in *Griffin* and *Douglas* independently violated the Due Process Clause. And attempts in subsequent cases to salvage a role for the Due Process Clause in this context and to explain the difference between the equal protection and due process analyses in *Griffin* have, in my opinion, been unpersuasive. See *Evitts* v. *Lucey*, 469 U. S. 387, 402–405 (1985); *Bearden* v. *Georgia*, 461 U. S. 660, 665–667 (1983). In any event, there do not appear to have been five votes in *Griffin* in support of a holding under the Due Process Clause; subsequent transcript and fee cases turned primarily, if not exclusively, on equal protection grounds, see, *e. g.*, *Smith* v. *Bennett*, *supra*, at 714; and the *Douglas* Court, with its "obvious emphasis" on equal protection, 372 U. S., at 361 (Harlan, J., dissenting), does not appear to have reached the due process question, notwithstanding Justice Harlan's supposition to the contrary, see *id.*, at 360–361.

It is difficult to see how due process could be implicated in these cases, given our consistent reaffirmation that the States can abolish criminal appeals altogether consistently with due process. See, *e. g.*, *Ross* v. *Moffitt*, 417 U. S., at 611. The fact that a State affords some access "does not automatically mean that a State then acts unfairly," and hence violates due process, by denying indigents assistance "at every stage of the way." *Ibid.* Under our cases, "[u]nfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty," a question "more profitably considered under an equal protection analysis." *Ibid.*

Our transcript and fee cases were, therefore, limited holdings rooted in principles of equal protection. In *Bounds*, these cases were recharacterized almost beyond recognition, as the Court created a new and different right on behalf of prisoners—a right to have the State pay for law libraries or other forms of legal assistance without regard to the equality of access. Only by divorcing our prior holdings from their reasoning, and by elevating dicta over constitutional principle, was the Court able to reach such a result.

The unjustified transformation of the right to nondiscriminatory access to the courts into the broader, untethered right to legal assistance generally would be reason enough for me to conclude that *Bounds* was wrongly decided. However, even assuming that *Bounds* properly relied upon the *Griffin* line of cases for the proposition for which those cases actually stood, the *Bounds* Court failed to address a significant intervening development in our jurisprudence: the fact that the equal protection theory underlying *Griffin* and its progeny had largely been abandoned prior to *Bounds*. The provisions invalidated in our transcript and fee cases were all facially neutral administrative regulations that had a disparate impact on the poor; there is no indication in any of those cases that the State imposed the challenged fee with the purpose of deliberately discriminating against indigent defendants. See, *e. g.*, *Douglas*, *supra*, at 361 (Harlan, J., dissenting) (criticizing the Court for invalidating a state law "of general applicability" solely because it "may affect the poor more harshly than it does the rich"). In the years between *Douglas* and *Bounds*, however, we rejected a disparate-impact theory of the Equal Protection Clause. That the doctrinal basis for *Griffin* and its progeny has largely been undermined—and in fact had been before *Bounds* was decided—confirms the invalidity of the right to law libraries and legal assistance created in *Bounds*.

We first cast doubt on the proposition that a facially neutral law violates the Equal Protection Clause solely because

it has a disparate impact on the poor in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973). In *Rodriguez*, the respondents challenged Texas' traditional system of financing public education under the Equal Protection Clause on the ground that, under that system, "some poorer people receive less expensive educations than other more affluent people." *Id.*, at 19. In rejecting the claim that this sort of disparate impact amounted to unconstitutional discrimination, we declined the respondents' invitation to extend the rationale of *Griffin*, *Douglas*, and similar cases. We explained that, under those cases, unless a group claiming discrimination on the basis of poverty can show that it is "*completely unable* to pay for some desired benefit, and as a consequence, . . . sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit," 411 U. S., at 20 (emphasis added), strict scrutiny of a classification based on wealth does not apply. Because the respondents in *Rodriguez* had not shown that "the children in districts having relatively low assessable property values are receiving *no* public education," but rather claimed only that "they are receiving a poorer quality education than that available to children in districts having more assessable wealth," *id.*, at 23 (emphasis added), we held that the "Texas system does not operate to the peculiar disadvantage of any suspect class," *id.*, at 28. After *Rodriguez*, it was clear that "wealth discrimination alone [does not] provid[e] an adequate basis for invoking strict scrutiny," *id.*, at 29, and that, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages," *id.*, at 24. See also *Kadrmas* v. *Dickinson Public Schools*, 487 U. S. 450, 458 (1988); *Harris* v. *McRae*, 448 U. S. 297, 322–323 (1980); *Maher* v. *Roe*, 432 U. S. 464, 470–471 (1977).[4]

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[4] The absence of a prison law library or other state-provided legal assistance can hardly be said to deprive inmates absolutely of an opportunity to bring their claims to the attention of a federal court. Clarence Earl Gideon, perhaps the most celebrated *pro se* prisoner litigant of all time, was able to obtain review by this Court even though he had no legal training

We rejected a disparate-impact theory of the Equal Protection Clause altogether in *Washington* v. *Davis*, 426 U. S. 229, 239 (1976), decided just one Term before *Bounds*. There we flatly rejected the idea that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." 426 U. S., at 242. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution "*solely* because it has a . . . disproportionate impact." *Id.*, at 239 (emphasis in original). See also *id.*, at 240 (acknowledging "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). At bottom, *Davis* was a recognition of "the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979).[5]

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and was incarcerated in a prison that apparently did not provide prisoners with lawbooks. See Answer to Respondent's Response to Pet. for Cert. in *Gideon* v. *Wainwright*, O. T. 1962, No. 155, p. 1 ("[T]he petitioner is not a *[sic]* attorney or versed in law nor does not have the law books to copy down the decisions of this Court. . . . Nor would the petitioner be allowed to do so").

Like anyone else seeking to bring suit without the assistance of the State, prisoners can seek the advice of an attorney, whether *pro bono* or paid, and can turn to family, friends, other inmates, or public interest groups. Inmates can also take advantage of the liberal pleading rules for *pro se* litigants and the liberal rules governing appointment of counsel. Federal fee-shifting statutes and the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases.

[5] Our decisions in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), and *Washington* v. *Davis*, 426 U. S. 229 (1976), validated the position taken by Justice Harlan in his dissents in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and *Douglas* v. *California*, 372 U. S. 353 (1963). As Justice Harlan persuasively argued in *Douglas*, facially neutral laws that disproportionately impact the poor "do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.' To so construe it would be

The *Davis* Court was motivated in no small part by the potentially radical implications of the *Griffin/Douglas* rationale. As Justice Harlan recognized in *Douglas:* "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent." 372 U. S., at 361 (dissenting opinion). Under a disparate-impact theory, Justice Harlan argued, regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. See *id.*, at 361–362.[6] Echoing Justice Harlan, we rejected in *Davis* the disparate-impact approach in part because of the recognition that "[a] rule that a statute designed to serve neutral ends is never-

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to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford." *Id.*, at 362 (dissenting opinion). See also *Griffin*, 351 U. S., at 35–36 (Harlan, J., dissenting); *id.*, at 29 (Burton, J., dissenting) ("The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws").

[6] Although he concurred in the judgment in *Griffin*, Justice Frankfurter expressed similar concerns. He emphasized that "the equal protection of the laws [does not] deny a State the right to make classifications in law when such classifications are rooted in reason," *id.*, at 21, and that "a State need not equalize economic conditions," *id.*, at 23. Justice Frankfurter acknowledged that differences in wealth are "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." *Ibid.* He also expressed concern that if absolute equality were required, a State would no longer be able to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Id.*, at 24. See also *United States* v. *MacCollom*, 426 U. S., at 330 (Blackmun, J., concurring in judgment) (the Constitution does not "require that an indigent be furnished every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind").

theless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U. S., at 248. See also *id.*, at 248, n. 14.

Given the unsettling ramifications of a disparate-impact theory, it is not surprising that we eventually reached the point where we could no longer extend the reasoning of *Griffin* and *Douglas*. For instance, in *Ross* v. *Moffitt*, 417 U. S. 600 (1974), decided just three years before *Bounds*, we declined to extend *Douglas* to require States to provide indigents with counsel in discretionary state appeals or in seeking discretionary review in this Court. We explained in *Ross* that "[t]he Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,'" 417 U. S., at 612 (quoting *Rodriguez*, 411 U. S., at 24), and that it "does [not] require the State to 'equalize economic conditions,'" 417 U. S., at 612 (quoting *Griffin*, 351 U. S., at 23 (Frankfurter, J., concurring in judgment)). We again declined to extend *Douglas* in *Pennsylvania* v. *Finley*, 481 U. S., at 555, where we rejected a claim that the Constitution requires the States to provide counsel in state postconviction proceedings. And we found *Ross* and *Finley* controlling in *Murray* v. *Giarratano*, 492 U. S. 1 (1989), where we held that defendants sentenced to death, like all other defendants, have no right to state-appointed counsel in state collateral proceedings. See also *United States* v. *MacCollom*, 426 U. S. 317 (1976) (federal habeas statute permitting district judge to deny free transcript to indigent petitioner raising frivolous claim does not violate the Constitution).

In sum, the *Bounds* Court's reliance on our transcript and fee cases was misplaced in two significant respects. First,

those cases did not stand for the proposition for which *Bounds* cited them: They were about *equal* access, not access *per se*. Second, the constitutional basis for *Griffin* and its progeny had been seriously undermined in the years preceding *Bounds*. Thus, even to the extent that *Bounds* intended to rely on those cases for the propositions for which they actually stood, their underlying rationale had been largely discredited. These cases, rooted in largely obsolete theories of equal protection, do not support the right to law libraries and legal assistance recognized in *Bounds*. Our repeated holdings declining to extend these decisions only confirm this conclusion.

2

The *Bounds* Court relied on a second line of cases in announcing the right to state-financed law libraries or legal assistance for prisoners. These cases, beginning with our decision in *Ex parte Hull*, prevent the States from imposing arbitrary obstacles to attempts by prisoners to file claims asserting federal constitutional rights. Although this line deals with access in its own right, and not equal access as in *Griffin* and *Douglas*, these cases do not impose any affirmative obligations on the States to improve the prisoners' chances of success.

Bounds identified *Ex parte Hull* as the first case to "recogniz[e]" a "constitutional right of access to the courts." 430 U. S., at 821–822. In *Ex parte Hull*, we considered a prison regulation that required prisoners to submit their habeas corpus petitions to a prison administrator before filing them with the court. Only if the administrator determined that a petition was "'properly drawn'" could the prisoner submit it in a federal court. 312 U. S., at 548–549 (quoting regulation). We invalidated the regulation, but the right we acknowledged in doing so bears no resemblance to the right generated in *Bounds*.

Our reasoning in *Ex parte Hull* consists of a straightforward, and rather limited, principle:

> "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." 312 U. S., at 549.

The "right of access" to the courts articulated in *Ex parte Hull* thus imposed no affirmative obligations on the States; we stated only that a State may not "abridge or impair" a prisoner's ability to file a habeas petition in federal court.[7] *Ex parte Hull* thus provides an extraordinarily weak starting point for concluding that the Constitution requires States to fund and otherwise assist prisoner legal research by providing law libraries or legal assistance.

Two subsequent decisions of this Court worked a moderate expansion of *Ex parte Hull*. The first, *Johnson* v. *Avery*, 393 U. S. 483 (1969), invalidated a Tennessee prison regulation that prohibited inmates from advising or assisting one another in the preparation of habeas corpus petitions. In striking down the regulation, the Court twice quoted *Ex*

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[7] The Court's rationale appears to have been motivated more by notions of federalism and the power of the federal courts than with the rights of prisoners. Our citation of three nonhabeas cases which held that a state court's determination on a matter of federal law is not binding on the Supreme Court supports this conclusion. See *Ex parte Hull*, 312 U. S., at 549, citing *First Nat. Bank of Guthrie Center* v. *Anderson*, 269 U. S. 341, 346 (1926) (the power of the Supreme Court to review independently state-court determinations of claims "grounded on the Constitution or a law of the United States" is "general, and is a necessary element of this Court's power to review judgments of state courts in cases involving the application and enforcement of federal laws"); *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 152 (1902) ("'[T]he question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State'" (citation omitted)); *Carter* v. *Texas*, 177 U. S. 442, 447 (1900) (same).

parte Hull's holding that a State may not "abridge or impair" a petitioner's efforts to file a petition for a writ of habeas corpus. See 393 U. S., at 486–487, 488. In contrast to *Ex parte Hull*, however, *Johnson* focused not on the respective institutional roles of state prisons and the federal courts but on "the fundamental importance of the writ of habeas corpus in our constitutional scheme." 393 U. S., at 485. Still, the Court did not hold that the Constitution places an affirmative obligation on the States to facilitate the filing of habeas petitions. The Court held only that a State may not "den[y] or obstruc[t]" a prisoner's ability to file a habeas petition. *Ibid.* We extended the holding of *Johnson* in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), where we struck down a similar regulation that prevented inmates from assisting one another in the preparation of civil rights complaints. We held that the "right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.*, at 579. Again, the right was framed exclusively in the negative. See *ibid.* (opportunity to file a civil rights action may not be "denied"). Thus, prior to *Bounds*, "if a prisoner incarcerated pursuant to a final judgment of conviction [was] not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he ha[d] been accorded the only constitutional right of access to the courts that our cases ha[d] articulated in a reasoned way." *Bounds*, 430 U. S., at 839–840 (REHNQUIST, J., dissenting) (citing *Ex parte Hull*).

C

That *Ex parte Hull*, *Johnson*, and *Wolff* were decided on different constitutional grounds from *Griffin* and *Douglas* is clear enough. According to *Bounds*, however, "[e]ssentially the same standards of access were applied" in all of these

cases. 430 U. S., at 823. This observation was wrong, but the equation of these two lines of cases allowed the *Bounds* Court to preserve the "affirmative obligations" element of the equal access cases, the rationale of which had largely been undermined prior to *Bounds*, by linking it with *Ex parte Hull*, which had not been undermined by later cases but which imposed no affirmative obligations. In the process, *Bounds* forged a right with no basis in precedent or constitutional text: a right to have the State "shoulder affirmative obligations" in the form of law libraries or legal assistance to ensure that prisoners can file meaningful lawsuits. By detaching *Griffin*'s right to equal access and *Ex parte Hull*'s right to physical access from the reasoning on which each of these rights was based, the *Bounds* Court created a virtually limitless right. And though the right was framed in terms of law libraries and legal assistance in that case, the reasoning is much broader, and this Court should have been prepared under the *Bounds* rationale to require the appointment of capable state-financed counsel for any inmate who wishes to file a lawsuit. See *Bounds*, *supra*, at 841 (REHNQUIST, J., dissenting) (observing that "the logical destination of the Court's reasoning" in *Bounds* is "lawyers appointed at the expense of the State"). See also *ante*, at 354. We have not, however, extended *Bounds* to its logical conclusion. And though we have not overruled *Bounds*, we have undoubtedly repudiated its reasoning in our consistent rejection of the proposition that the States must provide counsel beyond the trial and first appeal as of right. See *Ross*, 417 U. S., at 612; *Finley*, 481 U. S., at 555; *Giarratano*, 492 U. S., at 3–4 (plurality opinion).

In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court. The State, however, is not constitution-

ally required to finance or otherwise assist the prisoner's efforts, either through law libraries or other legal assistance. Whether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.

There is no basis in history or tradition for the proposition that the State's constitutional obligation is any broader. Although the historical record is relatively thin, those who have explored the development of state-sponsored legal assistance for prisoners agree that, until very recently, law libraries in prisons were "nearly nonexistent." A. Flores, Werner's Manual for Prison Law Libraries 1 (2d ed. 1990). Prior to *Bounds*, prison library collections (to the extent prisons had libraries) commonly reflected the correctional goals that a State wished to advance, whether religious, educational, or rehabilitative. Although some institutions may have begun to acquire a minimal collection of legal materials in the early part of this century, lawbooks generally were not included in prison libraries prior to the 1950's. See W. Coyle, Libraries in Prisons 54–55 (1987). The exclusion of lawbooks was consistent with the recommendation of the American Prison Association, which advised prison administrators nationwide to omit federal and state lawbooks from prison library collections. See American Prison Association, Objectives and Standards for Libraries in Adult Prisons and Reformatories, in Library Manual for Correctional Institutions 101, 106–107 (1950). The rise of the prison law library and other legal assistance programs is a recent phenomenon, and one generated largely by the federal courts. See Coyle, *supra*, at 54–55; B. Vogel, Down for the Count: A Prison Library Handbook 87–89 (1995). See also Ihrig, Providing Legal Access, in Libraries Inside: A Practical Guide for Prison Librarians 195 (R. Rubin & D. Suvak eds. 1995) (establishment of law libraries and legal service programs due to "inmate victories in the courts within the last two decades"). Thus, far from recognizing a long tradition

of state-sponsored legal assistance for prisoners, *Bounds* was in fact a major "disruption to traditional prison operation." Vogel, *supra*, at 87.

The idea that prisoners have a legal right to the assistance that they were traditionally denied is also of recent vintage. The traditional, pre-*Bounds* view of the law with regard to the State's obligation to facilitate prisoner lawsuits by providing law libraries and legal assistance was articulated in *Hatfield* v. *Bailleaux*, 290 F. 2d 632 (CA9), cert. denied, 368 U. S. 862 (1961):

> "State authorities have no obligation under the federal Constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.
>
> "Inmates have the constitutional right to waive counsel and act as their own lawyers, but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education. One question which an inmate must decide in determining if he should represent himself is whether in view of his own competency and general prison regulations he can do so adequately. He must make the decision in the light of the circumstances existing. The state has no duty to alter the circumstances to conform with his decision." 290 F. 2d, at 640–641.

Consistent with the traditional view, the lower courts understood the Constitution only to guarantee prisoners a right

to be free from state interference in filing papers with the courts:

> "[A]ccess to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Id.*, at 637.

See also *Oaks* v. *Wainwright*, 430 F. 2d 241, 242 (CA5 1970) (affirming dismissal of prisoner's complaint alleging denial of access to library and legal materials on ground that prisoner had not alleged that "he has in any way been denied access to the courts . . . , that he has ever lost the right to commence, prosecute or appeal in any court, or that he has been substantially delayed in obtaining a judicial determination in any proceeding"). Thus, while courts held that a prisoner is entitled to attack his sentence without state interference, they also consistently held that "[p]rison regulations are not required to provide prisoners with the time, the correspondence privileges, the materials or other facilities they desire for the special purpose of trying to find some way of making attack upon the presumptively valid judgments against them." *Lee* v. *Tahash*, 352 F. 2d 970, 973 (CA8 1965). "If the purpose was not to hamper inmates in gaining reasonable access to the courts with regard to their respective criminal matters, and if the regulations and practices do not interfere with such reasonable access," the inquiry was at an end. *Hatfield*, 290 F. 2d, at 640. That access could have been facilitated without impairing effective prison administration was considered "immaterial." *Ibid.*

Quite simply, there is no basis in constitutional text, pre-*Bounds* precedent, history, or tradition for the conclusion that the constitutional right of access imposes affirmative

obligations on the States to finance and support prisoner litigation.

II

A

Even when compared to the federal judicial overreaching to which we have now become accustomed, this is truly a remarkable case. The District Court's order vividly demonstrates the danger of continuing to afford federal judges the virtually unbridled equitable power that we have for too long sanctioned. We have here yet another example of a federal judge attempting to "direc[t] or manag[e] the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on [his] authority." *Missouri* v. *Jenkins*, 515 U. S., at 126 (THOMAS, J., concurring). And we will continue to see cases like this unless we take more serious steps to curtail the use of equitable power by the federal courts.

Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts. When these principles are accorded their proper respect, Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make. See *id.*, at 131–133. Broad remedial decrees strip state administrators of their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. See *Sandin* v. *Conner*, 515 U. S. 472, 482–483 (1995). At the state level, such decrees override the "State's discretionary authority over its own program and budgets and forc[e] state officials to reallocate state resources and funds to the [district court's] plan at the expense of other citizens, other government programs, and other in-

stitutions not represented in court." *Jenkins*, 515 U. S., at 131 (THOMAS, J., concurring). The federal judiciary is ill equipped to make these types of judgments, and the Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy.

Though we have sometimes closed our eyes to federal judicial overreaching, as in the context of school desegregation, see *id.*, at 124–125, we have been vigilant in opposing sweeping remedial decrees in the context of prison administration. "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser* v. *Rodriguez*, 411 U. S. 475, 491–492 (1973). In this area, perhaps more than any other, we have been faithful to the principles of federalism and separation of powers that limit the Federal Judiciary's exercise of its equitable powers in all instances.

Procunier v. *Martinez*, 416 U. S. 396 (1974), articulated the governing principles:

> "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America

> are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Id.*, at 404–405 (footnotes omitted).[8]

State prisons should be run by the state officials with the expertise and the primary authority for running such institutions. Absent the most "extraordinary circumstances," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 137 (1977) (Burger, C. J., concurring), federal courts should refrain from meddling in such affairs. Prison administrators have a difficult enough job without federal-court intervention. An overbroad remedial decree can make an already daunting task virtually impossible.[9]

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[8] *Martinez* was overruled on other grounds in *Thornburgh* v. *Abbott*, 490 U. S. 401, 413–414 (1989). We have consistently reaffirmed *Martinez*, however, in all respects relevant to this case, namely, that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management" and that prison administrators are entitled to "considerable deference." 490 U. S., at 407–408. See also *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987) (relying on *Martinez* for the principle that "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform'" (citation omitted)).

[9] The constitutional and practical concerns identified in *Martinez* have also resulted in a more deferential standard of review for prisoner claims of constitutional violations. In *Turner* v. *Safley*, we held that a prison regulation is valid if it is "reasonably related to legitimate penological interests," even when it "impinges on inmates' constitutional rights." 482 U. S., at 89. A deferential standard was deemed necessary to keep the

I realize that judges, "no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." *Bell* v. *Wolfish*, 441 U. S. 520, 562 (1979). But judges occupy a unique and limited role, one that does not allow them to substitute their views for those in the executive and legislative branches of the various States, who have the constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions. Though the temptation may be great, we must not succumb. The Constitution is not a license for federal judges to further social policy goals that prison administrators, in their discretion, have declined to advance.

B

The District Court's opinion and order demonstrate little respect for the principles of federalism, separation of powers, and judicial restraint that have traditionally governed federal judicial power in this area. In a striking arrogation of power, the District Court sought to micromanage every aspect of Arizona's "court access program" in all institutions statewide, dictating standard operating procedures and subjecting the state system to ongoing federal supervision. A

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courts out of the day-to-day business of prison administration, which "would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Ibid.* A more stringent standard of review "would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Ibid.* (quoting *Martinez*, 416 U. S., at 407).

sweeping remedial order of this nature would be inappropriate in any case. That the violation sought to be remedied was so minimal, to the extent there was any violation at all, makes this case all the more alarming.

The District Court cited only one instance of a prison inmate having a case dismissed due to the State's alleged failure to provide sufficient assistance, and one instance of another inmate who was unable to file an action. See 834 F. Supp. 1553, 1558, and nn. 37–38 (Ariz. 1992). All of the other alleged "violations" found by the District Court related not to court access, but to library facilities and legal assistance. Many of the found violations were trivial, such as a missing pocket part to a small number of volumes in just a few institutions. *Id.*, at 1562. And though every facility in the Arizona system already contained law libraries that greatly exceeded prisoner needs,[10] the District Court found the State to be in violation because some of its prison libraries lacked Pacific Second Reporters. *Ibid.* The District Court also struck down regulations that clearly pass muster under *Turner* v. *Safley*, 482 U. S. 78 (1987), such as restrictions at some facilities on "brows[ing] the shelves," 834 F. Supp., at 1555, the physical exclusion from the library of "lockdown" inmates, who are the most dangerous and disobe-

[10] The Arizona prison system had already adopted a policy of statewide compliance with an injunction that the same District Judge in this case imposed on a single institution in an earlier case. In compliance with that decree, which the District Court termed the "Muecke list," 834 F. Supp., at 1561, every facility in the Arizona correctional system had at least one library containing, at a minimum, the following volumes: United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplement; Shepard's U. S. Citations; Shepard's Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digests; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepard's Arizona Citations; Arizona Appeals Reports; Arizona Law of Evidence (Udall); ADC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedure (Wright); Corpus Juris Secundum; and Arizona Digest. *Id.*, at 1561–1562.

dient prisoners in the prison population, *id.*, at 1556, and the allowance of phone calls only for "legitimate pressing legal issues," *id.*, at 1564.

To remedy these and similar "violations," the District Court imposed a sweeping, indiscriminate, and systemwide decree. The microscopically detailed order leaves no stone unturned. It covers everything from training in legal research to the ratio of typewriters to prisoners in each facility. It dictates the hours of operation for all prison libraries statewide, without regard to inmate use, staffing, or cost. It guarantees each prisoner a minimum two-hour visit to the library per trip, and allows the prisoner, not prison officials, to determine which reading room he will use. The order tells ADOC the types of forms it must use to take and respond to prisoner requests for materials. It requires all librarians to have an advanced degree in library science, law, or paralegal studies. If the State wishes to remove a prisoner from the law library for disciplinary reasons, the order requires that the prisoner be provided written notice of the reasons and factual basis for the decision within 48 hours of removal. The order goes so far as to dictate permissible noise levels in law library reading rooms and requires the State to "take all necessary steps, and correct any structural or acoustical problems." App. to Pet. for Cert. 68a.

The order also creates a "legal assistance program," imposing rules for the selection and retention of prisoner legal assistants. *Id.*, at 69a. It requires the State to provide all inmates with a 30–40 hour videotaped legal research course, covering everything from habeas corpus and claims under 42 U. S. C. §1983 to torts, immigration, and family law. Prisoner legal assistants are required to have an additional 20 hours of live instruction. Prisoners are also entitled to a minimum of three 20-minute phone calls each week to an attorney or legal organization, without regard to the purpose for the call; the order expressly requires Arizona to install extra phones to accommodate the increased use. Of course,

legal supplies are covered under the order, which even provides for "ko-rec-type" to correct typographical errors. A Special Master retains ongoing supervisory power to ensure that the order is followed.

The District Court even usurped authority over the prison administrator's core responsibility: institutional security and discipline. See *Bell* v. *Wolfish*, 441 U. S., at 546 ("[M]aintaining institutional security and preserving internal order and discipline" are the central goals of prison administration). Apparently undeterred by this Court's repeated admonitions that security concerns are to be handled by prison administrators, see, *e. g.*, *ibid.*, the District Court decreed that "ADOC prisoners in *all* . . . custody levels shall be provided regular and comparable visits to the law library." App. to Pet. for Cert. 61a (emphasis added). Only if prison administrators can "documen[t]" an individual prisoner's "inability to use the law library without creating a threat to safety or security" may a potentially dangerous prisoner be kept out of the library, *ibid.*, and even then the decision must be reported to the Special Master. And since, in the District Court's view, "[a] prisoner cannot adequately use the law library under restraint, including handcuffs and shackles," *id.*, at 67a, the State is apparently powerless to take steps to ensure that inmates known to be violent do not injure other inmates or prison guards while in the law library "researching" their claims. This "one free bite" approach conflicts both with our case law, see *Hewitt* v. *Helms*, 459 U. S. 460, 474 (1983), and with basic common sense. The District Court apparently misunderstood that a prison is neither a law firm nor a legal aid bureau. Prisons are inherently dangerous institutions, and decisions concerning safety, order, and discipline must be, and always have been, left to the sound discretion of prison administrators.

Like the remedial decree in *Jenkins*, the District Court's order suffers from flaws characteristic of overly broad remedial decrees. First, "the District Court retained jurisdic-

tion over the implementation and modification of the remedial decree, instead of terminating its involvement after issuing its remedy." 515 U. S., at 134 (THOMAS, J., concurring). Arizona correctional officials must continually report to a Special Master on matters of internal prison administration, and the District Court retained discretion to change the rules of the game if, at some unspecified point in the future, it feels that Arizona has not done enough to facilitate court access. Thus, the District Court has "inject[ed] the judiciary into the day-to-day management of institutions and local policies—a function that lies outside of our Article III competence." *Id.*, at 135. The District Court also "failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims" of unconstitutional conduct. *Id.*, at 136. We reaffirmed in *Jenkins* that "the nature of the [equitable] remedy is to be determined by the nature and scope of the constitutional violation." *Id.*, at 88 (majority opinion) (citation and internal quotation marks omitted). Yet, in this case, when the District Court found the law library at a handful of institutions to be deficient, it subjected the entire system to the requirements of the decree and to ongoing federal supervision. And once it found that lockdown inmates experienced delays in receiving law books in some institutions, the District Court required all facilities statewide to provide physical access to all inmates, regardless of custody level. And again, when it found that some prisoners in some facilities were untrained in legal research, the District Court required the State to provide all inmates in all institutions with a 30–40 hour videotaped course in legal research. The remedy far exceeded the scope of any violation, and the District Court far exceeded the scope of its authority.

The District Court's order cannot stand under any circumstances. It is a stark example of what a district court should *not* do when it finds that a state institution has violated the Constitution. Systemwide relief is never appro-

priate in the absence of a systemwide violation, and even then should be no broader and last no longer than necessary to remedy the discrete constitutional violation.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the Court on certain, fundamental points: the case before us involves an injunction whose scope has not yet been justified by the factual findings of the District Court, *ante*, at 359–360, one that was imposed through a "process that failed to give adequate consideration to the views of state prison authorities," *ante*, at 362, and that does not reflect the deference we accord to state prison officials under *Turner* v. *Safley*, 482 U. S. 78 (1987), *ante*, at 361. Although I therefore concur in the judgment and in portions of the Court's opinion, reservations about the Court's treatment of standing doctrine and about certain points unnecessary to the decision lead me to write separately.

I

The question accepted for review was a broadside challenge to the scope of the District Court's order of systemic or classwide relief, issued in reliance on *Bounds* v. *Smith*, 430 U. S. 817 (1977), not whether proof of actual injury is necessary to establish standing to litigate a *Bounds* claim. The parties' discussions of actual injury, in their petition for certiorari, in their briefs, and during oral argument, focused upon the ultimate finding of liability and the scope of the injunction. Indeed, petitioners specifically stated that "[a]lthough the lack of a showing of injury means that Respondents are not entitled to any relief, the State does not contend that the Respondents lacked standing to raise these claims in the first instance. Respondents clearly met the threshold of an actual case or controversy pursuant to Article III of the United States Constitution. They simply failed to prove

the existence of a constitutional violation, including causation of injury, that would entitle them to relief." Brief for Petitioners 33, n. 23.[1]

While we are certainly free ourselves to raise an issue of standing as going to Article III jurisdiction, and must do so when we would lack jurisdiction to deal with the merits, see *Mount Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977), there is no apparent question that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction and no dispute that standing doctrine does not address the principal issue in the case. We may thus adequately dispose of the basic issue simply by referring to the evidentiary record. That is what I would do, for my review of the cases from the Courts of Appeals either treating or bearing on the subject of *Bounds* standing convinces me that there is enough reason for debate about its appropriate elements that we should reach no final conclusions about it. That is especially true since we have not had the "benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling." *Missouri* v. *Jenkins*, 515 U. S. 70, 139 (1995) (SOUTER, J., dissenting). Addressing issues of standing may not amount to the significant breakdown in our process of orderly adjudication represented by *Missouri* v. *Jenkins*, but the Court does reach out to address a difficult conceptual question that is unnecessary to resolution of this case, was never addressed by the District Court or Court of Appeals, and divides what would otherwise presumably have been a unanimous Court.

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[1] Moreover, the issue of actual injury, even as framed by the parties, received relatively short shrift; only small portions of the parties' briefs addressed the issue, see Brief for Petitioners 30–33; Reply Brief for Petitioners 11–13; Brief for Respondents 25–30, and a significant portion of that discussion concentrated upon whether the issue should even be addressed by the Court, Reply Brief for Petitioners 12–13; Brief for Respondents 25–27.

That said, I cannot say that I am convinced that the Court has fallen into any error by invoking standing to deal with the District Court's orders addressing claims by and on behalf of non-English speakers and prisoners in lockdown. While it is true that the demise of these prisoners' *Bounds* claims could be expressed as a failure of proof on the merits (and I would so express it), it would be equally correct to see these plaintiffs as losing on standing. "A determination even at the end of trial that the court is not prepared to award any remedy that would benefit the plaintiff[s] may be expressed as a conclusion that the plaintiff[s] lac[k] standing." 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3531.6, p. 478 (2d ed. 1984) (Wright & Miller).

Although application of standing doctrine may for our purposes dispose of the challenge to remedial orders insofar as they touch non-English speakers and lockdown prisoners, standing principles cannot do the same job in reviewing challenges to the orders aimed at providing court access for the illiterate prisoners. One class representative has standing, as the Court concedes, and with the right to sue thus established, standing doctrine has no further part to play in considering the illiterate prisoners' claims. More specifically, the propriety of awarding classwide relief (in this case, affecting the entire prison system) does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs.

> "[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends

> rather on meeting the prerequisites of Rule 23 governing class actions." 1 H. Newberg & A. Conte, Newberg on Class Actions § 2.07, pp. 2–40 to 2–41 (3d ed. 1992).

See also 7B Wright & Miller § 1785.1, at 141 ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others . . . depends not on standing, but on an assessment of typicality and adequacy of representation"). This analysis is confirmed by our treatment of standing when the case of a named class-action plaintiff protesting a durational residence requirement becomes moot during litigation because the requirement becomes satisfied; even then the question is not whether suit can proceed on the standing of some unnamed members of the class, but whether "the named representative [can continue] to 'fairly and adequately protect the interests of the class.'" *Sosna* v. *Iowa*, 419 U. S. 393, 403 (1975) (quoting Fed. Rule Civ. Proc. 23(a)).

JUSTICE SCALIA says that he is not applying a standing rule when he concludes (as I also do) that systemic relief is inappropriate here. *Ante*, at 360–361, n. 7. I accept his assurance. But he also makes it clear, by the same footnote, that he does not rest his conclusion (as I rest mine) solely on the failure to prove that in every Arizona prison, or even in many of them, the State denied court access to illiterate prisoners, a point on which I take it every Member of the Court agrees. Instead, he explains that a failure to prove that more than two illiterate prisoners suffered prejudice to nonfrivolous claims is (at least in part) the reason for reversal. Since he does not intend to be applying his standing rule in so saying, I assume he is applying a class-action rule (requiring a denial of classwide relief when trial evidence does not show the existence of a class of injured claimants). But that route is just as unnecessary and complicating as the route through standing. (Indeed, the distinction between standing and class-action rules might be practically irrele-

vant in this case, however important as precedent for other cases.)

While the propriety of the order of systemic relief for illiterate prisoners does not turn on the standing of class members, and certainly need not turn on class-action rules, it clearly does turn on the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system. Leaving aside the question whether that failure of proof might have been dealt with by reconsidering the class certification, see Fed. Rule Civ. Proc. 23(c)(1); *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 160 (1982); 7B Wright & Miller § 1785, at 128–136, the state of the evidence simply left the District Court without an adequate basis for the exercise of its equitable discretion in issuing an order covering the entire system.

The injunction, for example, imposed detailed rules and requirements upon each of the State's prison libraries, including rules about library hours, supervision of prisoners within the facilities, request forms, educational and training requirements for librarians and their staff members, prisoners' access to the stacks, and inventory. Had the findings shown libraries in shambles throughout the prison system, this degree of intrusion might have been reasonable. But the findings included the specific acknowledgment that "[g]enerally, the facilities appear to have complete libraries." 834 F. Supp. 1553, 1568 (Ariz. 1992). The District Court found only that certain of the prison libraries did not allow inmates to browse the shelves, only that some of the volumes in some of the libraries lacked pocket parts, only that certain librarians at some of the libraries lacked law or library science degrees, and only that some prison staff members have no training in legal research. Given that adequately stocked libraries go far in satisfying the *Bounds* requirements, it was an abuse of discretion for the District Court to aggregate discrete, small-bore problems in individual prisons and to treat them as if each prevailed throughout the prison system,

for the purpose of justifying a broad remedial order covering virtually every aspect of each prison library.

Other elements of the injunction were simply unsupported by any factual finding. The District Court, for example, made no factual findings about problems prisoners may have encountered with noise in any library, let alone any findings that noise violations interfered with prisoners' access to the courts. Yet it imposed a requirement across the board that the State correct all "structural or acoustical problems." App. to Pet. for Cert. 68a. It is this overreaching of the evidentiary record, not the application of standing or even class-action rules, that calls for the judgment to be reversed.

Finally, even with regard to the portions of the injunction based upon much stronger evidence of a *Bounds* violation, I would remand simply because the District Court failed to provide the State with an ample opportunity to participate in the process of fashioning a remedy and because it seems not to have considered the implications that *Turner* holds for this case. For example, while the District Court was correct to conclude that prisoners who experience delays in receiving books and receive only a limited number of books at the end of that delay have been denied access to the courts, it is unlikely that a proper application of *Turner* would have justified its decision to order the State to grant lockdown prisoners physical access to the stacks, given the significance of the State's safety interest in maintaining the lockdown system and the existence of an alternative, an improved paging system, acceptable to the respondents. Brief for Respondents 39.

II

Even if I were to reach the standing question, however, I would not adopt the standard the Court has established. In describing the injury requirement for standing, we have spoken of it as essential to an Article III case or controversy that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as

capable of judicial resolution." *Flast* v. *Cohen,* 392 U. S. 83, 101 (1968). We ask a plaintiff to prove "actual or threatened injury" to ensure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982).

I do not disagree with the Court that in order to meet these standards (in a case that does not involve substantial systemic deprivation of access), a prisoner suing under *Bounds* must assert something more than an abstract desire to have an adequate library or some other access mechanism. Nevertheless, while I believe that a prisoner must generally have some underlying claim or grievance for which he seeks judicial relief, I cannot endorse the standing requirement the Court now imposes.

On the Court's view, a district court may be required to examine the merits of each plaintiff's underlying claim in order to determine whether he has standing to litigate a *Bounds* claim. *Ante,* at 353, n. 3. The Court would require a determination that the claim is "nonfrivolous," *ante,* at 353, in the legal sense that it states a claim for relief that is at least arguable in law and in fact. I, in contrast, would go no further than to require that a prisoner have some concrete grievance or gripe about the conditions of his confinement, the validity of his conviction, or perhaps some other problem for which he would seek legal redress, see Part III–B, *infra* (even though a claim based on that grievance might well fail sooner or later in the judicial process).

There are three reasons supporting this as a sufficient standard. First, it is the existence of an underlying grievance, not its ultimate legal merit, that gives a prisoner a concrete interest in the litigation and will thus assure the serious and adversarial treatment of the *Bounds* claim.

Second, *Bounds* recognized a right of access for those who seek adjudication, not just for sure winners or likely winners or possible winners. See *Bounds*, 430 U. S., at 824, 825, 828 (describing the constitutional right of access without limiting the right to prisoners with meritorious claims); see also *ante*, at 354 (describing the right of access even before *Bounds* as covering "a grievance that the inmate wished to present . . ." (citations omitted)). Finally, insistence on a "nonfrivolous claim" rather than a "concrete grievance" as a standing requirement will do no more than guarantee a lot of preliminary litigation over nothing. There is no prison system so blessed as to lack prisoners with nonfrivolous complaints. They will always turn up, or be turned up, and one way or the other the *Bounds* litigation will occur.

That last point may be, as the Court says, the answer to any suggestion that there need be no underlying claim requirement for a *Bounds* claim of complete and systemic denial of all means of court access. But in view of the Courts of Appeals that have seen the issue otherwise,[2] I would cer-

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[2] See, *e. g.*, *Jenkins* v. *Lane*, 977 F. 2d 266, 268–269 (CA7 1992) (waiving the requirement that a prisoner prove prejudice "where the prisoner alleges a direct, substantial and continuous, rather than a 'minor and indirect,' limit on legal materials" on the ground that "a prisoner without any access to materials cannot determine the pleading requirements of his case, including the necessity of pleading prejudice"); cf. *Strickler* v. *Waters*, 989 F. 2d 1375, 1385, n. 16 (CA4 1993) (acknowledging the possibility that injury may be presumed in some situations, *e. g.*, total denial of access to a library), cert. denied, 510 U. S. 949 (1993); *Sowell* v. *Vose*, 941 F. 2d 32, 35 (CA1 1991) (acknowledging that a prisoner may not need to prove prejudice when he alleges "[a]n *absolute* deprivation of access to *all* legal materials" (emphases in original)). Dispensing with any underlying claim requirement in such instances would be consistent with the rule of equity dealing with threatened injury. See, *e. g.*, *Farmer* v. *Brennan*, 511 U. S. 825, 845 (1994) (holding that a prisoner need not suffer physical injury before obtaining relief because " '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief' " (quoting *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923))); *Helling* v. *McKinney*, 509 U. S. 25, 33 (1993) (observing that prisoners may obtain relief

tainly reserve that issue for the day it might actually be addressed by the parties in a case before us.

In sum, I would go no further than to hold (in a case not involving substantial, systemic deprivation of access to court) that Article III requirements will normally be satisfied if a prisoner demonstrates that (1) he has a complaint or grievance, meritorious or not,[3] about the prison system or the validity of his conviction[4] that he would raise if his library research (or advice, or judicial review of a form complaint, or other means of "access" chosen by the State) were to indicate that he had an actionable claim; and (2) the access scheme provided by the prison is so inadequate that he cannot research, consult about, file, or litigate the claim, as the case may be.

"even though it was not alleged that the likely harm would occur immediately and even though the possible [harm] might not affect all of those [at risk]" (discussing *Hutto* v. *Finney*, 437 U. S. 678 (1978))). If the State denies prisoners all access to the courts, it is hardly implausible for a prisoner to claim a protected stake in opening some channel of access.

[3] See *Harris* v. *Young*, 718 F. 2d 620, 622 (CA4 1983) ("It is unfair to force an inmate to prove that he has a meritorious claim which will require access until after he has had an opportunity to see just what his rights are"); see also *Magee* v. *Waters*, 810 F. 2d 451, 452 (CA4 1987) (suggesting that a prisoner must identify the "specific problem he wishe[s] to research"); cf. *Vandelft* v. *Moses*, 31 F. 3d 794, 798 (CA9 1994) (dismissing a *Bounds* claim in part because the prisoner "simply failed to show that the restrictions on *library* access had any effect on his access to the *court* relative to his personal restraint petition" (emphases in original)), cert. denied, 516 U. S. 825 (1995); *Casteel* v. *Pieschek*, 3 F. 3d 1050, 1056 (CA7 1993) (it is enough if the prisoner merely "identif[ies] the constitutional right the defendant allegedly violated and the specific facts constituting the deprivation"); *Chandler* v. *Baird*, 926 F. 2d 1057, 1063 (CA11 1991) ("[T]here was no allegation in the complaint or in plaintiff's deposition that he was contemplating a challenge at that time [of the deprivation] to the conditions of his confinement"); *Martin* v. *Tyson*, 845 F. 2d 1451, 1456 (CA7) (dismissing a claim in part because the prisoner "does not point to any claim that he was unable to pursue"), cert. denied, 488 U. S. 863 (1988).

[4] I do not foreclose the possibility of certain other complaints, see text accompanying n. 2, *supra*, and Part III–B, *infra*.

While a more stringent standing requirement would, of course, serve to curb courts from interference with prison administration, that legitimate object is adequately served by two rules of existing law. *Bounds* itself makes it clear that the means of providing access is subject to the State's own choice. If, for example, a State wishes to avoid judicial review of its library standards and the adequacy of library services, it can choose a means of access involving use of the complaint-form procedure mentioned by the Court today. *Ante*, at 352. And any judicial remedy, whatever the chosen means of court access, must be consistent with the rule in *Turner* v. *Safley*, 482 U. S. 78 (1987), that prison restrictions are valid if reasonably related to valid penological interests. *Turner*'s level of scrutiny surely serves to limit undue intrusions and thus obviates the need for further protection. In the absence of evidence that the *Turner* framework does not adequately channel the discretion of federal courts, there would be no reason to toughen standing doctrine to provide an additional, and perhaps unnecessary, protection against this danger.

But instead of relying on these reasonable and existing safeguards against interference, the Court's resolution of this case forces a district court to engage in extensive and, I believe, needless enquiries into the underlying merit of prisoners' claims during the initial and final stages of a trial, and renders properly certified classes vulnerable to constant challenges throughout the course of litigation. The risk is that district courts will simply conclude that prisoner class actions are unmanageable. What, at the least, the Court overlooks is that a class action lending itself to a systemwide order of relief consistent with *Turner* avoids the multiplicity of separate suits and remedial orders that undermine the efficiency of a United States district court just as surely as it can exhaust the legal resources of a much-sued state prison system.

III

A

There are, finally, two additional points on which I disagree with the Court. First, I cannot concur in the suggestion that *Bounds* should be overruled to the extent that it requires States choosing to provide law libraries for court access to make them available for a prisoner's use in the period between filing a complaint and its final disposition. *Ante*, at 354. *Bounds* stated the obvious reasons for making libraries available for these purposes, 430 U. S., at 825–826, and developments since *Bounds* have confirmed its reasoning. With respect to habeas claims, for example, the need for some form of legal assistance is even more obvious now than it was then, because the restrictions developed since *Bounds* have created a "substantial risk" that prisoners proceeding without legal assistance will never be able to obtain review of the merits of their claims. See *McFarland* v. *Scott*, 512 U. S. 849 (1994) (discussing these developments). Nor should discouragement from the number of frivolous prison suits lead us to doubt the practical justifiability of providing assistance to a *pro se* prisoner during trial. In the past few years alone, we have considered the petitions of several prisoners who represented themselves at trial and on appeal, and who ultimately prevailed. See, *e. g.*, *Farmer* v. *Brennan*, 511 U. S. 825 (1994); *Helling* v. *McKinney*, 509 U. S. 25 (1993); *Hudson* v. *McMillian*, 503 U. S. 1 (1992).

B

Second, I see no reason at this point to accept the Court's view that the *Bounds* right of access is necessarily restricted to attacks on sentences or challenges to conditions of confinement. See *ante*, at 354–355. It is not clear to me that a State may force a prisoner to abandon all opportunities to vindicate rights outside these two categories no matter how significant. We have already held that prisoners do not en-

tirely forfeit certain fundamental rights, including the right to marry, *Turner* v. *Safley*, *supra*, at 95; the right to free speech, *Thornburgh* v. *Abbott*, 490 U. S. 401, 407 (1989); and the right to free exercise of religion, see *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342 (1987). One can imagine others that would arguably entitle a prisoner to some limited right of access to court. See, *e. g.*, *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18 (1981) (parental rights); *Boddie* v. *Connecticut*, 401 U. S. 371 (1971) (divorce); cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49–50 (1950) (deportation). This case does not require us to consider whether, as a matter of constitutional principle, a prisoner's opportunities to vindicate rights in these spheres may be foreclosed, and I would not address such issues here.

IV

I therefore concur in Parts I and III of the Court's opinion, dissent from Part II, and concur in the judgment.

JUSTICE STEVENS, dissenting.

The Fourteenth Amendment prohibits the States from depriving any person of life, liberty, or property without due process of law. While at least one 19th-century court characterized the prison inmate as a mere "slave of the State," *Ruffin* v. *Commonwealth*, 62 Va. 790, 796 (1871), in recent decades this Court has repeatedly held that the convicted felon's loss of liberty is not total. See *Turner* v. *Safley*, 482 U. S. 78, 84 (1987); *e. g.*, *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972). "Prison walls do not . . . separat[e] . . . inmates from the protections of the Constitution," *Turner*, 482 U. S., at 84, and even convicted criminals retain some of the liberties enjoyed by all who live outside those walls in communities to which most prisoners will someday return.

Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitu-

tion: freedom to worship according to the dictates of their own conscience, *e. g.*, *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987); *Cruz*, 405 U. S., at 321, freedom to communicate with the outside world, *e. g.*, *Thornburgh* v. *Abbott*, 490 U. S. 401, 411–412 (1989), and the freedom to petition their government for a redress of grievances, *e. g.*, *Johnson* v. *Avery*, 393 U. S. 483, 485 (1969). While the exercise of these freedoms may of course be regulated and constrained by their custodians, they may not be obliterated either actively or passively. Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.

The "well-established" right of access to the courts, *ante*, at 350, is one of these aspects of liberty that States must affirmatively protect. Where States provide for appellate review of criminal convictions, for example, they have an affirmative duty to make transcripts available to indigent prisoners free of charge. *Griffin* v. *Illinois*, 351 U. S. 12, 19–20 (1956) (requiring States to waive transcript fees for indigent inmates); see also *Burns* v. *Ohio*, 360 U. S. 252, 257–258 (1959) (requiring States to waive filing fees for indigent prisoners). It also protects an inmate's right to file complaints, whether meritorious or not, see *Ex parte Hull*, 312 U. S. 546 (1941) (affirming right to file habeas petitions even if prison officials deem them meritless, in case in which petition at issue was meritless), and an inmate's right to have access to fellow inmates who are able to assist an inmate in preparing, "with reasonable adequacy," such complaints. *Johnson*, 393 U. S., at 489; *Wolff* v. *McDonnell*, 418 U. S. 539, 580 (1974).[1] And for almost two decades, it has explicitly

[1] See also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson* v. *Avery*, 393 U. S. 483, 485; *Ex parte Hull*, 312 U. S. 546, 549"); *Bill Johnson's Restaurants*,

included the right of prisoners to have access to "adequate law libraries or adequate assistance from persons trained in the law." *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977). As the Court points out, States are free to "experiment" with the types of legal assistance that they provide to inmates, *ante*, at 352—as long as the experiment provides adequate access.

The constitutional violations alleged in this case are similar to those that the District Court previously found in one of Arizona's nine prisons. See *Gluth* v. *Kangas*, 773 F. Supp. 1309 (Ariz. 1988), aff'd, 951 F. 2d 1504 (CA9 1991). The complaint in this case was filed in 1990 by 22 prisoners on behalf of a class including all inmates in the Arizona prison system. The prisoners alleged that the State's institutions provided inadequate access to legal materials or other assistance, App. 31–33, and that as a result, "[p]risoners are harmed by the denial of meaningful access to the courts." *Id.*, at 32. The District Court agreed, concluding that the State had failed, throughout its prison system, to provide adequate access to legal materials, particularly for those in administrative seg-

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Inc. v. *NLRB*, 461 U. S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"); *id.*, at 743.

The right to claim a violation of a constitutional provision in a manner that will be recognized by the courts is also embedded in those rights recognized by the Constitution's text and our interpretations of it. Without the ability to access the courts and draw their attention to constitutionally improper behavior, all of us—prisoners and free citizens alike—would be deprived of the first—and often the only—"line of defense" against constitutional violations. *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977); see *Wolff* v. *McDonnell*, 418 U. S., at 579 (recognition of constitutional rights "would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts"); cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) (allowing plaintiff alleging violation of Fourth Amendment rights access to the courts through a cause of action directly under the Constitution).

regation, or "lockdown," and that the State had failed to provide adequate legal assistance to illiterate and non-English speaking inmates. After giving all the parties an opportunity to participate in the process of drafting the remedy, the court entered a detailed (and I agree excessively so, see *infra,* at 409) order to correct the State's violations.

As I understand the record, the State has not argued that the right of effective access to the courts, as articulated in *Bounds,* should be limited in any way. It has not challenged the standing of the named plaintiffs to represent the class, nor has it questioned the propriety of the District Court's order allowing the case to proceed as a class action. I am also unaware of any objection having been made in the District Court to the plaintiffs' constitutional standing in this case, and the State appears to have conceded standing with respect to most claims in the Court of Appeals.[2] Yet the majority chooses to address these issues unnecessarily and, in some instances, incorrectly.

For example, although injury in fact certainly is a jurisdictional issue into which we inquire absent objection from the parties, even the majority finds on the record that at least two of the plaintiffs had standing in this case, *ante,* at 356,[3]

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[2] See Opening Brief for Appellant in No. 93–17169 (CA9), pp. 29–30; Reply Brief for Defendant/Appellants in No. 93–17169 (CA9), p. 14, n. 20. The State directly questioned constitutional standing only with respect to two narrow classes of claims: the standard for indigency (a claim on which the State was successful below) and, in its reply brief, photocopying.

[3] In all likelihood, the District Court's failure to articulate additional specific examples of missing claims was due more to the fact that the State did not challenge the constitutional standing of the prisoners in the District Court than to a lack of actual evidence relating to such lost claims. Now that the District Court and prisoners are on notice that standing is a matter of specific concern, it is free on remand to investigate the record or other evidence that the parties could make available regarding other claims that have been lost because of inadequate facilities.

which should be sufficient to satisfy any constitutional concerns.[4] Yet the Court spends 10 pages disagreeing.

Even if we had reason to delve into standing requirements in this case, the Court's view of those requirements is excessively strict. I think it perfectly clear that the prisoners had standing, even absent the specific examples of failed complaints. There is a constitutional right to effective access, and if a prisoner alleges that he personally has been denied that right, he has standing to sue.[5] One of our first cases to address directly the right of access to the courts illustrates this principle particularly well. In *Ex parte Hull*, we reviewed the constitutionality of a state prison's rule that impeded an inmate's access to the courts. The rule authorized corrections officers to intercept mail addressed to a court and refer it to the legal investigator for the parole board to determine whether there was sufficient merit in the claim to justify its submission to a court. Meritless claims were simply not delivered. Petitioner Hull succeeded in smuggling papers to his father, who in turn delivered them to this Court. Although we held that the smuggled petition had insufficient merit even to require an answer from the

[4] If named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification. 1 H. Newberg & A. Conte, Newberg on Class Actions § 2.01, p. 2–3 (3d ed. 1992); *ante*, at 395–396 (SOUTER, J., concurring in part, dissenting in part, and concurring in judgment). Because the State did not challenge that certification, it is rather late in the game to now give it the advantage of a conclusion that the class was improper (even if it is—although illiterate inmates, it seems to me, are not positioned much differently with respect to English language legal materials than are non-English speaking prisoners).

[5] Although a prisoner would lose on the merits if he alleged that the deprivation of that right occurred because the State, for example, did not provide him with access to on-line computer databases, he would also certainly have "standing" to make his claim. The Court's argument to the contrary with respect to most of the prisoners in this case, it seems to me, is not as much an explication of the principles of standing, but the creation of a new rule requiring prisoners making *Bounds* claims to demonstrate prejudice flowing from the lack of access.

State, 312 U. S., at 551, we nevertheless held that the regulation was invalid for the simple and sufficient reason that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for writ of habeas corpus." *Id.*, at 549.

At first glance, the novel approach adopted by the Court today suggests that only those prisoners who have been refused the opportunity to file claims later found to have arguable merit should be able to challenge a rule as clearly unconstitutional as the one addressed in *Hull*. Perhaps the standard is somewhat lower than it appears in the first instance; using *Hull* as an example, the Court suggests that even facially meritless petitions can provide a sufficient basis for standing. See *ante*, at 352, n. 2. Nonetheless, because prisoners are uniquely subject to the control of the State, and because unconstitutional restrictions on the right of access to the courts—whether through nearly absolute bars like that in *Hull* or through inadequate legal resources—frustrate the ability of prisoners to identify, articulate, and present to courts injuries flowing from that control, I believe that any prisoner who claims to be impeded by such barriers has alleged constitutionally sufficient injury in fact.

My disagreement with the Court is not complete: I am persuaded—as respondents' counsel essentially has conceded—that the relief ordered by the District Court was broader than necessary to redress the constitutional violations identified in the District Court's findings. I therefore agree that the case should be remanded. I cannot agree, however, with the Court's decision to use the case as an opportunity to meander through the laws of standing and access to the courts, expanding standing requirements here and limiting rights there,[6] when the most obvious concern in

[6] In addition to the Court's discussion of "standing," the opinion unnecessarily enters into discussion about at least two other aspects of the scope of the *Bounds* right. First, the Court concludes that the *Bounds* right does not extend to any claims beyond attacks on sentences and conditions

the case is with the simple disjunct between the limited scope of the injuries articulated in the District Court's findings and the remedy it ordered as a result. Because most or all of petitioners' concerns regarding the order could be addressed with a simple remand, I see no need to resolve the other constitutional issues that the Court reaches out to address.

The Court is well aware that much of its discussion preceding Part III is unnecessary to the decision. Reflecting on its view that the District Court railroaded the State into accepting its order lock, stock, and barrel, the Court concludes on the last page of its decision that "[t]he State was entitled to far more than an opportunity for rebuttal, and on that ground alone this order would have to be set aside." *Ante*, at 363. To the extent that the majority suggests that the order in this case is flawed because of a breakdown in the process of court-supervised negotiation that should generally precede systemic relief, I agree with it. I also agree that the failure in that process "*alone*" would justify a remand

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of confinement. *Ante*, at 355. But given its subsequent finding that only two plaintiffs have met its newly conjured rule of standing, see *ibid.*, its conclusion regarding the scope of the right is purely dicta. Second, the Court argues that the *Bounds* right does not extend to the right to "discover" grievances, or to "litigate effectively" once in court. *Ante*, at 354 (emphasis deleted). This statement is also largely unnecessary given the Court's emphasis in Part III on the need for the District Court both to tailor its remedy to the constitutional violations it has discovered and the requirement that it remain respectful of the difficult job faced by state prison administrators.

Moreover, I note that the State has not asked for these limitations on *Bounds*. While I doubt that Arizona will object to its unexpected windfall, its briefs in the District Court, Court of Appeals, and this Court have argued that the District Court order simply went further than was necessary given the injuries identified in its own opinion. See Brief for Petitioners 13–16. By agreeing with that proposition but nonetheless going on to extend unrequested relief, the Court oversteps the scope of the debate presented in this case. Whenever we take such a step, we venture unnecessarily onto dangerous ground.

in this case. I emphatically disagree, however, with the Court's characterization of who is most to blame for the objectionable character of the final order. Much of the blame for its breadth, I propose, can be placed squarely in the lap of the State.

A fair evaluation of the procedures followed in this case must begin with a reference to *Gluth*, the earlier case in which the same District Judge found petitioners guilty of a systemic constitutional violation in one facility. In that case the District Court expressly found that the state officials had demonstrated "a callous unwillingness to face the issues" and had pursued "diversion[ary] tactics" that "forced [the court] to take extraordinary measures." 773 F. Supp., at 1312, 1314. Despite the Court's request that they propose an appropriate remedy, the officials refused to do so. It is apparent that these defense tactics played an important role in the court's decision to appoint a Special Master to assist in the fashioning of the remedy that was ordered in *Gluth*. Only after that order had been affirmed by the Court of Appeals did respondents commence this action seeking to obtain similar relief for the entire inmate population.

After a trial that lasted for 11 days over the course of two months, the District Court found that several of petitioners' policies denied illiterate and non-English-speaking prisoners meaningful access to the courts. Given the precedent established in *Gluth*, the express approval of that plan by the Court of Appeals, and the District Court's evaluation of the State's conclusions regarding the likelihood of voluntary remedial schemes, particularly in view of the State's unwillingness to play a constructive role in the remedy stage of that case, the District Court not unreasonably entered an order appointing the same Special Master and directing him to propose a similar remedy in this case. Although the District Court instructed the parties to submit specific objections to the remedial template derived from *Gluth*, see App. to Pet. for Cert. 89a, nothing in the court's order prevented the

State from submitting its own proposals without waiving its right to challenge the findings on the liability issues or its right to object to any remedial proposals by either the Master or the respondents. The District Court also told the parties that it would consider settlement offers, and instructed the Master to provide "such guidance and counsel as either of the parties may request to effect such a settlement." *Id.*, at 95a.

In response to these invitations to participate in the remedial process, the State filed only four half-hearted sets of written objections over the course of the six months during which the Special Master was evaluating the court's proposed order. See App. 218–221, 225–228, 231–238, and 239–240. Although the Master rejected about half of these narrow objections, he accepted about an equal number, noting that the State's limited formal participation had been "important" and "very helpful." Proposed Order (Permanent Injunction) in No. CIV 90–0054 (D. Ariz.), p. iii. After the Master released his proposed order, the State offered another round of objections. See App. 243–250. Although the District Court informed the Master that the objections could be considered, they did not have to be; the court reasonably noted that the State had been aware for six months about the potential scope of the order, and that it could have mounted the same objections prior to the deadline that the court had set at the beginning of the process. *Id.*, at 251–253.

One might have imagined that the State, faced with the potential of this "inordinately—indeed, wildly—intrusive" remedial scheme, *ante*, at 362, would have taken more care to protect its interests before the District Court and the Special Master, particularly given the express willingness of both to consider the State's objections. Having failed to zealously represent its interests in the District Court, the State's present complaints seem rather belated; the Court has generally been less than solicitous to claims that have

not been adequately pressed below. Cf., *e. g.*, *McCleskey* v. *Zant*, 499 U. S. 467, 488–489 (1991); compare *ante*, at 363–364, n. 8 (State made boilerplate reservation of rights in each set of objections), with *Gray* v. *Netherland*, *ante*, at 163 ("[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court").

The State's lack of interest in representing its interests is clear not only from the sparse objections in the District Court, but from proceedings both here and in the Court of Appeals. In argument before both courts, counsel for the prisoners have conceded that certain aspects of the consent decree exceeded the necessary relief. See, *e. g.*, 43 F. 3d 1261, 1271 (CA9 1994) (prisoners agree that typewriters are not required); Tr. of Oral Arg. 31 (provisions regarding noise in library are unnecessary). This flexibility further suggests that the State could have sought relief from aspects of the plan through negotiation. Indeed, at oral argument in the Ninth Circuit, the parties for both sides suggested that they were willing to settle the case, and the court deferred submission of the case for 30 days to enable a settlement. "However, before the settlement process had even begun, [the State] declined to mediate." 43 F. 3d, at 1265, n. 1. Notably, this is the only comment made by the appellate court regarding the process that led to the fashioning of the remedy in this case.

A fair reading of the record, therefore, reveals that the State had more than six months within which it could have initiated settlement discussions, presented more ambitious objections to the proposed decree reflecting the concerns it has raised before this Court, or offered up its own plan for the review of the plaintiffs and the Special Master. It took none of these steps. Instead, it settled for piecemeal and belated challenges to the scope of the proposed plan.

The Court implies that the District Court's decision to use the decree entered in *Gluth* as the starting point for fashion-

ing the relief to be ordered was unfair to petitioners and should not be repeated in comparable circumstances. The browbeaten State, the Court suggests, was "entitled to far more than an opportunity for rebuttal." *Ante*, at 363. I strongly disagree with this characterization of the process. Whether this Court now approves or disapproves of the contents of the *Gluth* decree, the Court of Appeals had affirmed it in its entirety when this case was tried, and it was surely appropriate for the District Court to use it as a starting-point for its remedial task in this case. Petitioners were represented by competent counsel who could have advanced their own proposals for relief if they had thought it expedient to do so. By going further than necessary to correct the excesses of the order, the Court's decision rewards the State for the uncooperative posture it has assumed throughout the long period of litigating both *Gluth* and this case. See *ante*, at 354–355; *Gluth*, 773 F. Supp., at 1312–1316. Although the State's approach has proven sound as a matter of tactics, allowing it to prevail in a forum that is not as inhibited by precedent as are other federal courts, the Court's decision undermines the authority and equitable powers of not only this District Court, but District Courts throughout the Nation. It is quite wrong, in my judgment, for this Court to suggest that the District Court denied the State a fair opportunity to be heard, and entirely unnecessary for it to dispose of the smorgasbord of constitutional issues that it consumes in Part II.

Accordingly, while I agree that a remand is appropriate, I cannot join the Court's opinion.

Syllabus

GASPERINI *v.* CENTER FOR HUMANITIES, INC.

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

No. 95–719. Argued April 16, 1996—Decided June 24, 1996

Under the law of New York, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." N. Y. Civ. Prac. Law and Rules (CPLR) § 5501(c). Under the Seventh Amendment, which governs proceedings in federal court, but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The compatibility of these provisions, in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship, is the issue the Court confronts in this case.

Petitioner Gasperini, a journalist and occasional photographer, loaned 300 original slide transparencies to respondent Center for Humanities, Inc. When the Center lost the transparencies, Gasperini commenced suit in the United States District Court for the Southern District of New York, invoking the court's diversity jurisdiction. The Center conceded liability. After a trial on damages, a jury awarded Gasperini $1,500 per transparency, the asserted "industry standard" of compensation for a lost transparency. Contending, *inter alia*, that the verdict was excessive, the Center moved for a new trial. The District Court, without comment, denied the motion.

The Court of Appeals for the Second Circuit, observing that New York law governed the controversy, endeavored to apply CPLR § 5501(c) to evaluate the Center's contention that the verdict was excessive. Guided by New York Appellate Division decisions reviewing damage awards for lost transparencies, the Second Circuit held that the $450,000 verdict "materially deviates from what is reasonable compensation." The court vacated the judgment entered on the jury verdict and ordered a new trial, unless Gasperini agreed to an award of $100,000.

Held: New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in CPLR § 5501(c) is applied by the federal trial court judge, with appellate control of the trial court's ruling confined to "abuse of discretion." Pp. 422–439.

Syllabus

(a) To heighten the judicial check on the size of jury awards, New York codified the "deviates materially" standard of review, replacing the judge-made "shock the conscience" formulation previously used in New York courts. In design and operation, § 5501(c) influences outcomes by tightening the range of tolerable awards. Although phrased as a direction to New York's intermediate appellate courts, § 5501(c)'s "deviates materially" standard, as construed by New York's courts, instructs state trial judges as well. Pp. 422–425.

(b) In cases like Gasperini's, in which New York law governs the claims for relief, the Court must determine whether New York law also supplies the test for federal-court review of the size of the verdict. Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law. Under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, federal courts sitting in diversity apply state substantive law and federal procedural law. Classification of a law as "substantive" or "procedural" for *Erie* purposes is sometimes a challenging endeavor. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, an early interpretation of *Erie*, propounded an "outcome-determination" test: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U. S., at 109. A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U. S. 460, 468.

Informed by these decisions, the Court concludes that, although § 5501(c) contains a procedural instruction assigning decisionmaking authority to the New York Appellate Division, the State's objective is manifestly substantive. More rigorous comparative evaluations attend application of § 5501(c)'s "deviates materially" standard than the common-law "shock the conscience" test. If federal courts ignore the change in the New York standard and persist in applying the "shock the conscience" test to damage awards on claims governed by New York law, "'substantial' variations between state and federal [money judgments]" may be expected. See *id.*, at 467–468. The Court therefore agrees with the Second Circuit that New York's check on excessive damages warrants application in federal court, for *Erie*'s doctrine precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court. Pp. 426–431.

Syllabus

(c) Nonetheless, when the Second Circuit used § 5501(c) as the standard for federal appellate review, it did not attend to "[a]n essential characteristic of [the federal court] system." *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537. The Seventh Amendment, which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial functions between judge and jury, the issue in *Byrd;* it also controls the allocation of authority to review verdicts, the issue of concern here. In keeping with the historic understanding, the Seventh Amendment's Reexamination Clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. Rule Civ. Proc. 59(a). In contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review, once deemed inconsonant with the Seventh Amendment's Reexamination Clause, has not been expressly approved by this Court before today. See, *e. g.*, *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 279, n. 25. Circuit decisions unanimously recognize, however, that appellate review, confined to abuse of discretion, is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice. The Court now approves this line of decisions. Pp. 431–436.

(d) In this case, the principal state and federal interests can be accommodated. New York's dominant interest in having its substantive law guide the allowable damages arising out of a state-law claim for relief can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of applying the State's "deviates materially" standard. The Court recalls, in this regard, that the "deviates materially" standard serves as the guide to be applied in trial as well as appellate courts in New York. Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)'s check. District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. Pp. 436–439.

(e) It does not appear that the District Court checked the jury's verdict against the relevant New York decisions. Accordingly, the Court vacates the judgment of the Court of Appeals and instructs that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against CPLR § 5501(c)'s "deviates materially" standard. P. 439.

66 F. 3d 427, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 439. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 448.

Samuel A. Abady argued the cause for petitioner. With him on the briefs were *Jonathan S. Abady*, *Matthew D. Brinckerhoff*, and *Andrew Dwyer*.

Theodore B. Olson argued the cause for respondent. With him on the brief were *Theodore J. Boutrous, Jr.*, *Douglas R. Cox*, *Mark Snyderman*, and *Francis A. Montbach*.*

JUSTICE GINSBURG delivered the opinion of the Court.

Under the law of New York, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." N. Y. Civ. Prac. Law and Rules (CPLR) § 5501(c) (McKinney 1995). Under the Seventh Amendment, which governs proceedings in federal court, but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amdt. 7.

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*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Pamela A. Liapakis;* for the Picture Agency Council of America, Inc. (PACA), by *Nancy E. Wolff;* and for Federal Jurisdiction and Legal History Scholars Akhil Reed Amar et al. by *Arthur F. McEvoy pro se*, *Arthur R. Miller pro se*, *Daniel R. Coquillette pro se*, *Kenneth J. Chesebro*, *Arthur H. Bryant*, *William A. Rossbach*, and *Jonathan S. Massey*.

Briefs of *amici curiae* urging affirmance were filed for the City of New York by *Paul A. Crotty*, *Leonard J. Koerner*, and *Elizabeth S. Natrella;* for the American Council of Life Insurance et al. by *Patricia A. Dunn*, *Stephen J. Goodman*, *Phillip E. Stano*, and *Craig Berrington;* for the Chamber of Commerce of the United States et al. by *W. DeVier Pierson*, *Mark E. Greenwold*, *Clinton E. Cameron*, *Stephen A. Bokat*, and *Robin S. Conrad;* and for the Products Liability Advisory Council, Inc., by *Michael Hoenig* and *David B. Hamm*.

The compatibility of these provisions, in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship, is the issue we confront in this case. We hold that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in CPLR § 5501(c) is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for "abuse of discretion."

I

Petitioner William Gasperini, a journalist for CBS News and the Christian Science Monitor, began reporting on events in Central America in 1984. He earned his living primarily in radio and print media and only occasionally sold his photographic work. During the course of his seven-year stint in Central America, Gasperini took over 5,000 slide transparencies, depicting active war zones, political leaders, and scenes from daily life. In 1990, Gasperini agreed to supply his original color transparencies to The Center for Humanities, Inc. (Center) for use in an educational videotape, Conflict in Central America. Gasperini selected 300 of his slides for the Center; its videotape included 110 of them. The Center agreed to return the original transparencies, but upon the completion of the project, it could not find them.

Gasperini commenced suit in the United States District Court for the Southern District of New York, invoking the court's diversity jurisdiction pursuant to 28 U. S. C. § 1332.[1] He alleged several state-law claims for relief, including breach of contract, conversion, and negligence. See App. 5–6. The Center conceded liability for the lost transparencies and the issue of damages was tried before a jury.

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[1] Plaintiff Gasperini, petitioner here, is a citizen of California; defendant Center, respondent here, is incorporated, and has its principal place of business, in New York.

At trial, Gasperini's expert witness testified that the "industry standard" within the photographic publishing community valued a lost transparency at $1,500. See *id.*, at 227. This industry standard, the expert explained, represented the average license fee a commercial photograph could earn over the full course of the photographer's copyright, *i. e.*, in Gasperini's case, his lifetime plus 50 years. See *id.*, at 228; see also 17 U. S. C. § 302(a). Gasperini estimated that his earnings from photography totaled just over $10,000 for the period from 1984 through 1993. He also testified that he intended to produce a book containing his best photographs from Central America. See App. 175.

After a three-day trial, the jury awarded Gasperini $450,000 in compensatory damages. This sum, the jury foreperson announced, "is [$]1500 each, for 300 slides." *Id.*, at 313. Moving for a new trial under Federal Rule of Civil Procedure 59, the Center attacked the verdict on various grounds, including excessiveness. Without comment, the District Court denied the motion. See App. to Pet. for Cert. 12a.

The Court of Appeals for the Second Circuit vacated the judgment entered on the jury's verdict. 66 F. 3d 427 (1995). Mindful that New York law governed the controversy, the Court of Appeals endeavored to apply CPLR § 5501(c), which instructs that, when a jury returns an itemized verdict, as the jury did in this case, the New York Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." The Second Circuit's application of § 5501(c) as a check on the size of the jury's verdict followed Circuit precedent elaborated two weeks earlier in *Consorti* v. *Armstrong World Industries, Inc.*, 64 F. 3d 781, superseded, 72 F. 3d 1003 (1995). Surveying Appellate Division decisions that reviewed damage awards for lost transparencies, the Second Circuit concluded that testimony on industry standard alone was insufficient to justify a verdict; prime among other fac-

tors warranting consideration were the uniqueness of the slides' subject matter and the photographer's earning level.[2]

Guided by Appellate Division rulings, the Second Circuit held that the $450,000 verdict "materially deviates from what is reasonable compensation." 66 F. 3d, at 431. Some of Gasperini's transparencies, the Second Circuit recognized, were unique, notably those capturing combat situations in which Gasperini was the only photographer present. *Id.*, at 429. But others "depicted either generic scenes or events at which other professional photojournalists were present." *Id.*, at 431. No more than 50 slides merited a $1,500 award, the court concluded, after "[g]iving Gasperini every benefit of the doubt." *Ibid.* Absent evidence showing significant earnings from photographic endeavors or concrete plans to publish a book, the court further determined, any damage award above $100 each for the remaining slides would be excessive. Remittiturs "presen[t] difficult problems for appellate courts," the Second Circuit acknowledged, for court of appeals judges review the evidence from "a cold paper record." *Ibid.* Nevertheless, the Second Circuit set aside the $450,000 verdict and ordered a new trial, unless Gasperini agreed to an award of $100,000.

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[2] See *Blackman* v. *Michael Friedman Publishing Group, Inc.*, 201 App. Div. 2d 328, 328–329, 607 N. Y. S. 2d 43, 44 (1st Dept. 1994) (award reduced from $1,000 to $400 per transparency in the absence of evidence to establish uniqueness); *Nierenberg* v. *Wursteria, Inc.*, 189 App. Div. 2d 571, 571–572, 592 N. Y. S. 2d 27, 27–28 (1st Dept. 1993) (award reduced from $1,500 to $500 per slide because evidence showed photographer earned little from slide sales); *Alen MacWeeney, Inc.* v. *Esquire Assocs.*, 176 App. Div. 2d 217, 218; 574 N. Y. S. 2d 340, 341 (1st Dept. 1991) (award reduced from $1,500 to $159 per transparency because evidence indicated that images were generic; court distinguished prior ruling in *Girard Studio Group, Ltd.* v. *Young & Rubicam, Inc.*, 147 App. Div. 2d 357, 536 N. Y. S. 2d 790 (1st Dept. 1989), permitting an award reduced from $3,000 to $1,500 per slide where evidence showed that "the lost slides represented classics from a long career").

This case presents an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law. We therefore granted certiorari. 516 U. S. 1086 (1996).

II

Before 1986, state and federal courts in New York generally invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it "shocked the conscience of the court." See *Consorti*, 72 F. 3d, at 1012–1013 (collecting cases). As described by the Second Circuit:

> "The standard for determining excessiveness and the appropriateness of remittitur in New York is somewhat ambiguous. Prior to 1986, New York law employed the same standard as the federal courts, *see Matthews* v. *CTI Container Transport Int'l Inc.*, 871 F. 2d 270, 278 (2d Cir. 1989), which authorized remittitur only if the jury's verdict was so excessive that it 'shocked the conscience of the court.'" *Id.*, at 1012.

See also D. Siegel, Practice Commentaries C5501:10, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 25 (1995) ("conventional standard for altering the verdict was that its sum was so great or so small that it 'shocked the conscience' of the court").

In both state and federal courts, trial judges made the excessiveness assessment in the first instance, and appellate judges ordinarily deferred to the trial court's judgment. See, *e. g.*, *McAllister* v. *Adam Packing Corp.*, 66 App. Div. 2d 975, 976, 412 N. Y. S. 2d 50, 52 (3d Dept. 1978) ("The trial court's determination as to the adequacy of the jury verdict will only be disturbed by an appellate court where it can be said that the trial court's exercise of discretion was not reasonably grounded."); *Martell* v. *Boardwalk Enterprises*,

Inc., 748 F. 2d 740, 750 (CA2 1984) ("The trial court's refusal to set aside or reduce a jury award will be overturned only for abuse of discretion.").

In 1986, as part of a series of tort reform measures,[3] New York codified a standard for judicial review of the size of jury awards. Placed in CPLR § 5501(c), the prescription reads:

> "In reviewing a money judgment . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."[4]

As stated in Legislative Findings and Declarations accompanying New York's adoption of the "deviates materially" formulation, the lawmakers found the "shock the conscience" test an insufficient check on damage awards; the legislature therefore installed a standard "invit[ing] more careful appellate scrutiny." Ch. 266, 1986 N. Y. Laws 470 (McKinney). At the same time, the legislature instructed the Appellate Division, in amended § 5522, to state the reasons for the court's rulings on the size of verdicts, and the factors the

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[3] The legislature sought, particularly, to curtail medical and dental malpractice, and to contain "already high malpractice premiums." Legislative Findings and Declaration, Ch. 266, 1986 N. Y. Laws 470 (McKinney).

[4] In full, CPLR § 5501(c) provides:

"The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

court considered in complying with § 5501(c).[5] In his signing statement, then-Governor Mario Cuomo emphasized that the CPLR amendments were meant to rachet up the review standard: "This will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Memorandum on Approving L. 1986, Ch. 682, 1986 N. Y. Laws, at 3184; see also Newman & Ahmuty, Appellate Review of Punitive Damage Awards, in Insurance, Excess, and Reinsurance Coverage Disputes 1990, p. 409 (B. Ostrager & T. Newman eds. 1990) (review standard prescribed in § 5501(c) "was intended to . . . encourage Appellate Division modification of excessive awards").

New York state-court opinions confirm that § 5501(c)'s "deviates materially" standard calls for closer surveillance than "shock the conscience" oversight. See, *e. g.*, *O'Connor* v. *Graziosi*, 131 App. Div. 2d 553, 554, 516 N. Y. S. 2d 276, 277 (2d Dept. 1987) ("apparent intent" of 1986 legislation was "to facilitate appellate changes in verdicts"); *Harvey* v. *Mazal American Partners*, 79 N. Y. 2d 218, 225, 590 N. E. 2d 224, 228 (1992) (instructing Appellate Division to use, in setting remittitur, only the "deviates materially" standard, and not the "shock the conscience" test); see also *Consorti*, 72 F. 3d, at 1013 ("Material deviation from reasonableness is less than that deviation required to find an award so excessive as to 'shock the conscience.' "); 7 J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶ 5501.21, p. 55–64 (1995) ("Under [§ 5501(c)'s] new standard, the reviewing court is given greater power to review the size of a jury award than had heretofore been afforded . . . .").

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[5] CPLR § 5522(b) provides:

"In an appeal from a money judgment in an action . . . in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter."

Although phrased as a direction to New York's intermediate appellate courts, § 5501(c)'s "deviates materially" standard, as construed by New York's courts, instructs state trial judges as well. See, *e. g.*, *Inya* v. *Ide Hyundai, Inc.*, 209 App. Div. 2d 1015, 619 N. Y. S. 2d 440 (4th Dept. 1994) (error for trial court to apply "shock the conscience" test to motion to set aside damages; proper standard is whether award "materially deviates from what would be reasonable compensation"); *Cochetti* v. *Gralow*, 192 App. Div. 2d 974, 975, 597 N. Y. S. 2d 234, 235 (3d Dept. 1993) ("settled law" that trial courts conduct "materially deviates" inquiry); *Shurgan* v. *Tedesco*, 179 App. Div. 2d 805, 806, 578 N. Y. S. 2d 658, 659 (2d Dept. 1992) (approving trial court's application of "materially deviates" standard); see also *Lightfoot* v. *Union Carbide Corp.*, 901 F. Supp. 166, 169 (SDNY 1995) (CPLR 5501(c)'s "materially deviates" standard "is pretty well established as applicable to [state] trial and appellate courts."). Application of § 5501(c) at the trial level is key to this case.

To determine whether an award "deviates materially from what would be reasonable compensation," New York state courts look to awards approved in similar cases. See, *e. g.*, *Leon* v. *J & M Peppe Realty Corp.*, 190 App. Div. 2d 400, 416, 596 N. Y. S. 2d 380, 389 (1st Dept. 1993) ("These awards . . . are not out of line with recent awards sustained by appellate courts."); *Johnston* v. *Joyce*, 192 App. Div. 2d 1124, 1125, 596 N. Y. S. 2d 625, 626 (4th Dept. 1993) (reducing award to maximum amount previously allowed for similar type of harm). Under New York's former "shock the conscience" test, courts also referred to analogous cases. See, *e. g.*, *Senko* v. *Fonda*, 53 App. Div. 2d 638, 639, 384 N. Y. S. 2d 849, 851 (2d Dept. 1976). The "deviates materially" standard, however, in design and operation, influences outcomes by tightening the range of tolerable awards. See, *e. g.*, *Consorti*, 72 F. 3d, at 1013, and n. 10, 1014–1015, and n. 14.

III

In cases like Gasperini's, in which New York law governs the claims for relief, does New York law also supply the test for federal-court review of the size of the verdict? The Center answers yes. The "deviates materially" standard, it argues, is a substantive standard that must be applied by federal appellate courts in diversity cases. The Second Circuit agreed. See 66 F. 3d, at 430; see also *Consorti*, 72 F. 3d, at 1011 ("[CPLR § 5501(c)] is the substantive rule provided by New York law."). Gasperini, emphasizing that § 5501(c) trains on the New York Appellate Division, characterizes the provision as procedural, an allocation of decisionmaking authority regarding damages, not a hard cap on the amount recoverable. Correctly comprehended, Gasperini urges, § 5501(c)'s direction to the Appellate Division cannot be given effect by federal appellate courts without violating the Seventh Amendment's Reexamination Clause.

As the parties' arguments suggest, CPLR § 5501(c), appraised under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and decisions in *Erie*'s path, is both "substantive" and "procedural": "substantive" in that § 5501(c)'s "deviates materially" standard controls how much a plaintiff can be awarded; "procedural" in that § 5501(c) assigns decisionmaking authority to New York's Appellate Division. Parallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment. The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.

A

Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law. As

Erie read the Rules of Decision Act:[6] "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U. S., at 78. Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

Classification of a law as "substantive" or "procedural" for *Erie* purposes is sometimes a challenging endeavor.[7] *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), an early interpretation of *Erie*, propounded an "outcome-determination" test: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" 326 U. S., at 109. Ordering application of a state statute of limitations to an equity proceeding in federal court, the Court said in *Guar-*

[6] Originally § 34 of the Judiciary Act of 1789, the Rules of Decision Act, now contained in 28 U. S. C. § 1652, reads: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[7] Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U. S. C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law. See *Hanna* v. *Plumer*, 380 U. S. 460, 469–474 (1965); *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987). Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies. See, *e. g.*, *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 750–752 (1980) (reaffirming decision in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), that state law rather than Rule 3 determines when a diversity action commences for the purposes of tolling the state statute of limitations; Rule 3 makes no reference to the tolling of state limitations, the Court observed, and accordingly found no "direct conflict"); *S. A. Healy Co.* v. *Milwaukee Metropolitan Sewerage Dist.*, 60 F. 3d 305, 310–312 (CA7 1995) (state provision for offers of settlement by plaintiffs is compatible with Federal Rule 68, which is limited to offers by defendants).

anty Trust: "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Ibid.;* see also *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 533 (1949) (when local law that creates the cause of action qualifies it, "federal court must follow suit," for "a different measure of the cause of action in one court than in the other [would transgress] the principle of *Erie*"). A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U. S. 460, 468 (1965).

Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"? *Id.*, at 468, n. 9.[8]

We start from a point the parties do not debate. Gasperini acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes. See Reply Brief for

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[8] *Hanna* keyed the question to *Erie*'s "twin aims"; in full, *Hanna* instructed federal courts to ask "whether application of the [State's] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." 380 U. S., at 468, n. 9.

Petitioner 2 ("[T]he state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity."); see also Tr. of Oral Arg. 4–5, 25; *Consorti*, 72 F. 3d, at 1011.[9] Although CPLR § 5501(c) is less readily classified, it was designed to provide an analogous control.

New York's Legislature codified in § 5501(c) a new standard, one that requires closer court review than the common-law "shock the conscience" test. See *supra*, at 422–423. More rigorous comparative evaluations attend application of § 5501(c)'s "deviates materially" standard. See *supra*, at 423–425. To foster predictability, the legislature required the reviewing court, when overturning a verdict under § 5501(c), to state its reasons, including the factors it considered relevant. See CPLR § 5522(b); *supra*, at 423–424. We think it a fair conclusion that CPLR § 5501(c) differs from a statutory cap principally "in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law." Brief for City of New York as *Amicus Curiae* 11. In sum, § 5501(c) contains a procedural instruction, see *supra*, at 426, but the State's objective is manifestly substantive. Cf. *S. A. Healy Co.* v. *Milwaukee Metropolitan Sewerage Dist.*, 60 F. 3d 305, 310 (CA7 1995).

It thus appears that if federal courts ignore the change in the New York standard and persist in applying the "shock

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[9] While we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment. See *Davis* v. *Omitowoju*, 883 F. 2d 1155, 1161–1165 (CA3 1989) (Reexamination Clause of Seventh Amendment does not impede federal court's postverdict application of statutory cap); *Boyd* v. *Bulala*, 877 F. 2d 1191, 1196 (CA4 1989) (postverdict application of statutory cap does not violate Seventh Amendment right of trial by jury).

the conscience" test to damage awards on claims governed by New York law,[10] "'substantial' variations between state and federal [money judgments]" may be expected. See *Hanna*, 380 U. S., at 467–468.[11] We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie*'s "twin aims." See *supra*, at 428.[12] Just as the *Erie* principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim] would have had in the state court," *Ragan*,

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[10] JUSTICE SCALIA questions whether federal *district* courts in New York "actually appl[y]" or "*ought*" to apply the "shock the conscience" test in assessing a jury's award for excessiveness. *Post*, at 465–466 (collecting various formulations of review standard). If there is a federal district court standard, it must come from the Court of Appeals, not from the over 40 district court judges in the Southern District of New York, each of whom sits alone and renders decisions not binding on the others. Indeed, in *Ismail* v. *Cohen*, 899 F. 2d 183 (1990), the authority upon which JUSTICE SCALIA relies, the Second Circuit stated that district courts test damage awards for excessiveness under the "shock the conscience" standard. See *id.*, at 186 ("A remittitur, in effect, is a statement by the court that it is shocked by the jury's award of damages."); see also *Scala* v. *Moore McCormack Lines, Inc.*, 985 F. 2d 680, 683 (CA2 1993) ("[I]n the federal courts, a judgment cannot stand where the damages awarded are so excessive as to shock the judicial conscience.") (internal quotation marks and citation omitted).

[11] JUSTICE SCALIA questions whether application of CPLR §5501(c), in lieu of the standard generally used by federal courts within the Second Circuit, see *supra*, at 422, will in fact yield consistent outcome differentials, see *post*, at 465, 466. The numbers, as the Second Circuit believed, are revealing. See 66 F. 3d 427, 430 (1995). Is the difference between an award of $450,000 and $100,000, see *supra*, at 421, or between $1,500 per transparency and $500, see *supra*, at 421, n. 2, fairly described as insubstantial? We do not see how that can be so.

[12] For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 568 (1996); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 278–279 (1989). An evenhanded approach would require federal-court deference to endeavors like New York's to control compensatory damages for excessiveness. See *infra*, at 435, n. 18.

337 U. S., at 533–534, so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.

B

CPLR § 5501(c), as earlier noted, see *supra*, at 425, 426, is phrased as a direction to the New York Appellate Division. Acting essentially as a surrogate for a New York appellate forum, the Court of Appeals reviewed Gasperini's award to determine if it "deviate[d] materially" from damage awards the Appellate Division permitted in similar circumstances. The Court of Appeals performed this task without benefit of an opinion from the District Court, which had denied "without comment" the Center's Rule 59 motion. 66 F. 3d, at 428. Concentrating on the authority § 5501(c) gives to the Appellate Division, Gasperini urges that the provision shifts fact-finding responsibility from the jury and the trial judge to the appellate court. Assigning such responsibility to an appellate court, he maintains, is incompatible with the Seventh Amendment's Reexamination Clause, and therefore, Gasperini concludes, § 5501(c) cannot be given effect in federal court. Brief for Petitioner 19–20. Although we reach a different conclusion than Gasperini, we agree that the Second Circuit did not attend to "[a]n essential characteristic of [the federal court] system," *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537 (1958), when it used § 5501(c) as "the standard for [federal] appellate review," *Consorti*, 72 F. 3d, at 1013; see also 66 F. 3d, at 430.

That "essential characteristic" was described in *Byrd*, a diversity suit for negligence in which a pivotal issue of fact would have been tried by a judge were the case in state court. The *Byrd* Court held that, despite the state practice,[13] the plaintiff was entitled to a jury trial in federal court.

[13] The defendant argued in *Byrd* that although the personal injury plaintiff was employed by an independent contractor, the work plaintiff was engaged to perform was the same as work done by defendant's own em-

In so ruling, the Court said that the *Guaranty Trust* "outcome-determination" test was an insufficient guide in cases presenting countervailing federal interests. See *Byrd*, 356 U. S., at 537. The Court described the countervailing federal interests present in *Byrd* this way:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Ibid.* (footnote omitted).

The Seventh Amendment, which governs proceedings in federal court, but not in state court,[14] bears not only on the allocation of trial functions between judge and jury, the issue in *Byrd;* it also controls the allocation of authority to review verdicts, the issue of concern here. The Amendment reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amdt. 7.

Byrd involved the first Clause of the Amendment, the "trial by jury" Clause. This case involves the second, the "re-examination" Clause. In keeping with the historic un-

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ployees. Therefore, defendant maintained, the plaintiff ranked as a "statutory employee" whose sole remedy was under the State's workers' compensation law. The sameness of the work plaintiff and defendant's own employees performed presented a fact question, but in state court, a jury trial would not have been available to resolve it.

[14] See *Walker* v. *Sauvinet*, 92 U. S. 90, 92 (1876).

derstanding,[15] the Reexamination Clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. Rule Civ. Proc. 59(a). That authority is large. See 6A Moore's Federal Practice ¶ 59.05[2], pp. 59–44 to 59–46 (2d ed. 1996) ("The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government."); see also *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 353 (CA4 1941) ("The exercise of [the trial court's power to set aside the jury's verdict and grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."); *Blunt* v. *Little*, 3 F. Cas. 760, 761–762 (No. 1,578) (CC Mass. 1822) (Story, J.) ("[I]f it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case."). "The trial judge in the federal system," we have reaffirmed, "has . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Byrd*, 356 U. S., at 540. This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur). See *Dimick* v. *Schiedt*, 293 U. S. 474, 486–487 (1935) (recognizing that remittitur withstands Seventh Amendment attack, but rejecting additur as unconstitutional).[16]

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[15] See 6A Moore's Federal Practice ¶ 59.05[1], pp. 59–38 to 59–40 (2d ed. 1996) (common-law origin of trial court power to grant or deny a new trial).

[16] Inviting rethinking of the additur question on a later day, Justice Stone, joined by Chief Justice Hughes and Justices Brandeis and Cardozo, found nothing in the history or language of the Seventh Amendment forc-

In contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause. See, *e. g.*, *Lincoln* v. *Power*, 151 U. S. 436, 437–438 (1894); *Williamson* v. *Osenton*, 220 F. 653, 655 (CA4 1915); see also 6A Moore's Federal Practice ¶ 59.08[6], at 59–167 (collecting cases). We subsequently recognized that, even in cases in which the *Erie* doctrine was not in play—cases arising wholly under federal law—the question was not settled; we twice granted certiorari to decide the unsettled issue, but ultimately resolved the cases on other grounds. See *Grunenthal* v. *Long Island R. Co.*, 393 U. S. 156, 158 (1968); *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955).[17]

Before today, we have not "expressly [held] that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 279, n. 25 (1989). But in successive reminders that the question was worthy of this Court's attention, we noted, without disapproval, that courts of appeals engage in review of district court excessiveness determina-

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ing the "incongruous position" that "a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount," but may not condition denial of the motion on "the defendant's consent to a comparable increase in the recovery." *Dimick* v. *Schiedt*, 293 U. S., at 495.

[17] Dissenting from the Court's professed refusal to answer the question presented in *Grunenthal* v. *Long Island R. Co.*, Justices Harlan and Stewart observed that in *Grunenthal* itself, this Court indeed had reviewed the refusal of the District Court to set aside a jury verdict for excessiveness. 393 U. S., at 163 (Harlan, J., dissenting); *id.*, at 164–165 (Stewart, J., dissenting). Justice Harlan commented: "Like my Brother STEWART, I am at an utter loss to understand how the Court manages to review the District Court's decision and find it proper while at the same time proclaiming that it has avoided decision of the issue whether appellate courts ever may review such actions." *Id.*, at 163.

tions, applying "abuse of discretion" as their standard. See *Grunenthal*, 393 U. S., at 159. We noted the Circuit decisions in point, *id.*, at 157, n. 3, and, in *Browning-Ferris*, we again referred to appellate court abuse-of-discretion review:

> "[T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." 492 U. S., at 279.[18]

As the Second Circuit explained, appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice: "We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, 806 (CA2 1961) (quoted in *Grunenthal*, 393 U. S., at 159). All other Circuits agree. See, *e. g.*, *Holmes* v. *Elgin, Joliet & Eastern R. Co.*, 18 F. 3d 1393, 1396 (CA7 1994); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, p. 209 (2d ed. 1995) ("[E]very circuit has said that there are circumstances in which it can reverse the denial of a new trial if the size of the verdict seems to be too far out of line."); 6A Moore's Federal Practice

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[18] *Browning-Ferris* concerned punitive damages. We agree with the Second Circuit, however, that "[f]or purposes of deciding whether state or federal law is applicable, the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law." *Consorti* v. *Armstrong World Industries, Inc.*, 72 F. 3d 1003, 1012 (1995).

¶ 59.08[6], at 59–177 to 59–185 (same).[19] We now approve this line of decisions, and thus make explicit what Justice Stewart thought implicit in our *Grunenthal* disposition: "[N]othing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." 393 U. S., at 164 (Stewart, J., dissenting) (internal quotation marks and footnote omitted).[20]

C

In *Byrd*, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice.[21] In the case before us, a choice of that

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[19] JUSTICE SCALIA disagrees. Ready to "destroy the uniformity of federal practice" in this regard, cf. *post*, at 467, he would render a judgment described as "astonishing" by the very authority upon which he relies. Compare *post*, at 460, with 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, p. 212 (2d ed. 1995) ("it would be astonishing if the Court, which has passed up three opportunities to do so, should ultimately reject" the unanimously held view of the courts of appeals).

[20] If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, "twelve good men and true," 3 W. Blackstone, Commentaries *349; see *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13 (1899) (" 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of twelve men."). But see *Colgrove* v. *Battin*, 413 U. S. 149, 160 (1973) (six-member jury for civil trials satisfies Seventh Amendment's guarantee). Procedures we have regarded as compatible with the Seventh Amendment, although not in conformity with practice at common law when the Amendment was adopted, include new trials restricted to the determination of damages, *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931), and Federal Rule of Civil Procedure 50(b)'s motion for judgment as a matter of law, see 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522, pp. 244–246 (2d ed. 1995). See also *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 335–337 (1979) (issue preclusion absent mutuality of parties does not violate Seventh Amendment, although common law as it existed in 1791 permitted issue preclusion only when there was mutuality).

[21] The two-trial rule posited by JUSTICE SCALIA, *post*, at 467, surely would be incompatible with the existence of "[t]he federal system [as] an independent system for administering justice," *Byrd* v. *Blue Ridge Rural*

order is not required, for the principal state and federal interests can be accommodated. The Second Circuit correctly recognized that when New York substantive law governs a claim for relief, New York law and decisions guide the allowable damages. See 66 F. 3d, at 430; see also *Consorti*, 72 F. 3d, at 1011. But that court did not take into account the characteristic of the federal court system that caused us to reaffirm: "The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." *Donovan* v. *Penn Shipping Co.*, 429 U. S. 648, 649 (1977) *(per curiam);* see also *Browning-Ferris*, 492 U. S., at 279 ("[T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law . . . . The court of appeals should then review the district court's determination under an abuse-of-discretion standard.").

New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i. e.*, that court can apply the State's "deviates materially" standard in line with New York case law evolving under CPLR § 5501(c).[22] We recall, in this regard, that the

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Elec. Cooperative, Inc., 356 U. S. 525, 537 (1958). We discern no disagreement on such examples among the many federal judges who have considered this case.

[22] JUSTICE SCALIA finds in Federal Rule of Civil Procedure 59 a "federal standard" for new trial motions in "'direct collision'" with, and "'leaving no room for the operation of,'" a state law like CPLR § 5501(c). *Post*, at 468 (quoting *Burlington Northern R. Co.*, 480 U. S., at 4–5). The relevant prescription, Rule 59(a), has remained unchanged since the adoption of the Federal Rules by this Court in 1937. 302 U. S. 783. Rule 59(a) is as encompassing as it is uncontroversial. It is indeed "Hornbook" law that a most usual ground for a Rule 59 motion is that "the damages are excessive." See C. Wright, Law of Federal Courts 676–677 (5th ed. 1994). Whether damages are excessive for the claim-in-suit must be governed by *some law.* And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York. See 28 U. S. C. §§ 2072(a) and (b) ("Supreme Court shall have the power to prescribe general rules of . . . procedure"; "[s]uch rules shall not abridge,

"deviates materially" standard serves as the guide to be applied in trial as well as appellate courts in New York. See *supra,* at 425.

Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)'s "deviates materially" check. Trial judges have the "unique opportunity to consider the evidence in the living courtroom context," *Taylor* v. *Washington Terminal Co.*, 409 F. 2d 145, 148 (CADC 1969), while appellate judges see only the "cold paper record," 66 F. 3d, at 431.

District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. See 11 Wright & Miller, Federal Practice and Procedure § 2820, at 212–214, and n. 24 (collecting cases); see 6A Moore's Federal Practice ¶ 59.08[6], at 59–177 to 59–185 (same). In light of *Erie*'s doctrine, the federal appeals court must be guided by the damage-control standard state law supplies,[23] but as the Second Circuit itself has said: "If we reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . We must give the benefit of

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enlarge or modify any substantive right"); *Browning-Ferris,* 492 U. S., at 279 ("standard of excessiveness" is a "matte[r] of state, and not federal, common law"); see also R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 729–730 (4th ed. 1996) (observing that Court "has continued since [*Hanna* v. *Plumer,* 380 U. S. 460 (1965),] to interpret the federal rules to avoid conflict with important state regulatory policies," citing *Walker* v. *Armco Steel Corp.*, 446 U. S. 740 (1980)).

[23] If liability and damage-control rules are split apart here, as JUSTICE SCALIA says they must be to save the Seventh Amendment, then Gasperini's claim and others like it would be governed by a most curious "law." The sphinx-like, damage-determining law he would apply to this controversy has a state forepart, but a federal hindquarter. The beast may not be brutish, but there is little judgment in its creation.

every doubt to the judgment of the trial judge." *Dagnello*, 289 F. 2d, at 806.

IV

It does not appear that the District Court checked the jury's verdict against the relevant New York decisions demanding more than "industry standard" testimony to support an award of the size the jury returned in this case. As the Court of Appeals recognized, see 66 F. 3d, at 429, the uniqueness of the photographs and the plaintiff's earnings as photographer—past and reasonably projected—are factors relevant to appraisal of the award. See, *e. g.*, *Blackman* v. *Michael Friedman Publishing Group, Inc.*, 201 App. Div. 2d 328, 607 N. Y. S. 2d 43, 44 (1st Dept. 1994); *Nierenberg* v. *Wursteria, Inc.*, 189 App. Div. 2d 571, 571–572, 592 N. Y. S. 2d 27, 27–28 (1st Dept. 1993). Accordingly, we vacate the judgment of the Court of Appeals and instruct that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against CPLR § 5501(c)'s "deviates materially" standard.

It is so ordered.

JUSTICE STEVENS, dissenting.

While I agree with most of the reasoning in the Court's opinion, I disagree with its disposition of the case. I would affirm the judgment of the Court of Appeals. I would also reject the suggestion that the Seventh Amendment limits the power of a federal appellate court sitting in diversity to decide whether a jury's award of damages exceeds a limit established by state law.

I

The Court correctly explains why the 1986 enactment of § 5501(c) of the N. Y. Civ. Prac. Law and Rules (McKinney 1995) changed the substantive law of the State. A state-law ceiling on allowable damages, whether fixed by a dollar limit or by a standard that forbids any award that "deviates mate-

rially from what would be reasonable compensation," *ibid.*, is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law.

I recognize that state rules of appellate procedure do not necessarily bind federal appellate courts. The majority persuasively shows, however, that New York has not merely adopted a new procedure for allocating the decisionmaking function between trial and appellate courts. *Ante*, at 422–425. Instead, New York courts have held that all jury awards, not only those reviewed on appeal, must conform to the requirement that they not "deviat[e] materially" from amounts awarded in like cases. *Ante*, at 425. That New York has chosen to tie its damages ceiling to awards traditionally recovered in similar cases, rather than to a legislatively determined but inflexible monetary sum, is none of our concern.

Given the nature of the state-law command, the Court of Appeals for the Second Circuit correctly concluded in *Consorti* v. *Armstrong World Industries, Inc.*, 64 F. 3d 781, superseded, 72 F. 3d 1003 (1995), that New York's excessiveness standard applies in federal court in diversity cases controlled by New York law. *Consorti* erred in basing that conclusion in part on the fact that a New York statute requires that State's appellate division to apply the standard, but it was nevertheless faithful to the Rules of Decision Act, as construed in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in holding that a state-law limitation on the size of a judgment could not be ignored.[1] Similarly, the Court of Appeals

[1] Because there is no conceivable conflict between Federal Rule of Civil Procedure 59 and the application of the New York damages limit, this case is controlled by *Erie* and the Rules of Decision Act, rather than by the Rules Enabling Act's limitation on federal procedural rules that conflict with state substantive rights. See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 698 (1974); see also *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). The Rule does state that new trials may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States," but that hardly consti-

correctly followed *Consorti* in this case and considered whether the damages awarded materially deviated from damages awarded in similar cases. 66 F. 3d 427, 431 (CA2 1995). I endorse both opinions in these respects.

Although the majority agrees with the Court of Appeals that New York law establishes the size of the damages that may be awarded, it chooses to vacate and remand. The majority holds that a federal court of appeals should review for abuse of discretion a district court's decision to deny a motion for new trial based on a jury's excessive award. As a result, it concludes that the District Court should be given the opportunity to apply in the first instance the "deviates materially" standard that New York law imposes. *Ante*, at 439.

The District Court had its opportunity to consider the propriety of the jury's award, and it erred. The Court of Appeals has now corrected that error after "drawing all reasonable inferences in favor of" petitioner. 66 F. 3d, at 431. As there is no reason to suppose that the Court of Appeals has reached a conclusion with which the District Court could permissibly disagree on remand, I would not require the District Court to repeat a task that has already been well performed by the reviewing court. I therefore would affirm the judgment of the Court of Appeals.

II

Although I have addressed the question presented as if our decision in *Erie* alone controlled its outcome, petitioner argues that the second clause of the Seventh Amendment, which states that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," U. S. Const., Amdt. 7,

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tutes a command that federal courts must always substitute federal limits on the size of judgments for those set by the several States in cases founded upon state-law causes of action. Even at the time of the Rule's adoption, federal courts were bound to apply state statutory law in such cases.

bars the procedure followed by the Court of Appeals. There is no merit to that position.

Early cases do state that the Reexamination Clause prohibits appellate review of excessive jury awards, but they do not foreclose the practice altogether. See, *e. g.*, *Southern Railway-Carolina Div.* v. *Bennett*, 233 U. S. 80, 87 (1914) ("It may be admitted that if it were true that the excess appeared as [a] matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court"); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, pp. 207–209 (2d ed. 1995). Indeed, for the last 30 years, we have consistently reserved the question whether the Constitution permits such review, *ante*, at 434–435, and, in the meantime, every Court of Appeals has agreed that the Seventh Amendment establishes no bar. 11 Wright & Miller § 2820, at 209.

Taking the question to be an open one, I start with certain basic principles. It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law. If an award is excessive as a matter of law—in a diversity case if it is larger than applicable state law permits—a trial judge has a duty to set it aside. A failure to do so is an error of law that the court of appeals has a duty to correct on appeal.

These principles are sufficiently well established that no Seventh Amendment issue would arise if an appellate court ordered a new trial because a jury award exceeded a monetary cap on allowable damages. That New York has chosen to define its legal limit in less mathematical terms does not require a different constitutional conclusion.

New York's limitation requires a legal inquiry that cannot be wholly divorced from the facts, but that quality does not necessarily make the question one for the factfinder rather

than the reviewing court. Three times this Term we have assigned appellate courts the task of independently reviewing similarly mixed questions of law and fact. See *Ornelas* v. *United States*, 517 U. S. 690, 696–697 (1996); *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 388–390 (1996); *Thompson* v. *Keohane*, 516 U. S. 90, 112–116 (1995). Such appellate review is proper because mixed questions require courts to construe all record inferences in favor of the fact-finder's decision and then to determine whether, on the facts as found below, the legal standard has been met. See *Ornelas*, 517 U. S., at 696–697 (quoting *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982)). In following that procedure here, the Court of Appeals did not reexamine any fact determined by a jury. 66 F. 3d, at 431. It merely identified that portion of the judgment that constitutes "unlawful excess." See *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935).[2]

Even if review by the Court of Appeals implicates the Reexamination Clause, it was "according to the rules of the common law." U. S. Const., Amdt. 7. At common law, the trial judge sitting *nisi prius* recommended whether a judicial panel sitting en banc at Westminster should accept the jury's award. The en banc court then ruled on the motion for new trial and entered judgment. 11 Wright & Miller § 2819, at 203.

Petitioner correctly points out that under this procedure motions for new trial based on excessiveness were not technically subject to appellate review. Riddell, New Trial at the Common Law, 26 Yale L. J. 49, 57 (1916) ("It seems clear that in criminal as in civil cases, the trial Judge had not the

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[2] I thus disagree with JUSTICE SCALIA's view that there is a separate federal standard to "determine whether the award exceeds what is lawful to such degree that it may be set aside by order for new trial or remittitur." *Post*, at 464. In my view, if an award "exceeds what is lawful," *ibid.*, legal error has occurred and may be corrected. Certainly *Dimick* does not premise a court's power to overturn an award that exceeds lawful limits on the degree of the excess.

power to grant a new trial, but that recourse must be had to 'the Court above' "); *id.*, at 60. However, because the *nisi prius* judge often did not serve on the en banc court, the "court above" was in essentially the same position as a modern court of appeals. It considered the legality of the jury's award in light of the trial judge's opinion, but without any firsthand knowledge of what had transpired below. See Blume, Review of Facts in Jury Cases—The Seventh Amendment, 20 J. Am. Jud. Soc. 130, 131 (1936).[3]

Petitioner also contends that at common law the en banc court could only grant a new trial if the trial judge so recommended. That contention is undermined by numerous cases in which the "court above" granted new trials without making any reference to the trial judge's view of the damages. See, *e. g.*, *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 422–425 (1994) (citing cases).[4] Moreover, early English cases repeatedly state that the power to order a new trial when the jury returned an excessive award rested with "the Court," rather than the judge below,[5] and Blackstone identifies excessive

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[3] For that reason, JUSTICE SCALIA is wrong to contend that the court at Westminster acted in no more of an appellate fashion when it entertained motions for new trials in causes tried at bar than when it entertained them in causes tried at *nisi prius*. *Post*, at 456. In the former cases, the en banc court would entertain a motion for new trial after having heard the evidence itself. In the latter, it would sometimes entertain the motion only after having heard the report on the evidence of the *nisi prius* judge.

[4] Although *Honda* itself involved review of punitive damages awards, we expressly noted that there was no basis for suggesting "that different standards of judicial review were applied for punitive and compensatory damages before the 20th century," 512 U. S., at 422, n. 2. Indeed, many of the decisions we relied upon in *Honda* involved compensatory damages, and there is some authority to suggest that judicial review of the former has a more secure historical pedigree than does judicial review of the latter.

[5] See, *e. g.*, *Bright* v. *Eynon*, 1 Burr. 390, 97 Eng. Rep. 365, 368 (K. B. 1757) (Denison, J., concurring) ("[T]he granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature

damages as an independent basis on which the "court above" may grant a new trial but makes no mention of a requirement that the trial judge must so recommend. 3 W. Blackstone, Commentaries *387.

Even when read most favorably to petitioner, therefore, no meaningful distinction exists between the common-law practice by which the "court above" considered a new trial motion in the first instance, and the practice challenged here, by which an appellate court reviews a district court's ruling on a new trial motion. See Riddell, 26 Yale L. J., at 57. As Justice Stone explained, in a dissenting opinion joined by Chief Justice Hughes, Justice Brandeis, and Justice Cardozo:

> "[The Seventh Amendment], intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons* v. *Bedford*, 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit.

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and circumstances of the particular case, and directed with a view to the attainment of justice"); *Wood* v. *Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655) ("It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them . . .").

> "Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791." *Dimick* v. *Schiedt*, 293 U. S., at 490–491.

Because the Framers of the Seventh Amendment evinced no interest in subscribing to every procedural nicety of the notoriously complicated English system, see Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 290 (1966), the common-law practice certainly does not demonstrate that the Reexamination Clause prohibits federal appellate courts from ensuring compliance with state-law limits on jury awards.

Nor does early and intricate English history justify the more limited assertion that federal appellate courts must be limited to a particular, highly deferential standard of excessiveness review. Common-law courts were hesitant to disturb jury awards, but less so in cases in which "a reasonably certain measure of damages is afforded." 1 D. Graham, Law of New Trials in Cases Civil and Criminal 452 (2d ed. 1855); Washington, Damages in Contract at Common Law, 47 L. Q. Rev. 345, 363–364 (1931).

Here, New York has prescribed an objective, legal limitation on damages. If an appellate court may reverse a jury's damages award when its own conscience has been shocked, 66 F. 3d, at 430, or its sense of justice outraged, *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, 802 (CA2 1961); cf. *Honda Motor Co.* v. *Oberg*, 512 U. S., at 422–424 (citing English

cases), it may surely follow a sovereign's command that it do so when a jury has materially deviated from awards granted by other juries. If anything, the New York standard, though less deferential, is more certain.[6]

III

For the reasons set forth above, I agree with the majority that the Reexamination Clause does not bar federal appellate courts from reviewing jury awards for excessiveness. I confess to some surprise, however, at its conclusion that "'the influence—if not the command—of the Seventh Amendment,'" *ante*, at 432 (quoting *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537 (1958) (footnote omitted)), requires federal courts of appeals to review district court applications of state-law excessiveness standards for an "abuse of discretion." *Ante*, at 438.

The majority's persuasive demonstration that New York law sets forth a substantive limitation on the size of jury awards seems to refute the contention that New York has merely asked appellate courts to reexamine facts. The majority's analysis would thus seem to undermine the conclusion that the Reexamination Clause is relevant to this case.

Certainly, our decision in *Byrd* does not make the Clause relevant. There, we considered only whether the Seventh Amendment's first clause should influence our decision to give effect to a state-law rule denying the right to a jury

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[6] Our *per curiam* decision in *Donovan* v. *Penn Shipping Co.*, 429 U. S. 648 (1977), provides no support for the proposition that federal appellate courts are confined to a federal standard of excessiveness. That case held only that a plaintiff who had consented to a remittitur could not challenge its adequacy on appeal. *Id.*, at 649. Although we stated in dicta that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law," *ibid.*, that broad statement was supported by citation to two cases, *Hanna* v. *Plumer*, 380 U. S. 460 (1965), and *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525 (1958), which did not involve the review of jury awards.

altogether. 356 U. S., at 537. That holding in no way requires us to consult the Amendment's second clause to determine the standard of review for a district court's application of state substantive law.

My disagreement is tempered, however, because the majority carefully avoids defining too strictly the abuse-of-discretion standard it announces. To the extent that the majority relies only on "practical reasons" for its conclusion that the Court of Appeals should give some weight to the District Court's assessment in determining whether state substantive law has been properly applied, *ante*, at 438, I do not disagree with its analysis.

As a matter of federal-court administration, we have recognized in other contexts the need for according some deference to the lower court's resolution of legal, yet fact-intensive, questions. See *Ornelas* v. *United States*, 517 U. S., at 699; *Pierce* v. *Underwood*, 487 U. S. 552, 558, n. 1 (1988). Indeed, it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion.

In the end, therefore, my disagreement with the label that the majority attaches to the standard of appellate review should not obscure the far more fundamental point on which we agree. Whatever influence the Seventh Amendment may be said to exert, *Erie* requires federal appellate courts sitting in diversity to apply "the damage-control standard state law supplies." *Ante*, at 438.

IV

Because I would affirm the judgment of the Court of Appeals, and because I do not agree that the Seventh Amendment in any respect influences the proper analysis of the question presented, I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited fed-

eral appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.

The Court also holds today that a state practice that relates to the division of duties between state judges and juries must be followed by federal courts in diversity cases. On this issue, too, our prior cases are directly to the contrary.

As I would reverse the judgment of the Court of Appeals, I respectfully dissent.

I

Because the Court and I disagree as to the character of the review that is before us, I recount briefly the nature of the New York practice rule at issue. Section 5501(c) of the N. Y. Civ. Prac. Law and Rules (CPLR) (McKinney 1995) directs New York intermediate appellate courts faced with a claim "that the award is excessive or inadequate and that a new trial should have been granted" to determine whether the jury's award "deviates materially from what would be reasonable compensation." In granting respondent a new trial under this standard, the Court of Appeals necessarily engaged in a two-step process. As it has explained the application of § 5501(c), that provision "requires the reviewing court to determine the range it regards as reasonable, and to determine whether the particular jury award deviates materially from that range." *Consorti* v. *Armstrong World Industries, Inc.*, 72 F. 3d 1003, 1013 (CA2 1995) (amended). The first of these two steps—the determination as to "rea-

sonable" damages—plainly requires the reviewing court to reexamine a factual matter tried by the jury: the appropriate measure of damages, on the evidence presented, under New York law. The second step—the determination as to the degree of difference between "reasonable" damages and the damages found by the jury (whether the latter "deviates materially" from the former)—establishes the degree of judicial tolerance for awards found not to be reasonable, whether at the trial level or by the appellate court. No part of this exercise is appropriate for a federal court of appeals, whether or not it is sitting in a diversity case.

A

Granting appellate courts authority to decide whether an award is "excessive or inadequate" in the manner of CPLR § 5501(c) may reflect a sound understanding of the capacities of modern juries and trial judges. That is to say, the people of the State of New York may well be correct that such a rule contributes to a more just legal system. But the practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment.

That Amendment was Congress's response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure the right to trial by jury in civil actions in federal court. The desire for an explicit constitutional guarantee against reexamination of jury findings was explained by Justice Story, sitting as Circuit Justice in 1812, as having been specifically prompted by Article III's conferral of "appellate Jurisdiction, both as to Law and Fact" upon the Supreme Court. "[O]ne of the most powerful objections urged against [the Constitution]," he recounted, was that this au-

thority "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." *United States* v. *Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass.).[1]

The second clause of the Amendment responded to that concern by providing that "[i]n [s]uits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amdt. 7. The Reexamination Clause put to rest "apprehensions" of "new trials by the appellate courts," *Wonson*, 28 F. Cas., at 750, by adopting, in broad fashion, "the rules of the common law" to govern federal-court interference with jury determinations.[2] The

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[1] This objection was repeatedly made following the Constitutional Convention, see, *e. g.*, Martin, Genuine Information, in 3 Records of the Federal Convention of 1787, pp. 172, 221–222 (M. Farrand ed. 1911); Gerry, Reply to a Landholder, *id.*, at 298, 299, and at the ratifying conventions in the States, see, *e. g.*, 3 J. Elliot, Debates on the Federal Constitution 525, 540–541, 544–546 (1863) (Virginia Convention, statements of Mr. Mason and Mr. Henry); 4 *id.*, at 151, 154 (North Carolina Convention, statements of Mr. Bloodworth and Mr. Spencer).

Prior to adoption of the Amendment, these concerns were addressed by Congress in the Judiciary Act of 1789, 1 Stat. 73, which expressly directed, in providing for "reexamin[ation]" of civil judgments "upon a writ of error," that "there shall be no reversal in either [the Circuit or Supreme Court] . . . for any error of fact." §22, 1 Stat. 84–85. That restriction remained in place until the 1948 revisions of the Judicial Code. See 62 Stat. 963, 28 U. S. C. §2105 (1946 ed., Supp. II).

[2] The Amendment was relied upon at least twice to prevent actual new trials. In *Wonson* itself, Justice Story rejected the United States' claim of right to retry, on appeal, a matter unsuccessfully put before a jury in the District Court—notwithstanding acceptance of such a practice under local law. The court based its ruling on statutory grounds, but its interpretation of its statutory jurisdiction was dictated by its view that a contrary interpretation would contravene the Seventh Amendment. 28 F. Cas., at 750. And in *Justices* v. *Murray*, 9 Wall. 274, 281 (1870), this Court relied on *Wonson* in invalidating under the Seventh Amendment a federal habeas statute that provided for removal of certain judgments from state courts for purposes of retrial in federal court.

content of that law was familiar and fixed. See, *e. g.*, *ibid.* ("[T]he common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence"); *Dimick* v. *Schiedt*, 293 U. S. 474, 487 (1935) (Seventh Amendment "in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791"). It quite plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence.

At common law, review of judgments was had only on writ of error, limited to questions of law. See, *e. g.*, *Wonson*, *supra*, at 748; 3 W. Blackstone, Commentaries on the Laws of England 405 (1768) ("The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it"); 1 W. Holdsworth, History of English Law 213–214 (7th ed. 1956); cf. *Ross* v. *Rittenhouse*, 2 Dall. 160, 163 (Pa. 1792) (McKean, C. J.). That principle was expressly acknowledged by this Court as governing federal practice in *Parsons* v. *Bedford*, 3 Pet. 433 (1830) (Story, J.). There, the Court held that no error could be assigned to a district court's refusal to allow transcription of witness testimony "to serve as a statement of facts in case of appeal," notwithstanding the right to such transcription under state practices made applicable to federal courts by Congress. *Id.*, at 443 (emphasis deleted). This was so, the Court explained, because "[t]he whole object" of the transcription was "to present the evidence here in order to establish the error of the verdict in matters of fact," *id.*, at 445—a mode of review simply unavailable on writ of error, see *id.*, at 446, 448. The Court concluded that Congress had not directed federal courts to follow state practices that would change "the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial," *id.*, at 449, because it had "the most serious doubts whether

[that] would not be unconstitutional" under the Seventh Amendment, *id.*, at 448.

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.
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> . . . . .
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> "[I]f the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial . . . ." *Id.*, at 447–449.

Nor was the common-law proscription on reexamination limited to review of the correctness of the jury's determination of liability on the facts. No less than the existence of liability, the proper measure of damages "involves only a question of fact," *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648, 661 (1915), as does a "motio[n] for a new trial based on the ground that the damages . . . are excessive," *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558, 574 (1887). As appeals from denial of such motions necessarily pose a factual question, courts of the United States are constitutionally forbidden to entertain them.

> "No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its gen-

> eral power to set aside the verdict. . . . Whether [the refusal to exercise that power] was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons* v. *Bedford*, [*supra*] . . . ." *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31–32 (1879).

This view was for long years not only unquestioned in our cases, but repeatedly affirmed.[3]

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[3] See, *e. g.*, *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial based upon that ground was erroneous or not, our power is restricted to the determination of questions of law arising upon the record. *Railroad Company* v. *Fraloff*, 100 U. S. 24 [(1879)]"); *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U. S. 69, 75 (1889) ("[H]owever it was ascertained by the court that the verdict was too large . . . , the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court") (citing *Parsons* v. *Bedford*, 3 Pet. 433 (1830); *Railroad Co.* v. *Fraloff*, 100 U. S. 24 (1879)); *Lincoln* v. *Power*, 151 U. S. 436, 437–438 (1894) ("[I]t is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of [a claim of excessive damages] where the complaint is only of the action of the jury. . . . [W]here there is no reason to complain of the instructions, an error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial") (citing *Parsons*, *supra; Fraloff*, *supra*); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 242–246 (1897); *Southern Railway-Carolina Div.* v. *Bennett*, 233 U. S. 80, 87 (1914) ("[A] case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reexamination here upon a writ of error") (citing *Lincoln*, *supra*); *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481–482 (1933) ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages

B

Respondent's principal response to these cases, which is endorsed by JUSTICE STEVENS, see *ante*, at 443–445, is that our forebears were simply wrong about the English common law. The rules of the common-law practice incorporated in the Seventh Amendment, it is claimed, did *not* prevent judges sitting in an appellate capacity from granting a new trial on the ground that an award was contrary to the weight of the evidence. This claim simply does not withstand examination of the actual practices of the courts at common law. The weight of the historical record strongly supports the view of the common law taken in our early cases.

At common law, all major civil actions were initiated before panels of judges sitting at the courts of Westminster. Trial was not always held at the bar of the court, however. The inconvenience of having jurors and witnesses travel to Westminster had given rise to the practice of allowing trials to be held in the countryside, before a single itinerant judge. This *nisi prius* trial, as it was called, was limited to the jury's deciding a matter of fact in dispute; once that was accomplished, the verdict was entered on the record which—along with any exceptions to the instructions or rulings of the *nisi prius* judge—was then returned to the en banc court at Westminster. See generally 1 Holdsworth, History of English Law, at 223–224, 278–282; G. Radcliffe & G. Cross, The English Legal System 90–91, 183–186 (3d ed. 1954). Requests for new trials were made not to the *nisi prius* judge, but to the en banc court, prior to further proceedings and entry of judgment. See 1 Holdsworth, *supra*, at 282; Riddell, New Trial at the Common Law, 26 Yale L. J. 49, 53, 57 (1916). Such motions were altogether separate from appeal on writ of error, which followed the entry of judg-

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awarded by the jury were excessive or were inadequate" (footnotes omitted)).

ment. 1 Holdsworth, *supra,* at 213–214; Radcliffe & Cross, *supra,* at 210–212.[4]

Nonetheless, respondent argues, the role of the en banc court at Westminster was essentially that of an appellate body, reviewing the proceedings below; and those appellate judges *were* capable of examining the evidence, and of granting a new trial when, in their view, the verdict was contrary to the weight of the evidence. See Blume, Review of Facts in Jury Cases—The Seventh Amendment, 20 J. Am. Jud. Soc. 130, 131 (1936); Riddell, *supra,* at 55–57, 60. There are two difficulties with this argument. The first is the characterization of the court at Westminster as an appellate body. The court's role with respect to the initiation of the action, the entertaining of motions for new trial, and the entry of judgment was the same in all cases—whether the cause was tried at the bar or at *nisi prius.* To regard its actions in deciding a motion for a new trial as "appellate" in the latter instance supposes a functional distinction where none existed. The second difficulty is that when the trial had been held at *nisi prius,* the judges of the en banc court apparently would order a new trial only if the *nisi prius* judge certified that he was dissatisfied with the verdict. To be sure, there are many cases where no mention is made of the judge's certificate, but there are many indications that it was a required predicate to setting aside a verdict rendered at *nisi prius,* and respondent has been unable to identify a single case where a new trial was granted in the absence of such certification. In short, it would seem that a new trial could not

[4] The grounds for granting a new trial were "want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict." 3 W. Blackstone, Commentaries on the Laws of England 387 (1768) (footnotes omitted; emphases deleted).

be had except upon the approval of the judge who presided over the trial and heard the evidence.[5]

I am persuaded that our prior cases were correct that, at common law, "reexamination" of the facts found by a jury could be undertaken only by the trial court, and that appellate review was restricted to writ of error which could challenge the judgment only upon matters of law. Even if there were some doubt on the point, we should be hesitant to advance our view of the common law over that of our forbears, who were far better acquainted with the subject than we are. But in any event, the question of how to apply the "rules of the common law" to federal appellate consideration of mo-

[5] See *ibid.* (new trial would be granted "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith"). See, *e. g.*, *Berks* v. *Mason*, Say. 264, 265, 96 Eng. Rep. 874, 874–875 (K. B. 1756); *Bright* v. *Eynon*, 1 Burr. 390, 97 Eng. Rep. 365 (K. B. 1757); see also Note, Limitations on Trial by Jury in Illinois, 19 Chi.-Kent L. Rev. 91, 92 (1940) ("An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict").

JUSTICE STEVENS understands Blackstone to say that new trials were granted for *excessiveness* even where the *nisi prius* judge was not dissatisfied with the damages awarded, see *ante*, at 444–445. Blackstone's phrasing certainly allows for this reading, see n. 4, *supra*, but what indications we have suggest that the dissatisfaction of the presiding judge played the same role where the motion for new trial was based on a claim of excessive damages as where based on a claim of an erroneous verdict. See, *e. g.*, *Boulsworth* v. *Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K. B. 1685); *Redshaw* v. *Brook*, 2 Wils. K. B. 405, 95 Eng. Rep. 887 (C. P. 1769); *Sharpe* v. *Brice*, 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774). The cases cited by JUSTICE STEVENS, *ante*, at 444–445, n. 5, are not at all to the contrary: In one, the case was tried at the bar of the court, so that there was no *nisi prius* judge, see *Wood* v. *Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655); in the other, the judge who had presided at trial was on the panel that ruled on the new trial motion, and recommended a new trial, see *Bright* v. *Eynon*, *supra*, at 390–391, 396–397, 97 Eng. Rep., at 365, 368.

tions for new trials is one that has already been clearly and categorically answered, by our precedents. As we said in *Dimick* v. *Schiedt*, 293 U. S. 474 (1935), in discussing the status of remittitur under "the rules of the common law," a doctrine that "has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time" and "finds some support in the practice of the English courts prior to the adoption of the Constitution" will not lightly "be reconsidered or disturbed," *id.*, at 484–485. The time to question whether orders on motions for a new trial were in fact reviewable at common law has long since passed. Cases of this Court reaching back into the early 19th century establish that the Constitution forbids federal appellate courts to "reexamine" a fact found by the jury at trial; and that this prohibition encompasses review of a district court's refusal to set aside a verdict as contrary to the weight of the evidence.

C

The Court, as is its wont of late, all but ignores the relevant history. It acknowledges that federal appellate review of district-court refusals to set aside jury awards as against the weight of the evidence was "once deemed inconsonant with the Seventh Amendment's Reexamination Clause," *ante*, at 434, but gives no indication of why ever we held that view; and its citation of only one of our cases subscribing to that proposition fails to convey how long and how clearly it was a fixture of federal practice, see *ibid.* (citing only *Lincoln* v. *Power*, 151 U. S. 436 (1894)). That our earlier cases are so poorly recounted is not surprising, however, given the scant analysis devoted to the conclusion that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment," *ante*, at 435.

No precedent of this Court affirmatively supports that proposition. The cases upon which the Court relies neither

affirmed nor rejected the practice of appellate weight-of-the-evidence review that has been adopted by the courts of appeals—a development that, in light of our past cases, amounts to studied waywardness by the intermediate appellate bench. Our unaccountable reluctance, in *Grunenthal* v. *Long Island R. Co.*, 393 U. S. 156, 158 (1968), and *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955), to stand by our precedents, and the undeniable illogic of our disposition of those two cases—approving ourselves a district-court denial of a new trial motion, so as not to have to confront the lawfulness of reversal by the court of appeals—is authority of only the weakest and most negative sort. Nor can any weight be assigned to our statement in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 279 (1989), seemingly approving appellate abuse-of-discretion review of denials of new trials where punitive damages are claimed to be excessive. *Browning-Ferris*, like *Grunenthal* and *Neese*, explicitly avoided the question that is before us today, see 492 U. S., at 279, n. 25. Even more significantly, *Browning-Ferris* involved review of a jury's *punitive* damages award. Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, see, *e. g.*, *Craft*, 237 U. S., at 661, the level of punitive damages is not really a "fact" "tried" by the jury. In none of our cases holding that the Reexamination Clause prevents federal appellate review of claims of excessive damages does it appear that the damages had a truly "punitive" component.

In any event, it is not *this* Court's statements that the Court puts forward as the basis for dispensing with our prior cases. Rather, it is the Courts of Appeals' unanimous "agree[ment]" that they may review trial-court refusals to set aside jury awards claimed to be against the weight of the evidence. *Ante*, at 435. This current unanimity is deemed controlling, notwithstanding the "relatively late" origin of the practice, *ante*, at 434, and without *any* inquiry into the

reasoning set forth in those Court of Appeals decisions.[6] The Court contents itself with citations of two federal appellate cases and the assurances of two leading treatises that the view (however meager its intellectual provenance might be) is universally held. See *ante*, at 435–436. To its credit, one of those treatises describes the "dramatic change in doctrine" represented by appellate abuse-of-discretion review of denials of new trial orders generally as having been "accomplished by a blizzard of dicta" that, through repetition alone, has "given legitimacy to a doctrine of doubtful constitutionality." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2819, pp. 200, 204 (2d ed. 1995).[7]

The Court's only suggestion as to what rationale might underlie approval of abuse-of-discretion review is to be found in a quotation from *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797 (CA2 1961), to the effect that review of denial of a new trial motion, if conducted under a sufficiently deferential standard, poses only "'a question of law.'" *Ante*, at 435 (quoting *Dagnello*, *supra*, at 806). But that is not the test that the Seventh Amendment sets forth. Whether or not it

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[6] The Second Circuit, notwithstanding its practice with respect to excessiveness claims, will not review a district court's determination that the jury's liability ruling was supported by the weight of the evidence, see *Stonewall Ins. Co.* v. *Asbestos Claims Management*, 73 F. 3d 1178, 1199 (1995) (such a decision is "one of those few rulings that is simply unavailable for appellate review"), and the Eighth Circuit has questioned whether the Seventh Amendment permits appellate review of such determinations, see *Thongvanh* v. *Thalacker*, 17 F. 3d 256, 259–260 (1994); see also *White* v. *Pence*, 961 F. 2d 776, 782 (1992).

[7] I am at a loss to understand the Court's charge that keeping faith with our precedents—and requiring that the courts of appeals do likewise—would "'destroy the uniformity of federal practice,'" *ante*, at 436, n. 19. I had thought our decisions established uniformity. And as for commentators' observations that it would be "'astonishing'" for us actually to heed our precedents, see *ibid.*, quoting 11 Wright, Miller, & Kane, § 2820, at 212, they are no more than a prediction of inconstancy—which the Court today fulfills.

is possible to characterize an appeal of a denial of new trial as raising a "legal question," it is not possible to review such a claim without engaging in a "reexamin[ation]" of the "facts tried by the jury" in a manner "otherwise" than allowed at common law. Determining whether a particular award is excessive requires that one first determine the nature and extent of the harm—which undeniably requires reviewing the facts of the case. That the court's review also entails application of a legal standard (whether "shocks the conscience," "deviates materially," or some other) makes no difference, for what is necessarily *also* required is *reexamination of facts* found by the jury.

In the last analysis, the Court frankly abandons any pretense at faithfulness to the common law, suggesting that "the meaning" of the Reexamination Clause was not "fixed at 1791," *ante*, at 436, n. 20, contrary to the view that all our prior discussions of the Reexamination Clause have adopted, see *supra*, at 451–454. The Court believes we can ignore the very explicit command that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" because, after all, we have not insisted that juries be all male, or consist of 12 jurors, as they were at common law. *Ante*, at 436, n. 20. This is a desperate analogy, since there is of course no comparison between the specificity of the command of the Reexamination Clause and the specificity of the command that there be a "jury." The footnote abandonment of our traditional view of the Reexamination Clause is a major step indeed.[8]

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[8] *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931), is the only case cited in the Court's footnote that arguably involved the slightest departure from common-law practices regarding review of jury findings. It held, to be sure, that a new trial could be ordered on damages alone, even though at common law there was no practice of setting a verdict aside in part. But it did so only after satisfying itself that the change

II

The Court's holding that federal courts of appeals may review district-court denials of motions for new trials for error of fact is not the only novel aspect of today's decision. The Court also directs that the case be remanded to the District Court, so that it may "test the jury's verdict against CPLR § 5501(c)'s 'deviates materially' standard." *Ante*, at 439. This disposition contradicts the principle that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." *Donovan* v. *Penn Shipping Co.*, 429 U. S. 648, 649 (1977) *(per curiam)*.

The Court acknowledges that state procedural rules cannot, as a general matter, be permitted to interfere with the allocation of functions in the federal court system, see *ante*, at 436–437. Indeed, it is at least partly for this reason that the Court rejects direct application of § 5501(c) at the appellate level as inconsistent with an "'essential characteristic'" of the federal court system—by which the Court presumably means abuse-of-discretion review of denials of motions for new trials. See *ante*, at 431, 437–438. But the scope of the Court's concern is oddly circumscribed. The "essential characteristic" of the federal jury, and, more specifically, the role of the federal trial court in reviewing jury judgments, apparently counts for little. The Court approves the "ac-

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was one of "form" rather than "substance," quoting Lord Mansfield to the effect that "'for form's sake, we must set aside the whole verdict.'" *Id.*, at 498 (quoting *Edie* v. *East India Co.*, 1 Black W. 295, 298, 96 Eng. Rep. 166, 167 (K. B. 1761)). It can hardly be maintained that whether or not a jury's damages award may be set aside on appeal is a matter of form. The footnote also cites 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522 (2d ed. 1995), for its discussion of Federal Rule of Civil Procedure 50(b), which permits post-trial motion for judgment as a matter of law. The Court neglects to mention that that discussion states: "The Supreme Court held that reservation of the decision in this fashion had been recognized at common law . . . ." *Id.*, § 2522, at 245.

commodat[ion]" achieved by having district courts review jury verdicts under the "deviates materially" standard, because it regards that as a means of giving effect to the State's purposes "without disrupting the federal system," *ante*, at 437. But changing the standard by which trial judges review jury verdicts *does* disrupt the federal system, and is plainly inconsistent with the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court." *Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 538 (1958).[9] The Court's opinion does not even acknowledge, let alone address, this dislocation.

We discussed precisely the point at issue here in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), and gave an answer altogether contrary to the one provided today. *Browning-Ferris* rejected a request to fashion a federal common-law rule limiting the size of punitive damages awards in federal courts, reaffirming the principle of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages . . . , and the factors the jury may consider in determining their amount, are questions of state law." 492 U. S., at 278. But the opinion expressly stated that "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." *Id.*, at 278–279. "In reviewing an award of punitive damages," it said, "the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." *Id.*, at 279. The same distinction necessarily applies where the

[9] Since I reject application of the New York standard on other grounds, I need not consider whether it constitutes "reexamination" of a jury's verdict in a manner "otherwise . . . than according to the rules of the common law."

judgment under review is for compensatory damages: State substantive law controls what injuries are compensable and in what amount; but federal standards determine whether the award exceeds what is lawful to such degree that it may be set aside by order for new trial or remittitur.[10]

The Court does not disavow those statements in *Browning-Ferris* (indeed, it does not even discuss them), but it presumably overrules them, at least where the state rule that governs "whether a new trial or remittitur should be ordered" is characterized as "substantive" in nature. That, at any rate, is the reason the Court asserts for giving § 5501(c) dispositive effect. The objective of that provision, the Court states, "is manifestly substantive," *ante*, at 429, since it operates to "contro[l] how much a plaintiff can be awarded" by "tightening the range of tolerable awards," *ante*, at 425, 426. Although "less readily classified" as substantive than "a statutory cap on damages," it nonetheless "was designed to provide an analogous control," *ante*, at 428, 429, by making a new trial mandatory when the award "deviat[es] materially" from what is reasonable, see *ante*, at 428–429.

I do not see how this can be so. It seems to me quite wrong to regard this provision as a "substantive" rule for *Erie* purposes. The "analog[y]" to "a statutory cap on damages," *ante*, at 428, 429, fails utterly. There is an absolutely fundamental distinction between a *rule of law* such as that, which would ordinarily be imposed upon the jury in the trial court's instructions, and a *rule of review*, which simply determines how closely the jury verdict will be scrutinized for

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[10] JUSTICE STEVENS thinks that if an award "'exceeds what is lawful,'" the result is "legal error" that "may be corrected" by the appellate court. *Ante*, at 443, n. 2. But the sort of "legal error" involved here is the imposition of legal consequences (in this case, damages) in light of *facts* that, under the law, may not warrant them. To suggest that every fact may be reviewed, because what may ensue from an erroneous factual determination is a "legal error," is to destroy the notion that there is a factfinding function reserved to the jury.

compliance with the instructions. A tighter standard for reviewing jury determinations can no more plausibly be called a "substantive" disposition than can a tighter appellate standard for reviewing trial-court determinations. The one, like the other, provides additional assurance *that the law has been complied with;* but the other, like the one, *leaves the law unchanged.*

The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive, see *ante*, at 428–431. That is not the only factor to be considered. See *Byrd*, *supra*, at 537 ("[W]ere 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice. But there are affirmative countervailing considerations at work here"). Outcome determination "was never intended to serve as a talisman," *Hanna* v. *Plumer*, 380 U. S. 460, 466–467 (1965), and does not have the power to convert the most classic elements of the *process* of assuring that the law is observed into the substantive law itself. The right to have a jury make the findings of fact, for example, is generally thought to favor plaintiffs, and that advantage is often thought significant enough to be the basis for forum selection. But no one would argue that *Erie* confers a right to a jury in federal court wherever state courts would provide it; or that, were it not for the Seventh Amendment, *Erie* would require federal courts to dispense with the jury whenever state courts do so.

In any event, the Court exaggerates the difference that the state standard will make. It concludes that different outcomes are likely to ensue depending on whether the law being applied is the state "deviates materially" standard of § 5501(c) or the "shocks the conscience" standard. See *ante*, at 429–430. Of course it is not the federal *appellate* standard but the federal *district-court* standard for granting new trials that must be compared with the New York standard to determine whether substantially different results will obtain—and it is far from clear that the district-court standard

ought to be "shocks the conscience."[11] Indeed, it is not even clear (as the Court asserts) that "shocks the conscience" *is* the standard (erroneous or not) actually applied by the district courts of the Second Circuit. The Second Circuit's test for reversing a grant of a new trial for an excessive verdict is whether the award was "*clearly* within the maximum limit of a reasonable range," *Ismail* v. *Cohen*, 899 F. 2d 183, 186 (CA2 1990) (internal quotation marks omitted), so any district court that uses that standard will be affirmed. And while many district-court decisions express the "shocks the conscience" criterion, see, *e. g.*, *Koerner* v. *Club Mediterranee, S. A.*, 833 F. Supp. 327, 333 (SDNY 1993), some have used a standard of "indisputably egregious," *Banff* v. *Express, Inc.*, 921 F. Supp. 1065, 1069 (SDNY 1995), or have adopted the inverse of the Second Circuit's test for reversing a grant of new trial, namely, "*clearly* outside the maximum limit of a reasonable range," *Paper Corp.* v. *Schoeller Technical Papers, Inc.*, 807 F. Supp. 337, 350–351 (SDNY 1992). Moreover, some decisions that *say* "shocks the conscience" in fact apply a rule much less stringent. One case, for example, says that *any* award that would not be sustained under the New York "deviates materially" rule "shocks the conscience." See *In re Joint Eastern & S. Dist. Asbestos Litigation*, 798 F. Supp. 925, 937 (E&SDNY 1992), rev'd on other grounds, 995 F. 2d 343, 346 (CA2 1993). In sum, it is at least highly questionable whether the consistent outcome differential claimed by the Court even exists. What seems to me far more likely to produce forum shopping is the consistent difference between the state and federal *appellate* standards, which the Court leaves untouched. Under the Court's

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[11] That the "shocks the conscience" standard was not the traditional one would seem clear from the opinion of Justice Story, quoted approvingly by the Court, *ante*, at 433, to the effect that remittitur should be granted "if it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury." *Blunt* v. *Little*, 3 F. Cas. 760, 761–762 (No. 1,578) (CC Mass. 1822).

disposition, the Second Circuit reviews only for abuse of discretion, whereas New York's appellate courts engage in a *de novo* review for material deviation, giving the defendant a double shot at getting the damages award set aside. The only result that would produce the conformity the Court erroneously believes *Erie* requires is the one adopted by the Second Circuit and rejected by the Court: *de novo* federal appellate review under the § 5501(c) standard.

To say that application of § 5501(c) in place of the federal standard will not consistently produce disparate results is not to suggest that the decision the Court has made today is not a momentous one. The *principle* that the state standard governs is of great importance, since it bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system. Under the Court's view, a state rule that directed courts "to determine that an award is excessive or inadequate if it deviates *in any degree* from *the proper measure of compensation*" would have to be applied in federal courts, effectively requiring federal judges to determine the amount of damages *de novo*, and effectively taking the matter away from the jury entirely. Cf. *Byrd*, 356 U. S., at 537–538. Or consider a state rule that allowed the defendant a second trial on damages, with judgment ultimately in the amount of the lesser of two jury awards. Cf. *United States* v. *Wonson*, 28 F. Cas., at 747–748 (describing Massachusetts practice by which a second jury trial could be had on appeal). Under the reasoning of the Court's opinion, even such a rule as that would have to be applied in the federal courts.

The foregoing describes why I think the Court's *Erie* analysis is flawed. But in my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure, which provides that "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in

actions at law *in the courts of the United States.*" (Emphasis added.) That is undeniably a federal standard.[12] Federal District Courts in the Second Circuit have interpreted that standard to permit the granting of new trials where "'it is quite clear that the jury has reached a seriously erroneous result'" and letting the verdict stand would result in a "'miscarriage of justice.'" *Koerner* v. *Club Mediterranee, S. A.*, *supra*, at 331 (quoting *Bevevino* v. *Saydjari*, 574 F. 2d 676, 684 (CA2 1978)). Assuming (as we have no reason to question) that this is a correct interpretation of what Rule 59 requires, it is undeniable that the Federal Rule is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987). It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," *Hanna*, 380 U. S., at 472.

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There is no small irony in the Court's declaration today that appellate review of refusals to grant new trials for error of fact is "a control necessary and proper to the fair adminis-

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[12] I agree with the Court's entire progression of reasoning in its footnote 22, *ante*, at 437, leading to the conclusion that *state* law must determine "[w]hether damages are excessive." But the question whether damages are excessive is quite separate from the question of when a jury award may be set aside for excessiveness. See *supra*, at 465. It is the latter that is governed by Rule 59; as *Browning-Ferris* said, district courts are "to determine, by reference to *federal standards developed under Rule 59*, whether a new trial or remittitur should be ordered," 492 U. S., at 279 (emphasis added).

tration of justice," *ante,* at 435. It is objection to *precisely* that sort of "control" by federal appellate judges that gave birth to the Reexamination Clause of the Seventh Amendment. Alas, those who drew the Amendment, and the citizens who approved it, did not envision an age in which the Constitution means whatever this Court thinks it ought to mean—or indeed, whatever the courts of appeals have recently thought it ought to mean.

When there is added to the revision of the Seventh Amendment the Court's precedent-setting disregard of Congress's instructions in Rule 59, one must conclude that this is a bad day for the Constitution's distinctive Article III courts in general, and for the role of the jury in those courts in particular. I respectfully dissent.

Syllabus

MEDTRONIC, INC. *v.* LOHR ET VIR

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

No. 95–754. Argued April 23, 1996—Decided June 26, 1996*

Enacted "to provide for the safety and effectiveness of medical devices intended for human use," the Medical Device Amendments of 1976 (MDA or Act) classifies such devices based on the risk that they pose to the public. Class III devices pose the greatest risk and, thus, are subject to a rigorous premarket approval (PMA) process. However, most Class III devices on the market have not been through the PMA process due to two statutory exceptions. Realizing that existing devices could not be withdrawn from the market while the Food and Drug Administration (FDA) completed PMA analyses, Congress included a provision allowing pre-1976 devices to remain on the market without FDA approval until the requisite PMA is completed. The Act also permits devices that are "substantially equivalent" to pre-existing devices to avoid the PMA process until the FDA initiates the process for the underlying device. The FDA uses a "premarket notification" submitted by all manufacturers (§ 510(k) process) to determine substantial equivalence for Class III devices. Petitioner Medtronic, Inc.'s pacemaker is a Class III device found substantially equivalent under the § 510(k) process. Cross-petitioners, Lora Lohr and her spouse, filed a Florida state-court suit alleging both negligence and strict-liability claims in the failure of her Medtronic pacemaker, but Medtronic removed the case to the Federal District Court. That court ultimately dismissed the complaint as having been pre-empted by 21 U. S. C. § 360k(a), which provides that "no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under [the MDA] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [the Act]." The Court of Appeals reversed in part and affirmed in part, concluding that the Lohrs' negligent design claims were not pre-empted, but that their negligent manufacturing and failure to warn claims were.

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*Together with No. 95–886, *Lohr et vir* v. *Medtronic, Inc.*, also on certiorari to the same court.

Syllabus

Held: The judgment is reversed in part and affirmed in part, and the cases are remanded.

56 F. 3d 1335, reversed in part, affirmed in part, and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, V, and VII, concluding that the MDA does not pre-empt the Lohrs' common-law claims. Pp. 484–486; 492–502; 503.

(a) While the Court need not go beyond § 360k(a)'s pre-emptive language to determine whether Congress intended the MDA to pre-empt at least some state law, see *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 517, "the domain expressly pre-empted" by that language must be identified, *ibid.* Interpretation of the text is informed by the assumptions that the States' historic police powers cannot be superseded by a Federal Act unless that is Congress' clear and manifest purpose, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230, and that any understanding of a pre-emption statute's scope rests primarily on "a fair understanding of *congressional purpose*," *Cipollone*, 505 U. S., at 530, n. 27. Pp. 484–486.

(b) The Lohrs' negligent design claims are not pre-empted. The FDA's "substantially equivalent" determination as well as its continuing authority to exclude a device from the market do not amount to a specific, federally enforceable design requirement that would be affected by state-law pressures such as those imposed here. Since the § 510(k) process is focused on *equivalence*, not safety, substantial equivalence determinations provide little protection to the public. Neither the statutory scheme nor legislative history suggests that the § 510(k) process was intended to do anything other than maintain the status quo, which included the possibility that a device's manufacturer would have to defend itself against state-law negligent design claims. Pp. 492–494.

(c) Section 360k(a) does not pre-empt state rules that merely duplicate the FDA's rules regulating manufacturing practices and labeling. That the state requirements may be narrower than the federal rules does not make them "different" under § 360k. Nor does the presence of a damages remedy amount to an additional or different "requirement"; it merely provides another reason for manufacturers to comply with identical existing federal law "requirements." This view is supported by the regulations of the FDA, to which Congress has delegated authority to implement the MDA. Pp. 494–497.

(d) The Lohrs' manufacturing and labeling claims are not pre-empted. Although the statutory and regulatory language may not preclude "general" federal requirements from ever pre-empting state requirements, or "general" state requirements from ever being pre-empted, it is impossible to ignore its overarching concern that pre-emption occur only

where a particular state requirement threatens to interfere with a specific federal interest. State requirements must be "with respect to" medical devices and "different from, or in addition to," federal requirements. They must also relate "to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device," and the regulations provide that state requirements of general applicability are pre-empted only where they have "the effect of establishing a substantive requirement for a specific device." Federal requirements must be "applicable to the device" in question, and, according to the regulations, pre-empt state law only if they are "specific counterpart regulations" or "specific" to a "particular device." The federal manufacturing and labeling requirements at issue reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation which the statute or regulations were designed to protect from potentially contradictory state requirements. Similarly, Florida's common-law requirements were not specifically developed "with respect to" medical devices and, thus, are not the kinds of requirements that Congress and the FDA feared would impede implementation and enforcement of specific federal requirements. Pp. 497–502.

JUSTICE STEVENS, joined by JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded in Part IV that Medtronic's argument that any common-law cause of action is a "requirement" under § 360k(a) is implausible, for it would grant complete immunity from design defect liability to an entire industry that, in Congress' judgment, needed more stringent regulation. It would take language much plainer than § 360k's text to do that. The word "requirement," which appears to presume that the State is imposing a specific duty upon the manufacturer, would be an odd term to use to indicate the sweeping pre-emption Medtronic urges here. *Cipollone*, 505 U. S., at 521–522, distinguished. The legislation's basic purpose and history entirely support the rejection of such an extreme position. Pp. 486–491.

JUSTICE BREYER concluded that, although the MDA will sometimes pre-empt a state-law tort suit, it does not pre-empt the claims at issue here. First, since the MDA's pre-emption provision is highly ambiguous, Congress must have intended that courts look elsewhere for help as to just which federal requirements pre-empt just which state requirements, as well as just how they might do so. Second, in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721. Third, the FDA's regula-

tions indicate that the FDA does not consider that its requirements pre-empt the state requirements at issue here. Fourth, ordinary principles of "conflict" and "field" pre-emption support the conclusion that plaintiffs' tort claims are not pre-empted. Pp. 503–508.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts IV and VI, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 503. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 509.

Arthur Miller argued the cause for Medtronic, Inc., in both cases. With him on the briefs were *Daniel G. Jarcho*, *Donald R. Stone*, *Kenneth S. Geller*, *Roy T. Englert, Jr.*, *Alan E. Untereiner*, *Dennis P. Waggoner*, *Ronald E. Lund*, *John W. Borg*, and *Sue R. Halverson*.

Brian Wolfman argued the cause for Lohr et vir in both cases. With him on the brief were *Allison M. Zieve*, *Alan B. Morrison*, *Laurence H. Tribe*, *Robert L. Cowles*, and *Robert F. Spohrer*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Days*, *Deputy Assistant Attorney General Preston*, *Richard H. Seamon*, and *Douglas N. Letter*.†

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†Briefs of *amici curiae* were filed for the State of California by *Daniel E. Lungren*, Attorney General, *Roderick E. Walston*, Chief Assistant Attorney General, *Theodora Berger*, Assistant Attorney General, and *Susan S. Fiering*, Deputy Attorney General; for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, and *Louis F. Hubener* and *Charley McCoy*, Assistant Attorneys General, joined by the Attorneys General for their respective jurisdictions as follows: *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Pamela Carter* of Indiana, *A. B. Chandler III* of Kentucky, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael*

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V, and VII, and an opinion with respect to Parts IV and VI, in which JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join.

Congress enacted the Medical Device Amendments of 1976, in the words of the statute's preamble, "to provide for the safety and effectiveness of medical devices intended for human use." 90 Stat. 539. The question presented is whether that statute pre-empts a state common-law negligence action against the manufacturer of an allegedly defective medical device. Specifically, we must consider whether Lora Lohr, who was injured when her pacemaker failed, may rely on Florida common law to recover damages from Medtronic, Inc., the manufacturer of the device.

F. Easley of North Carolina, *Heidi Heitkamp* of North Dakota, *Theodore R. Kulongoski* of Oregon, *Mark Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Association of Retired Persons et al. by *David Halperin;* for the American Insurance Association et al. by *Victor E. Schwartz, Joseph N. Onek, Robert P. Charrow, Mark A. Behrens,* and *Jan S. Amundson;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Pamela A. Liapakis;* for the Center for Patient Advocacy et al. by *John G. Roberts, Jr.;* for Collagen Corp. by *Joe W. Redden, Jr., Keith A. Jones,* and *Frederick D. Baker;* for General Motors Corp. by *Kenneth W. Starr, Richard A. Cordray, Paul T. Cappuccio, David M. Heilbron, Leslie G. Landau,* and *James A. Durkin;* for the Health Industry Manufacturers Association et al. by *Bruce N. Kuhlik, Paul J. Maloney,* and *William J. Carter;* for the Medical Device Manufacturers Association by *Stephen S. Phillips* and *James M. Beck;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *Lee Fennell;* for the Plaintiffs' Legal Committee in MDL Docket No. 1014 by *Stanley M. Chesley, John J. Cummings III, Calvin Fayard, Jr., Wendell Gauthier, Darryl J. Tschirn,* and *Michael D. Fishbein;* for the Product Liability Advisory Council, Inc., by *Robert N. Weiner* and *Hugh F. Young, Jr.;* for Trial Lawyers for Public Justice, P. C., by *Jonathan S. Massey* and *Arthur H. Bryant;* for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp;* and for Two Products Liability Law Professors by *Richard N. Pearson, pro se.*

I

Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, . . . matter[s] of local concern," *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985), the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 756 (1985) (internal quotation marks omitted).

Despite the prominence of the States in matters of public health and safety, in recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people. Congress' first significant enactment in the field of public health was the Food and Drug Act of 1906, a broad prohibition against the manufacture or shipment in interstate commerce of any adulterated or misbranded food or drug. See 34 Stat. 768; Regier, The Struggle for Federal Food and Drugs Legislation, 1 Law & Contemp. Prob. 1 (1933). Partly in response to an ongoing concern about radio and newspaper advertising making false therapeutic claims for both "quack machines" and legitimate devices such as surgical instruments and orthopedic shoes, in 1938 Congress broadened the coverage of the 1906 Act to include misbranded or adulterated medical devices and cosmetics. See Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), §§ 501, 502, 52 Stat. 1049–1051; Cavers, The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions, 6 Law & Contemp. Prob. 2 (1939); H. R. Rep. No. 94–853, p. 6 (1976).

While the FDCA provided for premarket approval of new drugs, Cavers, 6 Law & Contemp. Prob., at 40, it did not authorize any control over the introduction of new medical devices, see S. Rep. No. 93–670, pp. 1–2 (1974); H. R. Rep. No. 94–853, at 6. As technologies advanced and medicine

relied to an increasing degree on a vast array of medical equipment "[f]rom bedpans to brainscans,"[1] including kidney dialysis units, artificial heart valves, and heart pacemakers,[2] policymakers and the public became concerned about the increasingly severe injuries that resulted from the failure of such devices. See generally Finck, The Effectiveness of FDA Medical Device Regulation, 7 U. C. D. L. Rev. 293, 297–301 (1974); H. R. Rep. No. 94–853, at 7.

In 1970, for example, the Dalkon Shield, an intrauterine contraceptive device, was introduced to the American public and throughout the world. Touted as a safe and effective contraceptive, the Dalkon Shield resulted in a disturbingly high percentage of inadvertent pregnancies, serious infections, and even, in a few cases, death. *Id.*, at 8; Regulation of Medical Devices (Intrauterine Contraceptive Devices), Hearings before a Subcommittee of the House Committee on Government Operations, 93d Cong., 1st Sess. (1973). In the early 1970's, several other devices, including catheters, artificial heart valves, defibrillators, and pacemakers (including pacemakers manufactured by petitioner Medtronic), attracted the attention of consumers, the Food and Drug Administration (FDA), and Congress as possible health risks. See Medical Device Amendments, 1973, Hearings before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess., 270–361 (1973).

In response to the mounting consumer and regulatory concern, Congress enacted the statute at issue here: the Medical Device Amendments of 1976 (MDA or Act), 90 Stat. 539. The Act classifies medical devices in three categories based on the risk that they pose to the public. Devices that pre-

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[1] Medical Device Regulation: The FDA's Neglected Child (Committee Print compiled for the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce), Comm. Print 98–F, p. 1 (1983).

[2] S. Rep. No. 94–33, p. 5 (1975).

sent no unreasonable risk of illness or injury are designated Class I and are subject only to minimal regulation by "general controls." 21 U. S. C. § 360c(a)(1)(A). Devices that are potentially more harmful are designated Class II; although they may be marketed without advance approval, manufacturers of such devices must comply with federal performance regulations known as "special controls." § 360c(a)(1)(B). Finally, devices that either "presen[t] a potential unreasonable risk of illness or injury," or which are "purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health," are designated Class III. § 360c(a)(1)(C). Pacemakers are Class III devices. See 21 CFR § 870.3610 (1995).

Before a new Class III device may be introduced to the market, the manufacturer must provide the FDA with a "reasonable assurance" that the device is both safe and effective. See 21 U. S. C. § 360e(d)(2). Despite its relatively innocuous phrasing, the process of establishing this "reasonable assurance," which is known as the "premarket approval," or "PMA" process, is a rigorous one. Manufacturers must submit detailed information regarding the safety and efficacy of their devices, which the FDA then reviews, spending an average of 1,200 hours on each submission. Hearings before the Subcommittee on Health and the Environment of the House Committee on Energy & Commerce, 100th Cong., 1st Sess. (Ser. No. 100–34), p. 384 (1987) (hereinafter 1987 Hearings); see generally Kahan, Premarket Approval Versus Premarket Notification: Different Routes to the Same Market, 39 Food Drug Cosm. L. J. 510, 512–514 (1984).

Not all, nor even most, Class III devices on the market today have received premarket approval because of two important exceptions to the PMA requirement. First, Congress realized that existing medical devices could not be

withdrawn from the market while the FDA completed its PMA analysis for those devices. The statute therefore includes a "grandfathering" provision which allows pre-1976 devices to remain on the market without FDA approval until such time as the FDA initiates and completes the requisite PMA. See 21 U. S. C. § 360e(b)(1)(A); 21 CFR § 814.1(c)(1) (1995).[3] Second, to prevent manufacturers of grandfathered devices from monopolizing the market while new devices clear the PMA hurdle, and to ensure that improvements to existing devices can be rapidly introduced into the market, the Act also permits devices that are "substantially equivalent" to pre-existing devices to avoid the PMA process. See 21 U. S. C. § 360e(b)(1)(B).

Although "substantially equivalent" Class III devices may be marketed without the rigorous PMA review, such new devices, as well as all new Class I and Class II devices, are subject to the requirements of § 360(k). That section imposes a limited form of review on every manufacturer intending to market a new device by requiring it to submit a "premarket notification" to the FDA (the process is also known as a "§ 510(k) process," after the number of the section in the original Act). If the FDA concludes on the basis of the § 510(k) notification that the device is "substantially equivalent" to a pre-existing device, it can be marketed without further regulatory analysis (at least until the FDA initiates the PMA process for the underlying pre-1976 device to which the new device is "substantially equivalent"). The § 510(k) notification process is by no means comparable to the PMA

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[3] The FDA has not yet initiated nor suggested the initiation of a PMA process for pacemakers or most other grandfathered devices. But see 60 Fed. Reg. 41984, 41986 (1995) (pursuant to Safe Medical Devices Act of 1990, 104 Stat. 4511, calling for submission of information by February 1997 which may lead the FDA to reclassify or initiate PMA process at some time in the future for implantable pacemaker pulse generators and lead adapters).

process; in contrast to the 1,200 hours necessary to complete a PMA review, the § 510(k) review is completed in an average of only 20 hours. See 1987 Hearings, at 384. As one commentator noted: "The attraction of substantial equivalence to manufacturers is clear. [Section] 510(k) notification requires little information, rarely elicits a negative response from the FDA, and gets processed very quickly." Adler, The 1976 Medical Device Amendments: A Step in the Right Direction Needs Another Step in the Right Direction, 43 Food Drug Cosm. L. J. 511, 516 (1988); see also Kahan, 39 Food Drug Cosm. L. J., at 514–519.

Congress anticipated that the FDA would complete the PMA process for Class III devices relatively swiftly. But because of the substantial investment of time and energy necessary for the resolution of each PMA application, the ever-increasing numbers of medical devices, and internal administrative and resource difficulties, the FDA simply could not keep up with the rigorous PMA process. As a result, the § 510(k) premarket notification process became the means by which most new medical devices—including Class III devices—were approved for the market. In 1983, for instance, a House Report concluded that nearly 1,000 of approximately 1,100 Class III devices that had been introduced to the market since 1976 were admitted as "substantial equivalents" and without any PMA review. See Medical Device Regulation: The FDA's Neglected Child (Committee Print compiled for the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce), Comm. Print 98–F, p. 34 (1983). This lopsidedness has apparently not evened out; despite an increasing effort by the FDA to consider the safety and efficacy of substantially equivalent devices, the House reported in 1990 that 80% of new Class III devices were being introduced to the market through the § 510(k) process and without PMA review. H. R. Rep. No. 101–808, p. 14 (1990); see also D. Kessler, S. Pape, &

D. Sundwall, The Federal Regulation of Medical Devices, 317 New England J. Med. 357, 359 (1987) (55 § 510(k) notifications are filed for each PMA application; average FDA response to § 510(k) notification is one-fifth the response time to a PMA).[4]

II

As have so many other medical device manufacturers, petitioner Medtronic took advantage of § 510(k)'s expedited process in October 1982, when it notified the FDA that it intended to market its Model 4011 pacemaker lead as a device that was "substantially equivalent" to devices already on the market. (The lead is the portion of a pacemaker that transmits the heartbeat-steadying electrical signal from the "pulse generator" to the heart itself.) On November 30, 1982, the FDA found that the model was "substantially equivalent to devices introduced into interstate commerce" prior to the effective date of the Act, and advised Medtronic that it could therefore market its device subject only to the general control provisions of the Act, which could be found in the Code of Federal Regulations. See Respondent's Memorandum in Support of Motion for Summary Judgment in No. 93–482 (MD Fla., Nov. 1, 1993), Exh. A to Exh. 1 (Declaration of Charles H. Swanson) (hereinafter FDA Substantial Equivalence Letter). The agency emphasized, however, that this determination should not be construed as an endorsement of the pacemaker lead's safety. *Ibid.*

Cross-petitioner Lora Lohr is dependent on pacemaker technology for the proper functioning of her heart. In 1987 she was implanted with a Medtronic pacemaker equipped with one of the company's Model 4011 pacemaker leads. On

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[4] In 1990, Congress enacted amendments to the MDA which were designed to reduce the FDA's reliance on the § 510(k) process while continuing to ensure that particularly risky devices received full PMA review. See Safe Medical Devices Act of 1990.

December 30, 1990, the pacemaker failed, allegedly resulting in a "complete heart block" that required emergency surgery. According to her physician, a defect in the lead was the likely cause of the failure.

In 1993 Lohr and her husband filed this action in a Florida state court. Their complaint contained both a negligence count and a strict-liability count. The negligence count alleged a breach of Medtronic's "duty to use reasonable care in the design, manufacture, assembly, and sale of the subject pacemaker" in several respects, including the use of defective materials in the lead and a failure to warn or properly instruct the plaintiff or her physicians of the tendency of the pacemaker to fail, despite knowledge of other earlier failures. Complaint ¶ 5. The strict-liability count alleged that the device was in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale. *Id.*, ¶ 11. (A third count alleging breach of warranty was dismissed for failure to state a claim under Florida law.)

Medtronic removed the case to Federal District Court, where it filed a motion for summary judgment arguing that both the negligence and strict-liability claims were preempted by 21 U. S. C. § 360k(a). That section, which is at the core of the dispute between the parties in this suit, provides:

> "§ 360k. State and local requirements respecting devices
>
> "(a) General rule
>
> "Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> "(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

> "(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter."[5]

The District Court initially denied Medtronic's motion, finding nothing in the statute to support the company's argument that the MDA entirely exempted from liability a manufacturer who had allegedly violated the FDA's regulations. See App. to Pet. for Cert. 5d. Not long after that decision, however, the United States Court of Appeals for the Eleventh Circuit concluded that § 360k required pre-emption of at least some common-law claims brought against the manu-

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[5] Subsection (b) of the statute authorizes the FDA to grant exemptions to state requirements that would otherwise be pre-empted by subsection (a). Section 360k(b) provides:

"(b) Exempt requirements

"Upon application of a State or a political subdivision thereof, the Secretary may, by regulation promulgated after notice and opportunity for an oral hearing, exempt from subsection (a) of this section, under such conditions as may be prescribed in such regulation, a requirement of such State or political subdivision applicable to a device intended for human use if—

"(1) the requirement is more stringent than a requirement under this chapter which would be applicable to the device if an exemption were not in effect under this subsection; or

"(2) the requirement—

"(A) is required by compelling local conditions, and

"(B) compliance with the requirement would not cause the device to be in violation of any applicable requirement under this chapter."

To carry out this grant of authority, the FDA has issued regulations under the statute which both construe the scope of § 360k(a) and address the instances in which the FDA will grant exemptions to its pre-emptive effect. See 21 CFR § 808.1 (1995); n. 18, *infra*.

We note that although it is the FDA that exercises this authority, the Act gives that authority directly to the Secretary of Health and Human Services, who subsequently delegated her authority to the FDA. See, *e. g.,* 21 U. S. C. § 360k(b) ("the Secretary may" exempt state requirements), § 321(d) ("Secretary" defined as "the Secretary of Health and Human Services"). Under the FDCA, the Secretary is vested with "[t]he authority to promulgate regulations for the efficient enforcement of" the Act. 21 U. S. C. § 371(a).

facturer of a medical device. See *Duncan* v. *Iolab Corp.*, 12 F. 3d 194 (1994). After reconsidering its ruling in light of *Duncan*, the District Court reversed its earlier decision and dismissed the Lohrs' entire complaint.

The Court of Appeals reversed in part and affirmed in part. 56 F. 3d 1335 (CA11 1995). Rejecting the Lohrs' broadest submission, it first decided that "common law actions are state requirements within the meaning of § 360k(a)." *Id.*, at 1342. It next held that pre-emption could not be avoided by merely alleging that the negligence flowed from a violation of federal standards. *Id.*, at 1343. Then, after concluding that the term "requirements" in § 360k(a) was unclear, it sought guidance from FDA's regulations regarding pre-emption. Those regulations provide that a state requirement is not pre-empted unless the FDA has established "'specific requirements applicable to a particular device.'" *Id.*, at 1344 (citing 21 CFR § 808.1(d) (1995)). Under these regulations, the court concluded, it was not necessary that the federal regulation specifically deal with pacemakers, but only that the federal requirement "should, in some way, be 'restricted by nature' to a particular process, procedure, or device and should not be completely open-ended," 56 F. 3d, at 1346 (footnote omitted), and that the specific device at issue should be subject to its requirements.

Under this approach, the court concluded that the Lohrs' negligent design claims were not pre-empted. It rejected Medtronic's argument that the FDA's finding of "substantial equivalence" had any significance with respect to the pacemaker's safety, or that the FDA's continued surveillance of the device constituted a federal "requirement" that its design be maintained. *Id.*, at 1347–1349. On the other hand, it concluded that the negligent manufacturing and failure to warn claims were pre-empted by FDA's general "good manufacturing practices" regulations, which establish general requirements for most steps in every device's manufacture, see *id.*, at 1350; 21 CFR §§ 820.20–820.198 (1995), and by the

FDA labeling regulations, which require devices to bear various warnings, see 56 F. 3d, at 1350–1351; 21 CFR § 801.109 (1995). The court made a parallel disposition of the strict-liability claims, holding that there was no pre-emption insofar as plaintiffs alleged an unreasonably dangerous design, but they could not revive the negligent manufacturing or failure to warn claims under a strict-liability theory. 56 F. 3d, at 1351–1352.

Medtronic filed a petition for certiorari seeking review of the Court of Appeals' decision insofar as it affirmed the District Court and the Lohrs filed a cross-petition seeking review of the judgment insofar as it upheld the pre-emption defense. Because the Courts of Appeals are divided over the extent to which state common-law claims are pre-empted by the MDA,[6] we granted both petitions. 516 U. S. 1087 (1996).

III

As in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992), we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of § 360k(a) means that we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law, see *id.*, at 517, we must nonetheless "identify the domain expressly pre-empted" by that language, *ibid.* Although our analysis of the scope of the pre-emption statute must begin with its text, see *Gade* v. *National Solid Wastes Management Assn.*,

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[6] See, *e. g.*, *English* v. *Mentor Corp.*, 67 F. 3d 477 (CA3 1995) (§ 510(k) process creates pre-emptive "requirements"); *Feldt* v. *Mentor Corp.*, 61 F. 3d 431 (CA5 1995) (§ 510(k) process does not create pre-emptive "requirements"); *Michael* v. *Shiley, Inc.*, 46 F. 3d 1316 (CA3 1995) (claim alleging violation of federal requirement not pre-empted); 56 F. 3d 1335 (CA11 1995) (case below) (claim alleging violation of federal requirement may be pre-empted; § 510(k) process may create pre-emptive requirements; common-law claims covered by § 360k(a)); *Kennedy* v. *Collagen Corp.*, 67 F. 3d 1453 (CA9 1995) (common-law claims not covered at all by § 360k(a)).

505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment), our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption. See *ibid.*

First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*; *Hillsborough Cty.*, 471 U. S., at 715–716; cf. *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 22 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, see *Cipollone*, 505 U. S., at 545–546 (SCALIA, J., concurring in judgment in part and dissenting in part), we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case. See, *e. g.*, *Cipollone*, 505 U. S., at 516; *Gade*, 505 U. S., at 96; *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978). As a result, any understanding of the scope of a pre-emption statute must rest pri-

marily on "a fair understanding of *congressional purpose.*" *Cipollone,* 505 U. S., at 530, n. 27 (opinion of STEVENS, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. *Gade,* 505 U. S., at 111 (KENNEDY, J., concurring in part and concurring in judgment). Also relevant, however, is the "structure and purpose of the statute as a whole," *id.,* at 98 (opinion of O'CONNOR, J.), as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

With these considerations in mind, we turn first to a consideration of petitioner Medtronic's claim that the Court of Appeals should have found the entire action pre-empted and then to the merits of the Lohrs' cross-petition.

IV

In its petition, Medtronic argues that the Court of Appeals erred by concluding that the Lohrs' claims alleging negligent design were not pre-empted by 21 U. S. C. § 360k(a). That section provides that "no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." Medtronic suggests that any common-law cause of action is a "requirement" which alters incentives and imposes duties "different from, or in addition to," the generic federal standards that the FDA has promulgated in response to mandates under the MDA. In essence, the company argues that the plain language of the statute pre-empts any and all common-law claims brought by an injured plaintiff against a manufacturer of medical devices.

Medtronic's argument is not only unpersuasive, it is implausible. Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device. Moreover, because there is no explicit private cause of action against manufacturers contained in the MDA, and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices.[7] Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," 90 Stat. 539 (preamble to Act). It is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984), and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.

Furthermore, if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any "remedy" under state law relating to medical devices. "Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain

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[7] The FDA's authority to require manufacturers to recall, replace, or refund defective devices is of little use to injured plaintiffs, since there is no indication that the right is available to private parties, the remedy would not extend to recovery for compensatory damages, and the authority is rarely invoked, if at all. See Adler, The 1976 Medical Device Amendments: A Step in the Right Direction Needs Another Step in the Right Direction, 43 Food Drug Cosm. L. J. 511, 526–527 (1988).

state "requirements" could also pre-empt common-law damages claims, see *Cipollone*, 505 U. S., at 521–522 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

The pre-emptive statute in *Cipollone*[8] was targeted at a limited set of state requirements—those "based on smoking and health"—and then only at a limited subset of the possible applications of those requirements—those involving the "advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of" the federal statute. See *id.*, at 515. In that context, giving the term "requirement" its widest reasonable meaning did not have nearly the pre-emptive scope nor the effect on potential remedies that Medtronic's broad reading of the term would have in this suit. The Court in *Cipollone* held that the petitioner in that case was able to maintain some common-law actions using theories of the case that did not run afoul of the pre-emption statute. See *id.*, at 524–530. Here, however, Medtronic's sweeping interpretation of the statute would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the

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[8] There were actually two pre-emptive statutes at issue: The first, enacted in 1965, provided that "[n]o statement relating to smoking and health . . . shall be required" on any cigarette package or in any cigarette advertising. See *Cipollone* v. *Liggett Group, Inc.*, 505 U. S., at 514. That provision, the Court concluded, did not pre-empt any of the petitioner's common-law claims. *Id.*, at 518–520. In 1969, Congress superseded the 1965 pre-emption statute with part of the Public Health Cigarette Smoking Act of 1969, which provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.*, at 515. The bulk of *Cipollone*'s analysis involved this later statute; unless otherwise stated, it is this statute to which we refer in subsequent references to the pre-emptive statute in *Cipollone.*

Lohrs' alleged injuries.[9] Given the ambiguities in the statute and the scope of the preclusion that would occur otherwise, we cannot accept Medtronic's argument that by using the term "requirement," Congress clearly signaled its intent to deprive States of any role in protecting consumers from the dangers inherent in many medical devices.

Other differences between this statute and the one in *Cipollone* further convince us that when Congress enacted § 360k, it was primarily concerned with the problem of specific, conflicting state statutes and regulations rather than the general duties enforced by common-law actions. Unlike the statute at issue in *Cipollone*, § 360k refers to "requirements" many times throughout its text. In each instance, the word is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries. For instance, subsections (a)(2) and (b) of the statute[10] also refer to "requirements"—but those "requirements" refer only to statutory and regulatory law that exists pursuant to the MDA itself, suggesting that the pre-empted "requirements" established or continued by States also refer primarily to positive enactments of state law. Moreover, in subsection (b) the FDA is given authority to exclude certain "requirements" from the scope of the pre-emption statute. Of the limited number of "exemptions"

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[9] Unlike § 360k, the pre-emptive effect of the statute in *Cipollone* was not dependent on the issuance of any agency regulations. The territory exclusively occupied by federal law was defined in the text of the statute itself; that text specified the precise warning to smokers that Congress deemed both necessary and sufficient. In the MDA, no such specifics exist until the FDA provides them. See also *infra*, at 495–496 (reliance on the FDA's interpretation of § 360k warranted, *inter alia*, because of the FDA's role in the administration of § 360k). Moreover, the statute in *Cipollone* was clearly intended to have a broader pre-emptive effect than its 1965 predecessor. See 505 U. S., at 515, 520–521.

[10] The text of the statute is quoted *supra*, at 482, and n. 5.

from pre-emption that the FDA has granted, none even remotely resemble common-law claims.[11]

An examination of the basic purpose of the legislation as well as its history entirely supports our rejection of Medtronic's extreme position. The MDA was enacted "to provide for the safety and effectiveness of medical devices intended for human use." 90 Stat. 539. Medtronic asserts that the Act was also intended, however, to "protect innovations in device technology from being 'stifled by unnecessary restrictions,'" Brief for Petitioner in No. 95–754, p. 3 (citing H. R. Rep. No. 94–853, at 12), and that this interest extended to the pre-emption of common-law claims. While the Act certainly reflects some of these concerns,[12] the legislative history indicates that any fears regarding regulatory burdens were related more to the risk of *additional* federal and state regulation rather than the danger of pre-existing duties under common law. See, *e. g.*, 122 Cong. Rec. 5850 (1976) (statement of Rep. Collins) (opposing further "redundant and burdensome Federal requirements"); *id.*, at 5855 (discussing efforts taken in MDA to protect small businesses from the additional requirements of the Act). Indeed, nowhere in the materials relating to the Act's history have we discovered a reference to a fear that product liability actions would hamper the development of medical devices. To the extent that Congress was concerned about protecting the industry, that intent was manifested primarily through fewer substantive requirements under the Act, not the pre-emption provision; furthermore, any such concern was far outweighed by con-

[11] All 22 exemptions at 21 CFR §§ 808.53–808.101 (1995) are exemptions for state statutes and regulations regarding the sale of hearing aids.

[12] Special statutory exemptions, for example, permit the FDA (with various oversight provisions) to allow investigative, experimental devices to be used in commerce without either PMA review or "substantial equivalence." See 21 U. S. C. § 360j(g); 21 CFR pt. 813 (1995). Moreover, the very existence of the pre-emption statute demonstrates some concern that competing state requirements may unduly interfere with the market for medical devices.

cerns about the primary issue motivating the MDA's enactment: the safety of those who use medical devices.

The legislative history also confirms our understanding that § 360(k) simply was not intended to pre-empt most, let alone all, general common-law duties enforced by damages actions. There is, to the best of our knowledge, nothing in the hearings, the Committee Reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices. If Congress intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation.[13] Along with the less-than-precise language of § 360k(a), that silence surely indicates that at least some common-law claims against medical device manufacturers may be maintained after the enactment of the MDA.

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[13] Furthermore, if Congress had intended the MDA to work this dramatic change in the availability of state-law remedies, one would expect some reference to that change in the extensive contemporary reviews of the legislation. We have been able to find no such reference. See, *e. g.*, Lesparre, Industry Spokesman Comments on Medical Device Amendments of 1976, 50 Hospitals 99, 103 (Sept. 16, 1976); A. Levine, Device Failure and the Plaintiff's Lawyer, in Proceedings of the Second Annual AAMI/FDA Conference on Medical Device Regulation 54 (1975); Medical Device Amendments of 1975, Hearings before the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, Ser. No. 94–39, 94th Cong., 1st Sess., 271 (1975) (statement of Anita Johnson, Public Citizen's Health Research Group) (arguing that the pre-emption provision should not be included, but making no mention of common law, and specifically discussing only a positive California enactment regarding the safety of intrauterine contraceptive devices); Medical Devices and Equipment Liability Avoidance (Frost & Sullivan pub. June 1977) (comprehensive 2-volume, 600-page review of published medical device product liability cases from 1910 to 1976, suggesting nowhere that MDA had mooted or even altered the longstanding ability of plaintiffs to seek and receive damages awards under state law).

V

Medtronic asserts several specific reasons why, even if § 360k does not pre-empt all common-law claims, it at least pre-empts the Lohrs' claims in this suit. In contrast, the Lohrs argue that their entire complaint should survive a reasonable evaluation of the pre-emptive scope of § 360k(a). First, the Lohrs claim that the Court of Appeals correctly held that their negligent design claims were not pre-empted because the § 510(k) premarket notification process imposes no "requirement" on the design of Medtronic's pacemaker. Second, they suggest that even if the FDA's general rules regulating manufacturing practices and labeling are "requirements" that pre-empt *different* state requirements, § 360k(a) does not pre-empt state rules that merely duplicate some or all of those federal requirements. Finally, they argue that because the State's general rules imposing common-law duties upon Medtronic do not impose a requirement "with respect to a device," they do not conflict with the FDA's general rules relating to manufacturing and labeling and are therefore not pre-empted.

Design Claim

The Court of Appeals concluded that the Lohrs' defective design claims were not pre-empted because the requirements with which the company had to comply were not sufficiently concrete to constitute a pre-empting federal requirement. Medtronic counters by pointing to the FDA's determination that Model 4011 is "substantially equivalent" to an earlier device as well as the agency's continuing authority to exclude the device from the market if its design is changed. These factors, Medtronic argues, amount to a specific, federally enforceable design requirement that cannot be affected by state-law pressures such as those imposed on manufacturers subject to product liability suits.

The company's defense exaggerates the importance of the § 510(k) process and the FDA letter to the company regard-

ing the pacemaker's substantial equivalence to a grandfathered device. As the court below noted, "[t]he 510(k) process is focused on *equivalence*, not safety." 56 F. 3d, at 1348. As a result, "substantial equivalence determinations provide little protection to the public. These determinations simply compare a post-1976 device to a pre-1976 device to ascertain whether the later device is no more dangerous and no less effective than the earlier device. If the earlier device poses a severe risk or is ineffective, then the later device may also be risky or ineffective." Adler, 43 Food Drug Cosm. L. J., at 516. The design of the Model 4011, as with the design of pre-1976 and other "substantially equivalent" devices, has never been formally reviewed under the MDA for safety or efficacy.

The FDA stressed this basic conclusion in its letter to Medtronic finding the 4011 lead "substantially equivalent" to devices already on the market. That letter only required Medtronic to comply with "general standards"—the lowest level of protection "applicable to all medical devices," and including "listing of devices, good manufacturing practices, labeling, and the misbranding and adulteration provisions of the Act." It explicitly warned Medtronic that the letter did "not in any way denote official FDA approval of your device," and that "[a]ny representation that creates an impression of official approval of this device because of compliance with the premarket notification regulations is misleading and constitutes misbranding." FDA Substantial Equivalence Letter.

Thus, even though the FDA may well examine § 510(k) applications for Class III devices (as it examines the entire medical device industry) with a concern for the safety and effectiveness of the device, see Brief for Petitioner in No. 95–754, at 22–26, it did not "require" Medtronics' pacemaker to take any particular form for any particular reason; the agency simply allowed the pacemaker, as a device substantially equivalent to one that existed before 1976, to be

marketed without running the gauntlet of the PMA process. In providing for this exemption to PMA review, Congress intended merely to give manufacturers the freedom to compete, to a limited degree, with and on the same terms as manufacturers of medical devices that existed prior to 1976.[14] There is no suggestion in either the statutory scheme or the legislative history that the § 510(k) exemption process was intended to do anything other than maintain the status quo with respect to the marketing of existing medical devices and their substantial equivalents. That status quo included the possibility that the manufacturer of the device would have to defend itself against state-law claims of negligent design. Given this background behind the "substantial equivalence" exemption, the fact that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case, 505 U. S., at 516 (internal quotation marks and citations omitted), and the presumption against pre-emption, the Court of Appeals properly concluded that the "substantial equivalence" provision did not pre-empt the Lohrs' design claims.

Identity of Requirements Claims

The Lohrs next suggest that even if "requirements" exist with respect to the manufacturing and labeling of the pace-

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[14] As the FDA Commissioner put it in 1982: "[T]he 510(k) provision of the law is a procompetition mechanism that permits firms to make and quickly market me-too versions of pre-1976 devices. The Congress apparently believed that a firm whose device happened to be on the market before enactment of the amendments and was never subject to preclearance by FDA should not enjoy a lengthy monopoly at the expense of other firms and ultimately the consumer." FDA Oversight: Medical Devices, Hearing before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 2d Sess., 9 (1982). See also Kahan, Premarket Approval Versus Premarket Notification: Different Routes to the Same Market, 39 Food Drug Cosm. L. J. 510, 514–515 (1984); D. Kessler, S. Pape, & D. Sundwall, The Federal Regulation of Medical Devices, 317 New England J. Med. 357, 359 (1987).

maker, and even if we can also consider state law to impose a "requirement" under the Act, the state requirement is not pre-empted unless it is "different from, or in addition to," the federal requirement. § 360k(a)(1). Although the precise contours of their theory of recovery have not yet been defined (the pre-emption issue was decided on the basis of the pleadings), it is clear that the Lohrs' allegations may include claims that Medtronic has, to the extent that they exist, violated FDA regulations. At least these claims, they suggest, can be maintained without being pre-empted by § 360k, and we agree.

Nothing in § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements. Even if it may be necessary as a matter of Florida law to prove that those violations were the result of negligent conduct, or that they created an unreasonable hazard for users of the product, such additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement. While such a narrower requirement might be "different from" the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule. The presence of a damages remedy does not amount to the additional or different "requirement" that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing "requirements" under federal law.

The FDA regulations interpreting the scope of § 360k's pre-emptive effect support the Lohrs' view, and our interpretation of the pre-emption statute is substantially informed by those regulations. The different views expressed by the Courts of Appeals regarding the appropriate scope of federal pre-emption under § 360k demonstrate that the language of that section is not entirely clear. In addition, Congress has

given the FDA a unique role in determining the scope of § 360k's pre-emptive effect. Unlike the statute construed in *Cipollone*, for instance, pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the FDA has promulgated a relevant federal "requirement." Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act,[15] the agency is uniquely qualified to determine whether a particular form of 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), and, therefore, whether it should be pre-empted. For example, Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA—an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws. See § 360k(b). FDA regulations implementing that grant of authority establish a process by which States or other individuals may request an advisory opinion from the FDA regarding whether a particular state requirement is pre-empted by the statute. See 21 CFR § 808.5 (1995). The ambiguity in the statute—and the congressional grant of authority to the agency on the matter contained within it—provide a "sound basis," *post*, at 509 (O'Connor, J., concurring in part and dissenting in part), for giving substantial weight to the agency's view of the statute. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); *Hillsborough Cty.*, 471 U. S., at 714 (considering FDA understanding of pre-emptive effect of its regulations "dispositive").

The regulations promulgated by the FDA expressly support the conclusion that § 360k "does not preempt State or local requirements that are equal to, or substantially identi-

[15] See n. 5, *supra;* 21 U. S. C. § 371(a).

cal to, requirements imposed by or under the act." 21 CFR § 808.1(d)(2) (1995); see also § 808.5(b)(1)(i).[16] At this early stage in the litigation, there was no reason for the Court of Appeals to preclude altogether the Lohrs' manufacturing and labeling claims to the extent that they rest on claims that Medtronic negligently failed to comply with duties "equal to, or substantially identical to, requirements imposed" under federal law.

Manufacturing and Labeling Claims

Finally, the Lohrs suggest that with respect to the manufacturing and labeling claims, the Court of Appeals should have rejected Medtronic's pre-emption defense in full. The Court of Appeals believed that these claims would interfere with the consistent application of general federal regulations governing the labeling and manufacture of all medical devices, and therefore concluded that the claims were pre-empted altogether.

The requirements identified by the Court of Appeals include labeling regulations that require manufacturers of every medical device, with a few limited exceptions, to include with the device a label containing "information for use, . . . and any relevant hazards, contraindications, side effects, and precautions." 21 CFR §§ 801.109(b) and (c) (1995). Similarly, manufacturers are required to comply with "Good Manufacturing Practices," or "GMP's," which are set forth in 32 sections and less than 10 pages in the Code of Federal Regulations.[17] In certain circumstances, the Court of Ap-

[16] We also note that the agency permits manufacturers of devices that have received PMA to make certain labeling, quality control, and manufacturing changes which would "enhanc[e] the safety of the device or the safety in the use of the device" without prior FDA approval. See 21 CFR §§ 814.39(d)(1) and (2) (1995).

[17] Some GMP's include the duty to institute a "quality assurance program," § 820.5, to have an "adequate organizational structure," § 820.20, to ensure that personnel in contact with a device are "clean, healthy, and suitably attired" where such matters are relevant to the device's safety,

peals recognized, the FDA will enforce these general requirements against manufacturers that violate them. See 56 F. 3d, at 1350–1351.

While admitting that these requirements exist, the Lohrs suggest that their general nature simply does not pre-empt claims alleging that the manufacturer failed to comply with other duties under state common law. In support of their claim, they note that § 360k(a)(1) expressly states that a federal requirement must be "applicable to the device" in question before it has any pre-emptive effect. Because the labeling and manufacturing requirements are applicable to a host of different devices, they argue that they do not satisfy this condition. They further argue that because only state requirements "with respect to a device" may be pre-empted, and then only if the requirement "relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device," § 360k(a) mandates pre-emption only where there is a conflict between a specific state requirement and a federal requirement "applicable to" the same device.

The Lohrs' theory is supported by the FDA regulations, which provide that state requirements are pre-empted "only" when the FDA has established "specific counterpart regulations or . . . other specific requirements applicable to a particular device." 21 CFR § 808.1(d) (1995).[18] They fur-

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§ 820.25, and to have buildings, environmental controls, and equipment of a quality adequate to produce a safe product, see §§ 820.40, 820.46, 820.60.

[18] FDA's narrow understanding of the scope of § 360k(a) is obvious from the full text of the regulation, which provides, in relevant part:

"(d) State or local requirements are preempted only when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific Food and Drug Administration requirements. There are other State or local requirements that affect devices that are not preempted by

ther note that the statute is not intended to pre-empt "State or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices . . . or to unfair trade practices in which the requirements are not limited to devices." § 808.1(d)(1). The regulations specifically provide, as examples of permissible general requirements, that general electrical codes and the Uniform Commercial Code warranty of fitness would not be pre-empted. See *ibid.* The regulations even go so far as to state that § 360k(a) generally "does not preempt a state or local requirement prohibiting the manufacture of adulterated or misbranded devices" unless "such a prohibition has the effect of establishing a substantive requirement for a specific device." § 808.1(d)(6)(ii). Furthermore, under its authority to grant exemptions to the pre-emptive effect of § 360k(a), the FDA has never granted, nor, to the best of our

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section 521(a) of the act because they are not 'requirements applicable to a device' within the meaning of section 521(a) of the act. The following are examples of State or local requirements that are not regarded as preempted by section 521 of the act:

"(1) Section 521(a) does not preempt State or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices (e. g., requirements such as general electrical codes, and the Uniform Commercial Code (warranty of fitness)), or to unfair trade practices in which the requirements are not limited to devices.

"(2) Section 521(a) does not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed by or under the act.

. . . . . .

"(6)(i) Section 521(a) does not preempt State or local requirements respecting general enforcement, e. g., requirements that State inspection be permitted of factory records concerning all devices . . . .

"(ii) Generally, section 521(a) does not preempt a State or local requirement prohibiting the manufacture of adulterated or misbranded devices. Where, however, such a prohibition has the effect of establishing a substantive requirement for a specific device, e. g., a specific labeling requirement, then the prohibition [may] be preempted." 21 CFR § 808.1(d) (1995).

knowledge, even been asked to consider granting, an exemption for a state law of general applicability; all 22 existing exemptions apply to excruciatingly specific state requirements regarding the sale of hearing aids. See §§ 808.53–808.101.

Although we do not believe that this statutory and regulatory language necessarily precludes "general" federal requirements from ever pre-empting state requirements, or "general" state requirements from ever being pre-empted, see Part VI, *infra*, it is impossible to ignore its overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest. State requirements must be "with respect to" medical devices and "different from, or in addition to," federal requirements. State requirements must also relate "to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device," and the regulations provide that state requirements of "general applicability" are not pre-empted except where they have "the effect of establishing a substantive requirement for a specific device." Moreover, federal requirements must be "applicable to the device" in question, and, according to the regulations, pre-empt state law only if they are "specific counterpart regulations" or "specific" to a "particular device." The statute and regulations, therefore, require a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations.[19]

[19] A plurality of this Court concluded in *Cipollone* that a similar analysis was required under the Public Health Cigarette Smoking Act of 1969. That Act pre-empted requirements and prohibitions based on smoking and health "imposed under State law with respect to the advertising or promotion" of cigarettes in packages that were labeled in conformity with that Act. 505 U. S., at 515. We held that the petitioner's fraudulent misrepresentation claims, including those based on allegedly false statements made in advertisements, were not pre-empted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general

Such a comparison mandates a conclusion that the Lohrs' common-law claims are not pre-empted by the federal labeling and manufacturing requirements. The generality of those requirements make this quite unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers. Rather, the federal requirements reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements.

Similarly, the general state common-law requirements in this suit were not specifically developed "with respect to" medical devices. Accordingly, they are not the kinds of requirements that Congress and the FDA feared would impede the ability of federal regulators to implement and enforce specific federal requirements. The legal duty that is the predicate for the Lohrs' negligent manufacturing claim is the general duty of every manufacturer to use due care to avoid foreseeable dangers in its products. Similarly, the predicate for the failure to warn claim is the general duty to inform users and purchasers of potentially dangerous items of the risks involved in their use. These general obligations are no more a threat to federal requirements than would be a state-law duty to comply with local fire prevention regula-

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obligation—the duty not to deceive." *Id.*, at 528–529. The general common-law duty "not to make fraudulent statements" was not within the specific category of requirements or prohibitions based on smoking and health imposed under state law "with respect to the advertising or promotion" of cigarettes that were pre-empted by the 1969 statute. *Id.*, at 529.

If anything, the language of the MDA's pre-emption statute and its counterpart regulations require an even more searching inquiry into the relationship between the federal requirement and the state requirement at issue than was true under the statute in *Cipollone*.

tions and zoning codes, or to use due care in the training and supervision of a work force. These state requirements therefore escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that § 360k envisioned to be "with respect to" specific devices such as pacemakers. As a result, none of the Lohrs' claims based on allegedly defective manufacturing or labeling are pre-empted by the MDA.

VI

In their cross-petition, the Lohrs present a final argument, suggesting that common-law duties are never "requirements" within the meaning of § 360k and that the statute therefore never pre-empts common-law actions. The Lohrs point out that our holding in *Cipollone* is not dispositive of this issue, for as Part IV, *supra*, suggests, there are significant textual and historical differences between the *Cipollone* statute and § 360k, and the meaning of words must always be informed by the environment within which they are situated. We do not think that the issue is resolved by the FDA regulation suggesting that § 360k is applicable to those requirements "having the force and effect of law" that are "established by . . . court decision," 21 CFR § 808.1(b) (1995); that reference, it appears, was intended to refer to court decisions *construing* state statutes or regulations. See 42 Fed. Reg. 30383, 30385 (1977); Brief for Petitioners in No. 95–886, p. 26, n. 7.

Nevertheless, we do not respond directly to this argument for two reasons. First, since none of the Lohrs' claims is pre-empted in this suit, we need not resolve hypothetical cases that may arise in the future. Second, given the critical importance of device specificity in our (and the FDA's) construction of § 360k, it is apparent that few, if any, common-law duties have been pre-empted by this statute. It will be rare indeed for a court hearing a common-law

cause of action to issue a decree that has "the effect of establishing a substantive requirement for a specific device." 21 CFR § 808.1(d)(6)(ii) (1995). Until such a case arises, we see no need to determine whether the statute explicitly pre-empts such a claim. Even then, the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis, see *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995).

VII

Accordingly, the judgment of the Court of Appeals is reversed insofar as it held that any of the claims were pre-empted and affirmed insofar as it rejected the pre-emption defense. The cases are remanded for further proceedings.

It is so ordered.

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

This action raises two questions. First, do the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act ever pre-empt a state-law tort action? Second, if so, does the MDA pre-empt the particular state-law tort claims at issue here?

I

My answer to the first question is that the MDA will sometimes pre-empt a state-law tort suit. I basically agree with JUSTICE O'CONNOR's discussion of this point and with her conclusion. See *post*, at 510–512. The statute's language, read literally, supports that conclusion. It says:

> "[N]o State . . . may establish . . . with respect to a device . . . any [state] *requirement* . . . which is different from, or in addition to, any [federal] requirement . . . ." 21 U. S. C. § 360k(a) (emphasis added).

One can reasonably read the word "requirement" as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law.

Moreover, in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992), the Court made clear that similar language "easily" encompassed tort actions because "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Id.*, at 521 (plurality opinion) (internal quotation marks omitted); see *id.*, at 548–549 (SCALIA, J., concurring in judgment in part and dissenting in part). Accord, *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993). This rationale would seem applicable to the quite similar circumstances at issue here.

Finally, a contrary holding would have anomalous consequences. Imagine that, in respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law, embodied in the "2-inch" MDA regulation, pre-empts the state "1-inch" agency regulation, why would it not similarly pre-empt a state-law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than 1-inch wire is negligent)? The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power (to set state standards "different from, or in addition to," federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes. Where Congress likely did not focus specifically upon the matter, see *ante*, at 486–491, I would not take it to have intended this anomalous result.

Consequently, I believe that ordinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a

standard of care or behavior imposed by a state-law tort action. It is possible that the plurality also agrees on this point, although it does not say so explicitly.

II

The answer to the second question turns on Congress' intent. See, *e. g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 30 (1996); *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985); *ante*, at 485–486. Although Congress has not stated whether the MDA does, or does not, pre-empt the tort claims here at issue, several considerations lead me to conclude that it does not.

First, the MDA's pre-emption provision is highly ambiguous. That provision makes clear that federal requirements may pre-empt state requirements, but it says next to nothing about just when, where, or how they may do so. The words "any [state] requirement" and "any [federal] requirement," for example, do not tell us *which* requirements are at issue, for *every* state requirement that is not identical to even *one* federal requirement is "different from, or in addition to," that single federal requirement; yet, Congress could not have intended that the existence of one single federal rule, say, about a 2-inch hearing aid wire, would pre-empt *every* state law hearing aid rule, even a set of rules related only to the packaging or shipping of hearing aids. Thus, Congress must have intended that courts look elsewhere for help as to just which federal requirements pre-empt just which state requirements, as well as just how they might do so.

Second, this Court has previously suggested that, in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721 (1985); cf. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 739–741

(1996); *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 261–262 (1985); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). To draw a similar inference here makes sense, and not simply because of the statutory ambiguity. The Food and Drug Administration (FDA) is fully responsible for administering the MDA. See 21 U. S. C. § 393. That responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives. See *Hillsborough*, 471 U. S., at 721. The FDA can translate these understandings into particularized pre-emptive intentions accompanying its various rules and regulations. See *id.*, at 718. It can communicate those intentions, for example, through statements in "regulations, preambles, interpretive statements, and responses to comments," *ibid.*, as well as through the exercise of its explicitly designated power to exempt state requirements from pre-emption, see 21 U. S. C. § 360k(b); see also *ante*, at 496 (noting that FDA's authority to exempt state requirements from pre-emption necessarily requires FDA to assess federal laws' pre-emptive effect).

Third, the FDA has promulgated a specific regulation designed to help. That regulation says:

> "State . . . requirements are preempted only when . . . there are . . . *specific* [federal] requirements applicable to a particular device . . . thereby making any existing *divergent* State . . . requirements applicable to the device different from, or in addition to, the *specific* [federal] requirements." 21 CFR § 808.1(d) (1995) (emphasis added).

The regulation does not fill all the statutory gaps, for its word "divergent" does not explain, any more than did the statute, just when different device-related federal and state

requirements are closely enough related to trigger pre-emption analysis. But the regulation's word "specific" does narrow the universe of federal requirements that the agency intends to displace at least some state law.

Insofar as there are any applicable FDA requirements here, those requirements, even if numerous, are not "specific" in any relevant sense. See *ante*, at 497–498, 501. Hence, as the FDA's above-quoted pre-emption rule tells us, the FDA does not intend these requirements to pre-empt the state requirements at issue here. At least in present circumstances, no law forces the FDA to make its requirements pre-emptive if it does not think it appropriate.

I cannot infer a contrary intent from JUSTICE O'CONNOR's characterization of the federal standards applicable here as "comprehensive" and "extensive," *post*, at 513, 514, both because that characterization is questionable, see *ante*, at 497–498, 501, and because this Court has previously said that it would "seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Hillsborough*, *supra*, at 718. It therefore seems to me that the better indicator of the FDA's intent is its pre-emption-related regulation. And that regulation's word "specific" would seem a reasonable exercise of the leeway that statutory language and practical administrative circumstance suggest Congress intended to grant to the agency.

Fourth, ordinary principles of "conflict" and "field" pre-emption point in the same direction. Those principles make clear that a federal requirement pre-empts a state requirement if (1) the state requirement actually conflicts with the federal requirement—either because compliance with both is impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or because the state requirement "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)—or (2) the

scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). See, *e. g.*, *Barnett Bank*, 517 U. S., at 31; *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98 (1992) (opinion of O'CONNOR, J.); *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 604–605 (1991); *English* v. *General Elec. Co.*, 496 U. S. 72, 79 (1990).

It makes sense, in the absence of any indication of a contrary congressional (or agency) intent, to read the pre-emption statute (and the pre-emption regulation) in light of these basic pre-emption principles. The statutory terms "different from" and "in addition to" readily lend themselves to such a reading, for their language parallels pre-emption law's basic concerns. Without any contrary indication from the agency, one might also interpret the regulation's word "divergent" in light of these same basic pre-emption principles.

Insofar as these basic principles inform a court's interpretation of the statute and regulation, they support the conclusion that there is no pre-emption here. I can find no actual conflict between any federal requirement and any of the liability-creating premises of the plaintiffs' state-law tort suit; nor, for the reasons discussed above, can I find any indication that either Congress or the FDA intended the relevant FDA regulations to occupy entirely any relevant field.

For these reasons, I concur in the Court's judgment. I also join the Court's opinion, but for Parts IV and VI. I do not join Part IV, which emphasizes the differences between the MDA and the pre-emption statute at issue in *Cipollone*, because those differences are not, in my view, relevant in this action. I do not join Part VI, because I am not convinced that future incidents of MDA pre-emption of common-law claims will be "few" or "rare," *ante*, at 502.

Justice O'Connor, with whom The Chief Justice, Justice Scalia, and Justice Thomas join, concurring in part and dissenting in part.

Section 360k(a), the pre-emption provision of the Medical Device Amendments of 1976 (MDA), provides that no State may establish or continue in effect "any requirement" "which is different from, or in addition to," any requirement applicable under the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) to the device. As the Court points out, because Congress has expressly provided a pre-emption provision, "we need not go beyond that language to determine whether Congress intended the MDA to pre-empt" state law. *Ante*, at 484. We agree, then, on the task before us: to interpret Congress' intent by reading the statute in accordance with its terms. This, however, the Court has failed to do.

The cases require us to determine whether the Lohrs' state common-law claims survive pre-emption under § 360k. I conclude that state common-law damages actions do impose "requirements" and are therefore pre-empted where such requirements would differ from those imposed by the FDCA. The plurality acknowledges that a common-law action might impose a "requirement," but suggests that such a pre-emption would be "rare indeed." *Ante*, at 502. To reach that determination, the opinion—without explicitly relying on Food and Drug Administration (FDA) regulations and without offering any sound basis for why deference would be warranted—imports the FDA regulations interpreting § 360k to "inform" the Court's reading. Accordingly, the principal opinion states that pre-emption occurs only "where a particular state requirement threatens to interfere with a specific federal interest," *ante*, at 500, and for that reason, concludes that common-law claims are almost never pre-empted, *ante*, at 502–503, and that the Lohrs' claims here are not pre-empted. This decision is bewildering and seemingly without guiding principle.

The language of § 360k demonstrates congressional intent that the MDA pre-empt "any requirement" by a State that is "different from, or in addition to," that applicable to the device under the FDCA. The Lohrs have raised various state common-law claims in connection with Medtronic's pacemaker lead. Analysis, therefore, must begin with the question whether state common-law actions can constitute "requirements" within the meaning of § 360k(a).

We recently addressed a similar question in *Cipollone*, where we examined the meaning of the phrase "no requirement or prohibition" under the Public Health Cigarette Smoking Act of 1969. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992). A majority of the Court agreed that state common-law damages actions do impose "requirements." *Id.*, at 521–522 (plurality opinion); *id.*, at 548–549 (SCALIA, J., joined by THOMAS, J., concurring in judgment in part and dissenting in part). As the plurality explained:

> "The phrase, '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959)." *Id.*, at 521.

That rationale is equally applicable in the present context. Whether relating to the labeling of cigarettes or the manufacture of medical devices, state common-law damages actions operate to require manufacturers to comply with common-law duties. As *Cipollone* declared, in answer to the same argument raised here that common-law actions

do not impose requirements, "such an analysis is at odds both with the plain words" of the statute and "with the general understanding of common-law damages actions." *Ibid.* If § 360k's language is given its ordinary meaning, it clearly pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA—just as it would pre-empt a state statute or regulation that had that effect. Justice Breyer reaches the same conclusion. *Ante*, at 503–505 (opinion concurring in part and concurring in judgment).

The plurality's reasons for departing from this reading are neither clear nor persuasive. It fails to refute the applicability of the reasoning of *Cipollone.* Instead, in Part IV, the plurality essentially makes the case that the statute's language, purpose, and legislative history, as well as the consequences of a different interpretation, indicate that Congress did not intend "requirement" to include state common-law claims at all. The principal opinion proceeds to disclaim this position, however, in Parts V and VI and concludes, rather, that a state common-law action might constitute a requirement, but that such a case would be "rare indeed." *Ante*, at 502. The Court holds that an FDCA "requirement" triggers pre-emption only when a conflict exists between a specific state requirement and a specific FDCA requirement applicable to the particular device. See *ante*, at 498–502. But see *ante*, at 500 ("[W]e do not believe that this statutory and regulatory language necessarily precludes 'general' federal requirements from ever pre-empting state requirements, or 'general' state requirements from ever being pre-empted . . ."). The plurality emphasizes the "critical importance of device specificity" in its understanding of the pre-emption scheme. *Ante*, at 502.

To reach its particularized reading of the statute, the Court imports the interpretation put forth by the FDA's regulations. Justice Breyer similarly relies on the FDA regulations to arrive at an understanding of § 360(k). *Ante*,

at 505–507. Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to "infor[m]" the Court's interpretation. *Ante*, at 495. It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference, cf. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 743–744 (1996), but one pertaining to the clear statute at issue here is surely not. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993). Where the language of the statute is clear, resort to the agency's interpretation is improper. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). Title 21 U. S. C. § 360k(a)(1) directs the pre-emption of "any [state] requirement" "which is different from, or in addition to, any requirement applicable under [the FDCA] to the device." As explained above, and as JUSTICE BREYER agrees, *ante*, at 503–505, the term "requirement" encompasses state common-law causes of action. The Court errs when it employs an agency's narrowing construction of a statute where no such deference is warranted. The statute makes no mention of a requirement of specificity, and there is no sound basis for determining that such a restriction on "any requirement" exists.

I conclude that a fair reading of § 360k indicates that state common-law claims are pre-empted, as the statute itself states, to the extent that their recognition would impose "any requirement" different from, or in addition to, FDCA requirements applicable to the device. From that premise, I proceed to the question whether FDCA requirements applicable to the device exist here to pre-empt the Lohrs' state-law claims.

I agree with the Court that the Lohrs' defective design claim is not pre-empted by the FDCA's § 510(k) "substantial equivalency" process. The § 510(k) process merely evaluates whether the Class III device at issue is substantially equivalent to a device that was on the market before 1976, the effective date of the MDA; if so, the later device may be also be marketed. Because the § 510(k) process seeks merely to establish whether a pre-1976 device and a post-1976 device are equivalent, and places no "requirements" on a device, the Lohrs' defective design claim is not pre-empted.

I also agree that the Lohrs' claims are not pre-empted by § 360k to the extent that they seek damages for Medtronic's alleged violation of federal requirements. Where a state cause of action seeks to enforce an FDCA requirement, that claim does not impose a requirement that is "different from, or in addition to," requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*.

I disagree, however, with the Court's conclusion that the Lohrs' claims survive pre-emption insofar as they would compel Medtronic to comply with requirements different from those imposed by the FDCA. Because I do not subscribe to the Court's reading into § 360k the additional requisite of "specificity," my determination of what claims are pre-empted is broader. Some, if not all, of the Lohrs' common-law claims regarding the manufacturing and labeling of Medtronic's device would compel Medtronic to comply with requirements different from, or in addition to, those required by the FDA. The FDA's Good Manufacturing Practice (GMP) regulations impose comprehensive requirements relating to every aspect of the device-manufacturing process,

including a manufacturer's organization and personnel, buildings, equipment, component controls, production and process controls, packaging and labeling controls, holding, distribution, installation, device evaluation, and recordkeeping. See 21 CFR §§ 820.20–820.198 (1995). The Lohrs' common-law claims regarding manufacture would, if successful, impose state requirements "different from, or in addition to," the GMP requirements, and are therefore pre-empted. In similar fashion, the Lohrs' failure to warn claim is pre-empted by the extensive labeling requirements imposed by the FDA. See, *e. g.*, 21 CFR § 801.109 (1995) (requiring labels to include such information as indications, effects, routes, methods, frequency and duration of administration, relevant hazards, contraindications, side effects, and precautions). These extensive federal manufacturing and labeling requirements are certainly applicable to the device manufactured by Medtronic. Section 360k(a) requires no more specificity than that for pre-emption of state common-law claims.

To summarize, I conclude that § 360k(a)'s term "requirement" encompasses state common-law claims. Because the statutory language does not indicate that a "requirement" must be "specific," either to pre-empt or be pre-empted, I conclude that a state common-law claim is pre-empted if it would impose "any requirement" "which is different from, or in addition to," any requirement applicable to the device under the FDCA. I would affirm the judgment of the Court of Appeals that the Lohrs' design claim is not pre-empted by the MDA, and that the manufacture and failure to warn claims are pre-empted; I would reverse the judgment of the Court of Appeals that the MDA pre-empts a common-law claim alleging violation of federal requirements.

Syllabus

UNITED STATES *v.* VIRGINIA ET AL.

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

No. 94–1941. Argued January 17, 1996—Decided June 26, 1996*

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all public undergraduate institutions in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

Held:

1. Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *E. g., Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724. Nei-

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*Together with No. 94–2107, *Virginia et al.* v. *United States*, also on certiorari to the same court.

ther federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. To meet the burden of justification, a State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.*, quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See, *e. g.*, *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643, 648. The heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women. Pp. 531–534.

2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women. Pp. 534–546.

(a) Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. Benign justifications proffered in defense of categorical exclusions, however, must describe actual state purposes, not rationalizations for actions in fact differently grounded. Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters. Pp. 535–540.

(b) Virginia also argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard

look" at generalizations or tendencies of the kind Virginia pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U. S., at 725. The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies], see *id.*, at 730, once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive." Pp. 540–546.

3. The remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a separate program for women—does not cure the constitutional violation. Pp. 546–558.

(a) A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. See *Milliken* v. *Bradley*, 433 U. S. 267, 280. The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI. Cf. *Sweatt* v. *Painter*, 339 U. S. 629. Pp. 547–554.

Syllabus

(b) The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the absence of discrimination, *Milliken*, 433 U. S., at 280, and considered instead whether the Commonwealth could provide, with fidelity to equal protection, separate and unequal educational programs for men and women. In declaring the substantially different and significantly unequal VWIL program satisfactory, the appeals court displaced the exacting standard developed by this Court with a deferential standard, and added an inquiry of its own invention, the "substantive comparability" test. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to such a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection. Pp. 554–558.

No. 94–2107, 976 F. 2d 890, affirmed; No. 94–1941, 44 F. 3d 1229, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, *post*, p. 558. SCALIA, J., filed a dissenting opinion, *post*, p. 566. THOMAS, J., took no part in the consideration or decision of the case.

Paul Bender argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Patrick*, *Cornelia T. L. Pillard*, *Jessica Dunsay Silver*, and *Thomas E. Chandler*.

Theodore B. Olson argued the cause and filed briefs for respondents in No. 94–1941 and petitioners in No. 94–2107. With him on the briefs were *James S. Gilmore III*, Attorney General of Virginia, *William H. Hurd*, Deputy Attorney General, *Thomas G. Hungar*, *D. Jarrett Arp*, *Robert H. Patterson, Jr.*, *Anne Marie Whittemore*, *William G. Broaddus*, *J. William Boland*, *Griffin B. Bell*, and *William A. Clineburg, Jr.*†

†Briefs of *amici curiae* urging reversal in No. 94–1941 were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Margery*

JUSTICE GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

S. Bronster of Hawaii, *Scott Harshbarger* of Massachusetts, *Frankie Sue Del Papa* of Nevada, *C. Sebastian Aloot* of the Northern Mariana Islands, and *Theodore R. Kulongoski* of Oregon; for the Employment Law Center et al. by *Patricia A. Shiu* and *Judith Kurtz;* and for the National Women's Law Center et al. by *Robert N. Weiner, Marcia D. Greenberger, Sara L. Mandelbaum, Janet Gallagher, Mary Wyckoff, Steven R. Shapiro,* and *Susan Deller Ross.*

Briefs of *amici curiae* urging affirmance in No. 94–1941 were filed for the State of South Carolina et al. by *Charles Molony Condon,* Attorney General, *Treva Ashworth,* Deputy Attorney General, *Kenneth P. Woodington,* Senior Assistant Attorney General, *Reginald I. Lloyd,* Assistant Attorney General, and *M. Dawes Cooke, Jr.;* and for Kenneth E. Clark et al. by *James C. Roberts* and *George A. Somerville.*

Briefs of *amici curiae* were filed in both cases for the State of Wyoming et al. by *William U. Hill,* Attorney General of Wyoming, *Thomas W. Corbett, Jr.,* Attorney General of Pennsylvania, and *Bradley B. Cavedo;* for Bennett College et al. by *Wendy S. White;* for the Center for Military Readiness et al. by *Mellissa Wells-Petry* and *Jordan W. Lorence;* for the Employment Law Center et al. by *Patricia A. Shiu* and *Judith Kurtz;* for the Independent Women's Forum et al. by *Anita K. Blair* and *C. Douglas Welty;* for Mary Baldwin College by *Craig T. Merritt* and *Richard K. Willard;* for the South Carolina Institute of Leadership for Women by *Julianne Farnsworth;* for Wells College et al. by *David M. Lascell;* for Women's Schools Together, Inc., et al. by *John C. Danforth* and *Thomas C. Walsh;* and for Nancy Mellette by *Valorie K. Vojdik, Henry Weisburg, Suzanne E. Coe,* and *Robert R. Black.*

Briefs of *amici curiae* were filed in No. 94–1941 for the American Association of University Professors et al. by *Joan E. Bertin* and *Ann H. Franke;* and for Rhonda Cornum et al. by *Allan L. Gropper.*

Daniel F. Kolb, Herbert J. Hansell, Paul C. Saunders, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson, and *Richard T. Seymour* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* in No. 94–2107.

I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II

A

From its establishment in 1839 as one of the Nation's first state military colleges, see 1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to

the control of the [Virginia] General Assembly," Va. Code Ann. § 23–92 (1993). First southern college to teach engineering and industrial chemistry, see H. Wise, Drawing Out the Man: The VMI Story 13 (1978) (The VMI Story), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, § 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2-year period).[1] Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. The VMI Story 47.

VMI today enrolls about 1,300 men as cadets.[2] Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school

> "'to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in

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[1] During the Civil War, school teaching became a field dominated by women. See A. Scott, The Southern Lady: From Pedestal to Politics, 1830–1930, p. 82 (1970).

[2] Historically, most of Virginia's public colleges and universities were single sex; by the mid-1970's, however, all except VMI had become coeducational. 766 F. Supp. 1407, 1418–1419 (WD Va. 1991). For example, Virginia's legislature incorporated Farmville Female Seminary Association in 1839, the year VMI opened. 1839 Va. Acts, ch. 167. Originally providing instruction in "English, Latin, Greek, French, and piano" in a "home atmosphere," R. Sprague, Longwood College: A History 7–8, 15 (1989) (Longwood College), Farmville Female Seminary became a public institution in 1884 with a mission to train "white female teachers for public schools," 1884 Va. Acts, ch. 311. The school became Longwood College in 1949, Longwood College 136, and introduced coeducation in 1976, *id.*, at 133.

> time of national peril.'" 766 F. Supp. 1407, 1425 (WD Va. 1991) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "[o]nly about 15% of VMI cadets enter career military service." 766 F. Supp., at 1432.

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." *Id.*, at 1421. As one Commandant of Cadets described it, the adversative method "'dissects the young student,'" and makes him aware of his "'limits and capabilities,'" so that he knows "'how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted.'" *Id.*, at 1421–1422 (quoting Col. N. Bissell).

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. *Id.*, at 1424, 1432. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. *Id.*, at 1422. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors. *Ibid.*

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "'does not lie, cheat, steal nor tolerate those who do.'" *Id.*, at 1422–1423.

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." *Id.*, at 1421. "[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI]." *Ibid.*

B

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 1408.[3] Trial of the action consumed six days and involved an array of expert witnesses on each side. *Ibid.*

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. *Id.*, at 1436. "[S]ome women, at least," the court said, "would want to attend the school if they had the opportunity." *Id.*, at 1414. The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"—"a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.*, at 1437–1438. And it was also established that "some women are capable of all of the individual activities required of VMI cadets." *Id.*, at 1412. In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." *Id.*, at 1441.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982), was

[3] The District Court allowed the VMI Foundation and the VMI Alumni Association to intervene as defendants. 766 F. Supp., at 1408.

the closest guide. 766 F. Supp., at 1410. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women*, 458 U. S., at 724 (internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single-gender environment, be it male or female," yields substantial benefits. 766 F. Supp., at 1415. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." *Ibid.* If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the *only* means of achieving the objective "is to exclude women from the all-male institution—VMI." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.*, at 1432. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered," if women were admitted, *id.*, at 1413: "Allowance for personal privacy would have to be made," *id.*, at 1412; "[p]hysical education requirements would have to be altered, at least for the women," *id.*, at 1413; the adversative environment could not survive unmodified, *id.*, at 1412–1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.*, at 1413.

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination,

under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." 976 F. 2d 890, 892 (1992).

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: "'[I]t is extremely important that [colleges and universities] deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*'" *Id.*, at 899 (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." 976 F. 2d, at 899. Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the movement away from [single-sex education] in Virginia by public colleges and universities." *Ibid.* In short, the court concluded, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Ibid.*

The parties agreed that "*some* women can meet the physical standards now imposed on men," *id.*, at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.*, at 899. The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation." *Id.*, at 896–897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions

or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.*, at 900. In May 1993, this Court denied certiorari. See 508 U. S. 946; see also *ibid.* (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

C

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission—to produce "citizen-soldiers"—the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F. Supp. 471, 476–477 (WD Va. 1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. See *id.*, at 501. Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," *id.*, at 502, and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), reprinted in 2 App. in Nos. 94–1667 and 94–1717 (CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F. Supp., at 503. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition. See *ibid.*

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. *Id.*, at 476. Training its attention on methods of instruction appropriate for "most women," the

Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.;* see 44 F. 3d 1229, 1233 (CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, *id.*, at 1234, but the VWIL House would not have a military format, 852 F. Supp., at 477, and VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, *id.*, at 495. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.*, at 476. In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F. 3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F. Supp., at 483, and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program, *id.*, at 499. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million. *Id.*, at 503. Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. *Ibid.* The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, *id.*, at 499, but those graduates will not have the advantage afforded by a VMI degree.

D

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. *Id.*, at 473. The District Court again acknowledged evidentiary support for these determinations: "[T]he VMI methodology could be used to educate women and, in fact, some

women . . . may prefer the VMI methodology to the VWIL methodology." *Id.*, at 481. But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.*, at 484.

A divided Court of Appeals affirmed the District Court's judgment. 44 F. 3d 1229 (CA4 1995). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." *Id.*, at 1236. The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitima[cy]" of the governmental objective and refusing approval for any purpose revealed to be "pernicious." *Ibid.*

"[P]roviding the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed, *id.*, at 1238; that objective, the court added, is "not pernicious," *id.*, at 1239. Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *Ibid.*

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means.

Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish [its] objective of providing single-gender education." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypass[ing] any equal protection scrutiny." *Id.*, at 1237. The court therefore added another inquiry, a decisive test it called "substantive comparability." *Ibid.* The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other means offered by the [S]tate." *Ibid.* Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable." *Id.*, at 1241.

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an "'exceedingly persuasive [justification]'" for the Commonwealth's action. *Id.*, at 1247 (quoting *Mississippi Univ. for Women*, 458 U. S., at 724). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." 44 F. 3d, at 1247. That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission." *Ibid.*

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, adminis-

tration and support services, and faculty and library resources." *Id.*, at 1250. But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short . . . from providing substantially equal tangible and intangible educational benefits to men and women." *Ibid.*

The Fourth Circuit denied rehearing en banc. 52 F. 3d 90 (1995). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion.[4] Judge Motz agreed with Judge Phillips that Virginia had not shown an "'exceedingly persuasive justification'" for the disparate opportunities the Commonwealth supported. *Id.*, at 92 (quoting *Mississippi Univ. for Women*, 458 U. S., at 724). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" 52 F. 3d, at 93. "Women need not be guaranteed equal 'results,'" Judge Motz said, "but the Equal Protection Clause does require equal opportunity . . . [and] that opportunity is being denied here." *Ibid.*

III

The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, *id.*, at 1413—as Virginia's sole single-sex public institution of

[4] Six judges voted to rehear the case en banc, four voted against rehearing, and three were recused. The Fourth Circuit's local Rule permits rehearing en banc only on the vote of a majority of the Circuit's judges in regular active service (currently 13) without regard to recusals. See 52 F. 3d, at 91, and n. 1.

higher education—offends the Constitution's equal protection principle, what is the remedial requirement?

IV

We note, once again, the core instruction of this Court's pathmarking decisions in *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136–137, and n. 6 (1994), and *Mississippi Univ. for Women*, 458 U. S., at 724 (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U. S. 677, 684 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People";[5] not until 1920 did women gain a constitutional right to the franchise. *Id.*, at 685. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e. g.*, *Goesaert* v. *Cleary*, 335 U. S. 464, 467 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male

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[5] As Thomas Jefferson stated the view prevailing when the Constitution was new:

"Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 Writings of Thomas Jefferson 45–46, n. 1 (P. Ford ed. 1899).

bartenders to . . . monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed* v. *Reed*, 404 U. S. 71, 73 (holding unconstitutional Idaho Code prescription that, among "'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females'"). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 462–463 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin,[6] the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See *J. E. B.*, 511 U. S., at 152 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differen-

[6] The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably "fatal in fact." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995) (internal quotation marks omitted).

tial treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U. S., at 724. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Ibid.* (quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980)). The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643, 648 (1975); *Califano* v. *Goldfarb*, 430 U. S. 199, 223–224 (1977) (STEVENS, J., concurring in judgment).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving* v. *Virginia*, 388 U. S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard* v. *United States*, 329 U. S. 187, 193 (1946).

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) *(per curiam)*, to "promot[e] equal employment opportunity," see *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's peo-

ple.[7] But such classifications may not be used, as they once were, see *Goesaert*, 335 U. S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, *i. e.*, it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F. 2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of

[7] Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F. Supp., at 1413, 1432; 976 F. 2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 720, n. 1 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross-Petitioners 20, and the option of single-sex education contributes to "diversity in educational approaches," *id.*, at 25. Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. *Id.*, at 33–36 (internal quotation marks omitted). We consider these two justifications in turn.

A

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation.[8] Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for ac-

[8] On this point, the dissent sees fire where there is no flame. See *post*, at 596–598, 598–600. "Both men and women can benefit from a single-sex education," the District Court recognized, although "the beneficial effects" of such education, the court added, apparently "are stronger among women than among men." 766 F. Supp., at 1414. The United States does not challenge that recognition. Cf. C. Jencks & D. Riesman, The Academic Revolution 297–298 (1968):

"The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay."

tions in fact differently grounded. See *Wiesenfeld,* 420 U. S., at 648, and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); *Goldfarb,* 430 U. S., at 212–213 (rejecting government-proffered purposes after "inquiry into the actual purposes" (internal quotation marks omitted)).

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." 458 U. S., at 727. Undertaking a "searching analysis," *id.*, at 728, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730. Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women;[9] reflecting

[9] Dr. Edward H. Clarke of Harvard Medical School, whose influential book, Sex in Education, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, Sex in Education 38–39, 62–63 (1873); *id.*, at 127 ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, Sex in Mind and in Education 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, Females and Their Diseases 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose . . . the habit of menstruation"

widely held views about women's proper place, the Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men. See E. Farello, A History of the Education of Women in the United States 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

"[N]o struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of Virginia." 2 T. Woody, A History of Women's Education in the United States 254 (1929) (History of Women's Education). In 1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia "'has never, at any period of her history,'" provided for the higher education of her daughters, though she "'has liberally provided for the higher education of her sons.'" *Ibid.* (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women.[10]

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See *supra*, at 521, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 766 F. Supp., at 1418–1419. By the mid-1970's, all four schools had become coeducational. *Ibid.*

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women

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and suffer numerous ills as a result of depriving her body for the sake of her mind).

[10] Virginia's Superintendent of Public Instruction dismissed the coeducational idea as "'repugnant to the prejudices of the people'" and proposed a female college similar in quality to Girton, Smith, or Vassar. 2 History of Women's Education 254 (quoting Dept. of Interior, 1 Report of Commissioner of Education, H. R. Doc. No. 5, 58th Cong., 2d Sess., 438 (1904)).

were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." 2 History of Women's Education 255.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. See *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184, 186 (ED Va. 1970). A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the [S]tate." *Id.*, at 187.

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross-Petitioners 30. But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. The state legislature, prior to the advent of this controversy, had repealed "[a]ll Virginia statutes requiring individual institutions to admit only men or women." 766 F. Supp., at 1419. And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy "'of affording broad access" while maintaining "autonomy and diversity.'" 976 F. 2d, at 898–899 (quoting Report of the Virginia Commission on the University of the 21st Century). Significantly, the commission reported:

> "'Because colleges and universities provide opportunities for students to develop values and learn from role

> models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.'" *Id.*, at 899 (emphasis supplied by Court of Appeals deleted).

This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." *Ibid.*

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See 766 F. Supp., at 1427–1428. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. See Reply Brief for Cross-Petitioners 6. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." See 766 F. Supp., at 1429 (internal quotation marks omitted). Whatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any commonwealth policy even-handedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focuse[d] on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how th[e] conclusion was reached." *Ibid.*

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.'" See 976 F. 2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array of educa-

tional options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan—a plan to "afor[d] a unique educational benefit only to males." *Ibid.* However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross-Petitioners 34–36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia." *Id.*, at 34.

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach." 976 F. 2d, at 896–897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11, 29–30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See *ibid.* "[S]ome women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., at 1414, and "some women," the expert testimony established, "are

capable of all of the individual activities required of VMI cadets," *id.*, at 1412. The parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now impose[s] on men." 976 F. 2d, at 896. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'être*, "nor VMI's implementing methodology is inherently unsuitable to women." *Id.*, at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." 766 F. Supp., at 1434–1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.*, at 1434. For example, "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere." *Ibid.* "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." *Ibid.* (internal quotation marks omitted).

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed* v. *Reed*, 404 U. S. 71 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, 66 N. Y. U. L. Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U. S., at 725; see *J. E. B.*, 511 U. S., at 139, n. 11 (equal protection principles, as applied to gender classifications, mean

state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F. 3d, at 93. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. *Ibid.*

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school,[11] is a judgment hardly proved,[12] a prediction

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[11] See *post*, at 566, 598–599, 603. Forecasts of the same kind were made regarding admission of women to the federal military academies. See, *e. g.*, Hearings on H. R. 9832 et al. before Subcommittee No. 2 of the House Committee on Armed Services, 93d Cong., 2d Sess., 137 (1975) (statement of Lt. Gen. A. P. Clark, Superintendent of U. S. Air Force Academy) ("It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere."); *id.*, at 165 (statement of Hon. H. H. Callaway, Secretary of the Army) ("Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear.").

[12] See 766 F. Supp., at 1413 (describing testimony of expert witness David Riesman: "[I]f VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."). Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history. Speaking in 1879 in support of higher education for females, for example, Virginia State Senator C. T. Smith of Nelson recounted that legislation proposed to pro-

hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women*, 458 U. S., at 730, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which

> "forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . [I]t arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to *grade up* the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added).

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although

> "[t]he faculty . . . never maintained that women could not master legal learning . . . . No, its argument has been . . . more practical. If women were admitted to

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tect the property rights of women had encountered resistance. 10 Educ. J. Va. 213 (1879). A Senator opposing the measures objected that "there [was] no formal call for the [legislation]," and "depicted in burning eloquence the terrible consequences such laws would produce." *Ibid.* The legislation passed, and a year or so later, its sponsor, C. T. Smith, reported that "not one of [the forecast "terrible consequences"] has or ever will happen, even unto the sounding of Gabriel's trumpet." *Ibid.* See also *supra*, at 537–538.

> the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, Sympathy and Science: Women Physicians in American Medicine 51–54, 250 (1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121–122 (1977) (quoting E. Clarke, Medical Education of Women, 4 Boston Med. & Surg. J. 345, 346 (1869) ("'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system . . . .'")); cf. *supra*, at 536–537, n. 9. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, Women in Control? 201 (1992); deprive male partners of adequate assistance, see *id.*, at 184–185; and lead to sexual misconduct, see C. Milton et al., Women in Policing 32–33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92–93; P. Bloch & D. Anderson, Policewomen on Patrol: Final Report (1974).

Women's successful entry into the federal military academies,[13] and their participation in the Nation's military forces,[14] indicate that Virginia's fears for the future of VMI

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[13] Women cadets have graduated at the top of their class at every federal military academy. See Brief for Lieutenant Colonel Rhonda Cornum et al. as *Amici Curiae* 11, n. 25; cf. Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 64 (1992).

[14] Brief for Lieutenant Colonel Rhonda Cornum, *supra*, at 5–9 (reporting the vital contributions and courageous performance of women in the military); see Mintz, President Nominates 1st Woman to Rank of Three-Star General, Washington Post, Mar. 27, 1996, p. A19, col. 1 (announcing President's nomination of Marine Corps Major General Carol Mutter to rank of Lieutenant General; Mutter will head corps manpower and planning); Tousignant, A New Era for the Old Guard, Washington Post, Mar. 23,

may not be solidly grounded.[15] The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, see 458 U. S., at 724–725, was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals

> "'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril.'" 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's

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1996, p. C1, col. 2 (reporting admission of Sergeant Heather Johnsen to elite Infantry unit that keeps round-the-clock vigil at Tomb of the Unknowns in Arlington National Cemetery).

[15] Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment. As one West Point cadet squad leader recounted: "[T]he classes of '78 and '79 see the women as women, but the classes of '80 and '81 see them as classmates." U. S. Military Academy, A. Vitters, Report of Admission of Women (Project Athena II) 84 (1978) (internal quotation marks omitted).

great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps.[16] Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,' " *Mississippi Univ. for Women*, 458 U. S., at 731, that must be the solid base for any gender-defined classification.

VI

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F. 3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afford[ed] to both genders benefits comparable in substance, [if] not in form and detail," *id.*, at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, *id.*, at 1240–1241. The United States challenges this "remedial" ruling as pervasively misguided.

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[16] VMI has successfully managed another notable change. The school admitted its first African-American cadets in 1968. See The VMI Story 347–349 (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." 766 F. Supp., at 1436–1437. The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission." *Id.*, at 1437.

A

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977) (internal quotation marks omitted). The constitutional violation in this suit is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities.[17] Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d] to" the violation, see *Milliken*, 433 U. S., at 282, *i. e.*, the equal protection denied to women ready, willing, and able to benefit from educational

[17] As earlier observed, see *supra*, at 529, Judge Phillips, in dissent, measured Virginia's plan against a paradigm arrangement, one that "could survive equal protection scrutiny": single-sex schools with "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,] and library resources." 44 F. 3d 1229, 1250 (CA4 1995). Cf. *Bray* v. *Lee*, 337 F. Supp. 934 (Mass. 1972) (holding inconsistent with the Equal Protection Clause admission of males to Boston's Boys Latin School with a test score of 120 or higher (up to a top score of 200) while requiring a score, on the same test, of at least 133 for admission of females to Girls Latin School, but not ordering coeducation). Measuring VMI/VWIL against the paradigm, Judge Phillips said, "reveals how far short the [Virginia] plan falls from providing substantially equal tangible and intangible educational benefits to men and women." 44 F. 3d, at 1250.

opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana*, 380 U. S., at 154. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See *supra*, at 520–523, 526–527.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F. Supp., at 1413–1414 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); *id.*, at 1421 (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F. 3d, at 1234, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F. Supp., at 476.

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, see 44 F. 3d, at 1234, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the schoolday. See 852 F. Supp., at 477, 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See 766 F. Supp., at 1423–1424. "[T]he most important aspects of the VMI educational experience occur in the barracks," the District Court

found, *id.*, at 1423, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, see 852 F. Supp., at 477, episodes and encounters lacking the "[p]hysical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training, see 766 F. Supp., at 1421.[18] Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see *id.*, at 1422, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets, *id.*, at 1426.

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." Brief for Respondents 28 (internal quotation marks omitted). The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*." 852 F. Supp., at 476 (emphasis added). See also 44 F. 3d, at 1233–1234 (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for *women as a group*" (emphasis added)). The Com-

[18] Both programs include an honor system. Students at VMI are expelled forthwith for honor code violations, see 766 F. Supp., at 1423; the system for VWIL students, see 852 F. Supp., at 496–497, is less severe, see Tr. 414–415 (testimony of Mary Baldwin College President Cynthia Tyson).

monwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F. Supp., at 480–481.

As earlier stated, see *supra*, at 541–542, generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men.* It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." 852 F. Supp., at 478. By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group,* for "[o]nly about 15% of VMI cadets enter career military service." See 766 F. Supp., at 1432.

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F. 2d, at 899; "some women . . . do well under [the] adversative model," 766 F. Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.*, at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.*, at 1412, and "can meet the physical standards [VMI] now impose[s] on men," 976 F. 2d, at 896. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,[19] a remedy that will end their

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[19] Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. See Brief for Petitioner 27–29; cf. note following 10 U. S. C. § 4342 (academic and other standards for women admitted to the Military, Naval,

exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." *Louisiana*, 380 U. S., at 154.

B

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. 852 F. Supp., at 501. The Mary Baldwin faculty holds "significantly fewer Ph. D.'s," *id.*, at 502, and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. See 852 F. Supp., at 503; Virginia Military Institute: More than an Education 11 (Govt. exh. 75,

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and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Experience shows such adjustments are manageable. See U. S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, Report of Admission of Women (Project Athena I–IV) (1977–1980) (4-year longitudinal study of the admission of women to West Point); Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17–18 (1992).

lodged with Clerk of this Court). VWIL students attend a school that "does not have a math and science focus," 852 F. Supp., at 503; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see *id.*, at 477.

For physical training, Mary Baldwin has "two multi-purpose fields" and "[o]ne gymnasium." *Id.*, at 503. VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track." *Ibid.*

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, *id.*, at 483, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, *id.*, at 499, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI's current endowment, $131 million—the largest public college per-student endowment in the Nation—will gain $220 million. *Id.*, at 503.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. See 976 F. 2d, at 892–893. "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 F. Supp., at 1421. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates," 852 F. Supp., at 499, will be equally responsive to her search for employment,

see 44 F. 3d, at 1250 (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." *Id.*, at 1241. Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. See *id.*, at 1250 (Phillips, J., dissenting).

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African-Americans could not be denied a legal education at a state facility. See *Sweatt* v. *Painter*, 339 U. S. 629 (1950). Reluctant to admit African-Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. *Id.*, at 632. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. *Id.*, at 633. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas." *Id.*, at 632 (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who ha[d] become a member of the Texas Bar." *Id.*, at 633. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over

65,000 volumes, scholarship funds, a law review, and moot court facilities. *Id.*, at 632–633.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. *Id.*, at 633. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African-Americans to the University of Texas Law School. *Id.*, at 636. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C

When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]." *Milliken*, 433 U. S., at 280 (internal quotation marks omitted). Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." 44 F. 3d, at 1241. The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no "comparable single-gender women's institution." *Ibid.* Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program sat-

isfactory. The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent, see *supra*, at 532–534, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see *supra*, at 528–529, a brand of review inconsistent with the more exacting standard our precedent requires, see *supra*, at 532–534. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." 44 F. 3d, at 1235, 1236. Recognizing that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J. E. B.*, 511 U. S., at 136. Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. See *supra*, at 549–554.[20] In sum, Virginia's

[20] Virginia's prime concern, it appears, is that "plac[ing] men and women into the adversative relationship inherent in the VMI program . . . would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." 44 F. 3d, at 1239; see *supra*, at 540–546. It is an ancient and familiar fear. Compare *In re Lavinia Goodell*, 39 Wis. 232, 246 (1875) (denying female applicant's motion for admission to the bar of its court, Wisconsin Supreme Court explained: "Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety."), with Levine, Closing Comments, 6 Law & Inequality 41 (1988) (presentation at

remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

VII

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertain[ed] the [then] relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein*, 309 F. Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187; see *supra*, at 538. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offer[ed] courses of instruction . . . not available elsewhere." 309 F. Supp., at 187. The court further noted: "[T]here exists at Charlottesville a 'prestige' factor

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Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987) (footnotes omitted):

"Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rulers of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women's native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women's nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender."

For Plato's full text on the equality of women, see 2 The Dialogues of Plato 302–312 (B. Jowett transl., 4th ed. 1953). Virginia, not bound to ancient Greek custom in its "rigorous physical and mental training" programs, could more readily make the accommodations necessary to draw on "the talent of [all] qualified citizens." Cf. *supra*, at 550–551, n. 19.

[not paralleled in] other Virginia educational institutions." *Ibid.*

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige"—associated with its success in developing "citizen-soldiers"—is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U. S., at 633. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded.[21] VMI's story continued as our comprehension of "We the People" expanded. See *supra*, at 532, n. 6.

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[21] R. Morris, The Forging of the Union, 1781–1789, p. 193 (1987); see *id.*, at 191, setting out letter to a friend from Massachusetts patriot (later second President) John Adams, on the subject of qualifications for voting in his home State:

"[I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level." Letter from John Adams to James Sullivan (May 26, 1776), in 9 Works of John Adams 378 (C. Adams ed. 1854).

There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

* * *

For the reasons stated, the initial judgment of the Court of Appeals, 976 F. 2d 890 (CA4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F. 3d 1229 (CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of these cases.

CHIEF JUSTICE REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

I

Two decades ago in *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), we announced that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See *Califano* v. *Goldfarb*, 430 U. S. 199, 210–211 (1977); *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979); *Caban* v. *Mohammed*, 441 U. S. 380, 388 (1979); *Davis* v. *Passman*, 442 U. S. 228, 234–235, 235, n. 9 (1979); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979);

Califano v. *Westcott*, 443 U. S. 76, 85 (1979); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980); *Kirchberg* v. *Feenstra*, 450 U. S. 455, 459–460 (1981); *Michael M.* v. *Superior Court, Sonoma Cty.*, 450 U. S. 464, 469 (1981); *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); *Heckler* v. *Mathews*, 465 U. S. 728, 744 (1984); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 137, n. 6 (1994). While the majority adheres to this test today, *ante*, at 524, 533, it also says that the Commonwealth must demonstrate an " 'exceedingly persuasive justification' " to support a gender-based classification. See *ante*, at 524, 529, 530, 531, 533, 534, 545, 546, 556. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, *e. g.*, *Feeney*, *supra*, at 273 ("[T]hese precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," *Hogan*, *supra*, at 723; *Heckler*, *supra*, at 744, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." *Feeney*, *supra*, at 273.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See *ante*, at 533, 535–536. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Common-

wealth has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and, as the Court notes, *ante*, at 536–537, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause. The Court refers to our decision in *Goesaert* v. *Cleary*, 335 U. S. 464 (1948). Likewise representing that now abandoned view was *Hoyt* v. *Florida*, 368 U. S. 57 (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life." *Id.*, at 62.

Then, in 1971, we decided *Reed* v. *Reed*, 404 U. S. 71, which the Court correctly refers to as a seminal case. But its facts have nothing to do with admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the Fourteenth Amendment because "a mandatory preference to members of either

sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.*, at 76. The brief opinion in *Reed* made no mention of either *Goesaert* or *Hoyt*.

Even at the time of our decision in *Reed* v. *Reed*, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In *Mississippi Univ. for Women* v. *Hogan*, *supra*, a case actually involving a single-sex admissions policy in higher education, the Court held that the exclusion of men from a nursing program violated the Equal Protection Clause. This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine "the legality and wisdom of VMI's single-sex policy in light of" *Hogan*. 766 F. Supp. 1407, 1427 (WD Va. 1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After three years of study, the committee found "'no information'" that would warrant a change in VMI's status. *Id.*, at 1429. Even the District Court, ultimately sympathetic to VMI's position, found that "[t]he Report provided very little indication of how [its] conclusion was reached" and that "[t]he one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." *Ibid.* The reasons given in the report for not changing the policy were the changes that admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after *Hogan*.

Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only.* But, unlike the majority, I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When *Hogan* placed Virginia on notice that

*The dissent equates our conclusion that VMI's "asserted interest in promoting diversity" is not "'genuine,'" with a "charge" that the diversity rationale is "a pretext for discriminating against women." *Post*, at 579–580. Of course, those are not the same thing. I do not read the Court as saying that the diversity rationale is a pretext for discrimination, and I would not endorse such a proposition. We may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was "antifeminism," *post*, at 580. Our cases simply require that the proffered purpose for the challenged gender classification be the actual purpose, although not necessarily recorded. See *ante*, at 533, 535–536. The dissent also says that the interest in diversity is so transparent that having to articulate it is "absurd on its face." *Post*, at 592. Apparently, that rationale was not obvious to the Mission Study Committee which failed to list it among its reasons for maintaining VMI's all-men admissions policy.

VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Ante*, at 529–530 (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal Protection Clause, but, until the decision in *Hogan*, a condition that had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the stark choice of either admitting women to VMI, on the

one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." *Post,* at 595. The private women's colleges are treated by the Commonwealth *exactly* as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, see 766 F. Supp., at 1414, and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

II

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." *Ante,* at 547. By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in "'the position they would have occupied in the absence of [discrimination],'" *ibid.*, the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution. As the foregoing discussion suggests, I would not define the violation in this way; it is not the "exclusion of women" that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. See *ante,* at 551–552. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

If a State decides to create single-sex programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume *a priori,* without evidence, that there would be

no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not

consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

I

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," *Clark* v. *Jeter*, 486 U. S. 456, 461 (1988) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," *Michael H.*

v. *Gerald D.*, 491 U. S. 110, 122 (1989) (plurality opinion of SCALIA, J.); but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex. See, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 662 (1994); *Mills* v. *Habluetzel*, 456 U. S. 91, 98–99 (1982); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 95 (1990) (SCALIA, J.,

dissenting). The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment. See, *e. g.*, *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990) (plurality opinion of SCALIA, J.) (Due Process Clause); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 156–163 (1994) (SCALIA, J., dissenting) (Equal Protection Clause); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 979–984, 1000–1001 (1992) (SCALIA, J., dissenting) (various alleged "penumbras").

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges—West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954—admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies, see *ante*, at 544–545, nn. 13, 15) came not by court decree, but because the people, through their elected representatives, decreed a change. See, *e. g.*, § 803(a), 89 Stat. 537, note following 10 U. S. C. § 4342. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by

today's decision with the cutoff of all state and federal support. Government-run *non*military educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] [c]oeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 736 (1982) (Powell, J., dissenting); see *id.*, at 736–739. These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, see *ante*, at 536–537, and n. 10, 537–539, 542–544, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

II

To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as JUSTICE O'CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "[b]etween th[e] extremes of rational basis review and strict scrutiny." *Clark* v. *Jeter*, 486 U. S., at 461. We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "sub-

stantially related to an important governmental objective." *Ibid.* See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 744 (1984); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980); *Craig* v. *Boren*, 429 U. S., at 197.

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court *avoids* doing so. Notwithstanding our above-described precedents and their " 'firmly established principles,' " *Heckler*, *supra*, at 744 (quoting *Hogan*, *supra*, at 723), the United States urged us to hold in this litigation "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." Brief for United States in No. 94–2107, p. 16. (This was in flat contradiction of the Government's position below, which was, in its own words, to "stat[e] *unequivocally* that the appropriate standard in this case is 'intermediate scrutiny.' " 2 Record, Doc. No. 88, p. 3 (emphasis added).) The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in *Hogan*, see *ante*, at 524, 532–533, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," 458 U. S., at 724 (internal quotation marks omitted), the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, see *ante*, at 524, 529, 530, 531, 533, 534, 545, 546, 556, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in *J. E. B.* v. *Alabama ex rel. T. B.*, *supra*, and *Hogan*, *supra*, see *ante*, at 531, would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking

"[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

That is essential to the Court's result, which can only be achieved by establishing that intermediate scrutiny is not survived if there are *some* women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Thus, the Court summarizes its holding as follows:

> "In contrast to the generalizations about women on which Virginia rests, we note again these *dispositive* realities: VMI's implementing methodology is not *inherently* unsuitable to women; *some* women do well under the adversative model; *some* women, at least, would want to attend VMI if they had the opportunity; *some* women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men." *Ante*, at 550 (internal quotation marks, citations, and punctuation omitted; emphasis added).

Similarly, the Court states that "[t]he Commonwealth's justification for excluding all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive' . . . ." *Ante*, at 545.[1]

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[1] Accord, *ante*, at 541 ("In sum . . . , neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is *inherently unsuitable* to women" (internal quotation marks omitted; emphasis added)); *ante*, at 542 ("[T]he question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords"); *ante*, at 547–548 (the "violation" is that "equal protection [has been] denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers"); *ante*, at 550 ("As earlier stated, see *supra*, at 541–542, gen-

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in *Califano* v. *Webster*, 430 U. S. 313 (1977) *(per curiam)*, we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women *on the average* received lower retirement benefits than men." *Id.*, at 318, and n. 5 (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In *Rostker* v. *Goldberg*, 453 U. S. 57 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.*, at 81. In *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 579, 582–583 (1990), overruled on other grounds, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying

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eralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").

objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

Not content to execute a *de facto* abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even in principle, a higher standard (*i. e.*, strict scrutiny) should apply. "The Court has," it says, "*thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin . . . ," *ante*, at 532, n. 6 (emphasis added); and it describes our earlier cases as having done no more than decline to "equat[e] gender classifications, *for all purposes*, to classifications based on race or national origin," *ante*, at 532 (emphasis added). The wonderful thing about these statements is that they are not actually false—just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically *held* strict scrutiny to be inapplicable to sex-based classifications. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728 (1984) (*upholding* state action after applying *only* intermediate scrutiny); *Michael M.* v. *Superior Court, Somoma Cty.*, 450 U. S. 464 (1981) (plurality and both concurring opinions) (same); *Califano* v. *Webster*, *supra (per curiam)* (same). And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law—not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applica-

ble standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's, see, *e. g.*, *Hoyt* v. *Florida*, 368 U. S. 57 (1961); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948). And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), which said (intimatingly) that we did not have to inquire in the case at hand

> "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*, at 152–153, n. 4.

It is hard to consider women a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. See, *e. g.*, *ante*, at 536–537, 542–546 (and accompanying notes). Moreover, a long list of legislation proves the proposition false. See, *e. g.*, Equal Pay Act of 1963, 29 U. S. C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2; Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681; Women's Business Ownership Act of 1988, Pub. L. 100–533, 102 Stat. 2689;

Violence Against Women Act of 1994, Pub. L. 103–322, Title IV, 108 Stat. 1902.

III

With this explanation of how the Court has succeeded in making its analysis seem orthodox—and indeed, if intimations are to be believed, even overly generous to VMI—I now proceed to describe how the analysis should have been conducted. The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective."

A

It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a *fact established in this case*." 44 F. 3d 1229, 1238 (CA4 1995) (emphasis added).

The evidence establishing that fact was overwhelming—indeed, "virtually uncontradicted" in the words of the court that received the evidence, 766 F. Supp. 1407, 1415 (WD Va. 1991). As an initial matter, Virginia demonstrated at trial that "[a] substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." *Id.*, at 1434. While no one questioned that for many students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

> "One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges pro-

> vide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." *Id.*, at 1412.

See also *id.*, at 1434–1435 (factual findings). "[I]n the light of this very substantial authority favoring single-sex education," the District Court concluded that "the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's teaching and training." *Id.*, at 1412. This finding alone, which even this Court cannot dispute, see *ante*, at 535, should be sufficient to demonstrate the constitutionality of VMI's all-male composition.

But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." 766 F. Supp., at 1413, 1421. "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." *Id.*, at 1421. No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case

practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [*i. e.*, adversative] program, the program would attract an insufficient number of participants to make the program work," 44 F. 3d, at 1241; and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether," 766 F. Supp., at 1413. Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

There can be no serious dispute that, as the District Court found, single-sex education and a distinctive educational method "represent legitimate contributions to diversity in the Virginia higher education system." *Ibid.* As a theoretical matter, Virginia's educational interest would have been *best* served (insofar as the two factors we have mentioned are concerned) by six different types of public colleges—an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method." But as a practical matter, of course, Virginia's financial resources, like any State's, are not limitless, and the Commonwealth must select among the available options. Virginia thus has decided to fund, in addition to some 14 coeducational 4-year colleges, one college that is run as an all-male school on the adversative model: the Virginia Military Institute.

Virginia did not make this determination regarding the make-up of its public college system on the unrealistic assumption that no other colleges exist. Substantial evidence in the District Court demonstrated that the Commonwealth has long proceeded on the principle that "'[h]igher education resources should be viewed as a whole—public and pri-

vate'"—because such an approach enhances diversity and because "'it is academic and economic waste to permit unwarranted duplication.'" *Id.*, at 1420–1421 (quoting 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia). It is thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one private all-male college," which "indicates that the private sector is providing for th[e] [former] form of education to a much greater extent that it provides for all-male education." 766 F. Supp., at 1420–1421. In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model—and to concentrate its resources in a single entity that serves both these interests in diversity—is substantially related to the Commonwealth's important educational interests.

B

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.

1. I have already pointed out the Court's most fundamental error, which is its reasoning that VMI's all-male composition is unconstitutional because "some women are capable of all of the individual activities required of VMI cadets," 766 F. Supp., at 1412, and would prefer military training on the adversative model. See *supra*, at 571–574. This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution—its asserted interest in promoting diversity of educational options—is not "genuin[e]," but is a pretext for discriminating against women. *Ante*, at 539; see *ante*, at 535–540. To support this

charge, the Court would have to impute that base motive to VMI's Mission Study Committee, which conducted a 3-year study from 1983 to 1986 and recommended to VMI's Board of Visitors that the school remain all male. The committee, a majority of whose members consisted of non-VMI graduates, "read materials on education and on women in the military," "made site visits to single-sex and newly coeducational institutions" including West Point and the Naval Academy, and "considered the reasons that other institutions had changed from single-sex to coeducational status"; its work was praised as "thorough" in the accreditation review of VMI conducted by the Southern Association of Colleges and Schools. See 766 F. Supp., at 1413, 1428; see also *id.*, at 1427–1430 (detailed findings of fact concerning the Mission Study Committee). The Court states that "[w]hatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options." *Ante*, at 539. But whether it is part of the evidence to prove that diversity *was* the Commonwealth's objective (its short report said nothing on that particular subject) is quite separate from whether it is part of the evidence to prove that antifeminism *was not*. The relevance of the Mission Study Committee is that its very creation, its sober 3-year study, and the analysis it produced utterly refute the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason.

The Court also supports its analysis of Virginia's "actual state purposes" in maintaining VMI's student body as all male by stating that there is no explicit statement in the record "'in which the Commonwealth has expressed itself'" concerning those purposes. *Ante*, at 535, 539 (quoting 976 F. 2d 890, 899 (CA4 1992)); see also *ante*, at 525. That is wrong on numerous grounds. First and foremost, in its implication that such an explicit statement of "actual purposes"

is needed. The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "[b]efore this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "[t]hat failure itself renders the VMI policy invalid." Brief for United States in No. 94–2107, at 10. This is an unheard-of doctrine. Each state decision to adopt or maintain a governmental policy need not be accompanied—in anticipation of litigation and on pain of being found to lack a relevant state interest—by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a "statement of basis and purpose" for their sovereign Acts, see 5 U. S. C. § 553(c). The situation would be different if what the Court assumes to have been the 1839 policy *had* been enshrined *and remained enshrined* in legislation—a VMI charter, perhaps, pronouncing that the institution's purpose is to keep women in their place. But since the 1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that *today's* Commonwealth continues to fund VMI "is enough to answer [the United States'] contention that the [classification] was the 'accidental by-product of a traditional way of thinking about females.'" *Michael M.*, 450 U. S., at 471, n. 6 (plurality opinion) (quoting *Califano* v. *Webster*, 430 U. S., at 320) (internal quotation marks omitted).

It is, moreover, not true that Virginia's contemporary reasons for maintaining VMI are not explicitly recorded. It is hard to imagine a more authoritative source on this subject than the 1990 Report of the Virginia Commission on the University of the 21st Century (1990 Report). As the parties stipulated, that report "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" Stipula-

tions of Fact 37, reprinted in Lodged Materials from the Record 64 (Lodged Materials). It said: "The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, traditionally black *and single-sex*." 1990 Report, quoted in relevant part at Lodged Materials 64–65 (emphasis added).[2] The Court's only response to this is repeated reliance on the Court of Appeals' assertion that "'the only explicit [statement] that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions'" (namely, the statement in the 1990 Report that the Commonwealth's institutions must "deal with faculty, staff, and students without regard to sex") had nothing to do with the purpose of diversity. *Ante*, at 525, 539 (quoting 976 F. 2d, at 899). This proves, I suppose, that the Court of Appeals did not find a statement dealing with sex and diversity in the record; but the pertinent question (accepting the need for such a statement) is *whether it was there.* And the plain fact, which the Court does not deny, is that it *was.*

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[2] This statement is supported by other evidence in the record demonstrating, by reference to both public and private institutions, that Virginia actively seeks to foster its "'rich heritage of pluralism and diversity in higher education,'" 1969 Report of the Virginia Commission on Constitutional Revision, quoted in relevant part at Lodged Materials 53; that Virginia views "'[o]ne special characteristic of the Virginia system [as being] its diversity,'" 1989 Virginia Plan for Higher Education, quoted in relevant part at Lodged Materials 64; and that in the Commonwealth's view "[h]igher education resources should be viewed as a whole—public and private"—because "'Virginia needs the diversity inherent in a dual system of higher education,'" 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, quoted in 766 F. Supp. 1407, 1420 (WD Va. 1991). See also Budget Initiatives for 1990–1992 of State Council of Higher Education for Virginia 10 (June 21, 1989) (Budget Initiatives), quoted at n. 3, *infra.* It should be noted (for this point will be crucial to my later discussion) that these official reports quoted here, in text and footnote, regard the Commonwealth's educational system—public *and private*—as a unitary one.

The Court contends that "[a] purpose genuinely to advance an array of educational options . . . is not served" by VMI. *Ante*, at 539–540. It relies on the fact that all of Virginia's *other* public colleges have become coeducational. *Ibid.;* see also *ante*, at 521, n. 2. The apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham. This fails to take account of the fact that Virginia's resources cannot support all possible permutations of schools, see *supra*, at 578, and of the fact that Virginia coordinates its public educational offerings with the offerings of in-state private educational institutions that the Commonwealth provides money for its residents to attend and otherwise assists—which include four women's colleges.[3]

Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized deci-

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[3] The Commonwealth provides tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia who attend private colleges in the Commonwealth. See, *e. g.,* Va. Code Ann. §§ 23–38.11 to 23–38.19 (1993 and Supp. 1995) (Tuition Assistance Grant Act); §§ 23–38.30 to 23–38.44:3 (Virginia Student Assistance Authorities); Va. Code Ann. §§ 23–38.45 to 23–38.53 (1993) (College Scholarship Assistance Act); §§ 23–38.53:1 to 23–38.53:3 (Virginia Scholars Program); §§ 23–38.70, 23–38.71 (Virginia Work-Study Program). These programs involve substantial expenditures: for example, Virginia appropriated $4,413,750 (not counting federal funds it also earmarked) for the College Scholarship Assistance Program for both 1996 and 1997, and for the Tuition Assistance Grant Program appropriated $21,568,000 for 1996 and $25,842,000 for 1997. See 1996 Va. Appropriations Act, ch. 912, pt. 1, § 160.

In addition, as the parties stipulated in the District Court, the Commonwealth provides other financial support and assistance to private institutions—including single-sex colleges—through low-cost building loans, state-funded services contracts, and other programs. See, *e. g.,* Va. Code Ann. §§ 23–30.39 to 23.30.58 (1993) (Educational Facilities Authority Act). The State Council of Higher Education for Virginia, in a 1989 document not created for purposes of this litigation but introduced into evidence, has described these various programs as a "means by which the Commonwealth can provide funding to its independent institutions, thereby helping to maintain a diverse system of higher education." Budget Initiatives 10.

sionmaking to achieve diversity—its granting of substantial autonomy to each institution with regard to student-body composition and other matters, see 766 F. Supp., at 1419. The Court adopts the suggestion of the Court of Appeals that it is not possible for "one institution with autonomy, but with no authority over any other state institution, [to] give effect to a state policy of diversity among institutions." *Ante*, at 539 (internal quotation marks omitted). If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution, that is to say, has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants. And of course none of the institutions is *entirely* autonomous; if and when the legislature decides that a particular school is not well serving the interest of diversity—if it decides, for example, that a men's school is not much needed—funding will cease.[4]

[4] The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to "'the Charlottesville campus'" of the University of Virginia. See *ante*, at 538. The University of Virginia, an institution even older than VMI, though not as old as another of the Commonwealth's universities, the College of William and Mary, occupies the portion of Charlottesville known, not as the "campus," but as "the grounds." More importantly, even if it were a "campus," there would be no need to specify "the Charlottesville campus," as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York (*e. g.*, the State University of New York at Binghamton or Buffalo), Illinois (University of Illinois at Urbana-Champaign or at Chicago), and California (University of California, Los Angeles, or University of California, Berkeley), there is only *one* University of Virginia. It happens (because Thomas Jefferson lived near there) to be located at Charlottesville. To many Virginians it is known,

3. In addition to disparaging Virginia's claim that VMI's single-sex status serves a state interest in diversity, the Court finds fault with Virginia's failure to offer education based on the adversative training method to women. It dismisses the District Court's "'findings' on 'gender-based developmental differences'" on the ground that "[t]hese 'findings' restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.'" *Ante,* at 541 (quoting 766 F. Supp., at 1434–1435). How remarkable to criticize the District Court on the ground that its findings rest on the evidence (*i. e.*, the testimony of Virginia's witnesses)! That is what findings are supposed to do. It is indefensible to tell the Commonwealth that "[t]he burden of justification is demanding and it rests entirely on [you]," *ante,* at 533, and then to ignore the District Court's findings *because* they rest on the evidence put forward by the Commonwealth—particularly when, as the District Court said, "[t]he evidence in the case . . . is *virtually uncontradicted,*" 766 F. Supp., at 1415 (emphasis added).

Ultimately, in fact, the Court does not deny the evidence supporting these findings. See *ante,* at 541–546. It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone

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simply, as "the University," which suffices to distinguish it from the Commonwealth's other institutions offering 4-year college instruction, which include Christopher Newport College, Clinch Valley College, the College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington University, Norfolk State University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, Virginia State University—and, of course, VMI.

who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this litigation en banc, see *ante,* at 542, (2) citations of nonevidentiary materials such as *amicus curiae* briefs filed in this Court, see *ante,* at 544–545, nn. 13, 14, and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days," see *ante,* at 542–544.

It is not too much to say that this approach to the litigation has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion. Not a single witness contested, for example, Virginia's "substantial body of 'exceedingly persuasive' evidence . . . that some students, both male and female, benefit from attending a single-sex college" and "[that] [f]or those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." 766 F. Supp., at 1411–1412. Even the United States' expert witness "called himself a 'believer in single-sex education,' " although it was his "personal, philosophical preference," not one "born of educational-benefit considerations," "that single-sex education should be provided only by the private sector." *Id.*, at 1412.

4. The Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "train-[ing] their argument on 'means' rather than 'end,' " *ante,* at 545. The Court focuses on "VMI's mission," which is to produce individuals "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national peril." 766 F. Supp., at 1425 (quoting Mission Study Committee of the VMI Board of

Visitors, Report, May 16, 1986). "Surely," the Court says, "that goal is great enough to accommodate women." *Ante*, at 545.

This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of *all* Virginia colleges. Which of them would the Old Dominion continue to fund if they did *not* aim to create individuals "imbued with love of learning, etc.," right down to being ready "to defend their country in time of national peril"? It can be summed up as "learning, leadership, and patriotism." To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But imparting those values *in that fashion—i. e.*, in a military, adversative, all-male environment—is the *distinctive* mission of VMI. And as I have discussed (and both courts below found), *that* mission is *not* "great enough to accommodate women."

The Court's analysis at least has the benefit of producing foreseeable results. Applied generally, it means that whenever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective—no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.

5. The Court argues that VMI would not have to change very much if it were to admit women. See, *e. g.*, *ante*, at 540–542. The principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to dis-

cuss, that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "[T]he evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." 766 F. Supp., at 1411. Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "[t]he intensity and aggressiveness of the current program"; and various modifications in other respects of the adversative training program that permeates student life. See *id.*, at 1412–1413, 1435–1443. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." 976 F. 2d, at 896–897.

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "[t]he notion that

admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." *Ante*, at 542 (footnote omitted). The point about "downgrad[ing] VMI's stature" is a straw man; no one has made any such claim. The point about "destroy[ing] the adversative system" is simply false; the District Court not only stated that "[e]vidence supports this theory," but specifically concluded that while "[w]ithout a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." 766 F. Supp., at 1413, and n. 8, 1440. And the point about "destroy[ing] the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women, 766 F. Supp., at 1412, and "would eventually find it necessary to drop the adversative system altogether," *id.*, at 1413.[5]

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[5] The Court's do-it-yourself approach to factfinding, which throughout is contrary to our well-settled rule that we will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949) (and cases cited), is exemplified by its invocation of the experience of the federal military academies to prove that not much change would occur. See *ante*, at 542, n. 11; 544–545, and n. 15; 550–551, n. 19. In fact, the District Court noted that "the West Point experience" *supported* the theory that a coeducational VMI would have to "adopt a [different] system," for West Point found it necessary upon becoming coeducational to "move away" from its adversative system. 766 F. Supp., at 1413, 1440. "Without a doubt . . . VMI's present methods of training and education would have to be changed as West Point's were." *Id.*, at 1413, n. 8; accord, 976 F. 2d 890, 896–897 (CA4 1992) (upholding District Court's findings that "the unique characteristics of VMI's program," including its "unique methodology," "would be destroyed by coeducation").

6. Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. In *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982), we attached no constitutional significance to the absence of an all-male nursing school. As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, "the opinion in *Hogan* could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.'" Brief for Cross-Petitioners in No. 94–2107, p. 38 (quoting *Mississippi Univ. for Women* v. *Hogan*, *supra*, at 720, n. 1).

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL because it is, under our established test, irrelevant, so long as *VMI*'s all-male character is "substantially related" to an important state goal. But VWIL now exists, and the Court's treatment of it shows how far reaching today's decision is.

VWIL was carefully designed by professional educators who have long experience in educating young women. The program *rejects* the proposition that there is a "difference in the respective spheres and destinies of man and woman," *Bradwell* v. *State*, 16 Wall. 130, 141 (1873), and is designed to "provide an all-female program that will achieve substantially similar outcomes [to VMI's] in an all-female environment," 852 F. Supp. 471, 481 (WD Va. 1994). After holding a trial where voluminous evidence was submitted and making detailed findings of fact, the District Court concluded that "there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the sub-

stantially similar ends." *Ibid.* The Court of Appeals undertook a detailed review of the record and affirmed. 44 F. 3d 1229 (CA4 1995).[6] But it is Mary Baldwin College, which runs VWIL, that has made the point most succinctly:

> "It would have been possible to develop the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation." Brief for Mary Baldwin College as *Amicus Curiae* 5.

It is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women. This Court, however, does not care. Even though VWIL was carefully designed by professional educators who have tremendous experience in the area, and survived the test of adversarial litigation, the Court simply declares, with no basis in the evidence, that

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[6] The Court is incorrect in suggesting that the Court of Appeals applied a "deferential" "brand of review inconsistent with the more exacting standard our precedent requires." *Ante*, at 555. That court "inquir[ed] (1) whether the state's objective is 'legitimate and important,' and (2) whether 'the requisite direct, substantial relationship between objective and means is present,'" 44 F. 3d, at 1235 (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 725 (1982)). To be sure, such review is "deferential" to a degree that the Court's new standard is not, *for it is intermediate scrutiny.* (The Court cannot evade this point or prove the Court of Appeals too deferential by stating that that court "devised another test, a 'substantive comparability' inquiry,'" *ante*, at 555 (quoting 44 F. 3d, at 1237), for as that court explained, its "substantive comparability" inquiry was an "*additional* step" that it engrafted on "th[e] traditional test" of intermediate scrutiny, *ibid.* (emphasis added).)

these professionals acted on "'overbroad' generalizations," *ante,* at 542, 550.

C

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more implausible. The concurrence offers three reasons: First, that there is "scant evidence in the record," *ante,* at 562, that diversity of educational offering was the real reason for Virginia's maintaining VMI. "Scant" has the advantage of being an imprecise term. I have cited the clearest statements of diversity as a goal for higher education in the 1990 Report, the 1989 Virginia Plan for Higher Education, the Budget Initiatives prepared in 1989 by the State Council of Higher Education for Virginia, the 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, and the 1969 Report of the Virginia Commission on Constitutional Revision. See *supra,* at 579, 581–582, and n. 2, 583, n. 3. There is *no* evidence to the contrary, once one rejects (as the concurrence rightly does) the relevance of VMI's founding in days when attitudes toward the education of women were different. Is this conceivably not enough to foreclose rejecting as clearly erroneous the District Court's determination regarding "the Commonwealth's objective of educational diversity"? 766 F. Supp., at 1413. Especially since it is absurd on its face even to *demand* "evidence" to prove that the Commonwealth's reason for maintaining a men's military academy is that a men's military academy provides a distinctive type of educational experience (*i. e.,* fosters diversity). What other purpose *would* the Commonwealth have? One may argue, as the Court does, that this *type* of diversity is designed only to indulge hostility toward women—but that is a separate point, explicitly rejected by the concurrence, and amply refuted by the evidence I have mentioned in dis-

cussing the Court's opinion.[7] What is now under discussion—the concurrence's making central to the disposition of this litigation the supposedly "scant" evidence that Virginia maintained VMI in order to offer a diverse educational experience—is rather like making crucial to the lawfulness of the United States Army record "evidence" that its purpose is to do battle. A legal culture that has forgotten the concept of *res ipsa loquitur* deserves the fate that it today decrees for VMI.

Second, the concurrence dismisses out of hand what it calls Virginia's "second justification for the single-sex admissions policy: maintenance of the adversative method." *Ante*, at 564. The concurrence reasons that "this justification does not serve an important governmental objective" because, whatever the record may show about the pedagogical benefits of *single-sex* education, "there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." *Ibid.* That is simply wrong. See, *e. g.*, 766 F. Supp., at 1426 (factual findings concerning character traits produced by VMI's adversative methodology); *id.*, at 1434 (factual findings concerning benefits for many college-age men of an adversative approach in general). In reality, the pedagogical benefits of VMI's adversative approach were not only proved, but were a *given* in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as

[7] The concurrence states that it "read[s] the Court" not "as saying that the diversity rationale is a pretext" for discriminating against women, but as saying merely that the diversity rationale is not genuine. *Ante*, at 562, n. The Court itself makes no such disclaimer, which would be difficult to credit inasmuch as the foundation for its conclusion that the diversity rationale is not "genuin[e]," *ante*, at 539, is its antecedent discussion of Virginia's "deliberate" actions over the past century and a half, based on "[f]amiliar arguments," that sought to enforce once "widely held views about women's proper place," *ante*, at 537, 538.

soon as she entered. She wanted the distinctive adversative education that VMI provided, and the battle was joined (in the main) over whether VMI had a basis for excluding women from that approach. The Court's opinion recognizes this, and devotes much of its opinion to demonstrating that "'some women . . . do well under [the] adversative model'" and that "[i]t is on behalf of these women that the United States has instituted this suit." *Ante*, at 550 (quoting 766 F. Supp., at 1434). Of course, in the last analysis it does not matter whether there are any benefits to the adversative method. The concurrence does not contest that there are benefits to *single-sex* education, and that alone suffices to make Virginia's case, since admission of a woman will even more surely put an end to VMI's single-sex education than it will to VMI's adversative methodology.

A third reason the concurrence offers in support of the judgment is that the Commonwealth and VMI were not quick enough to react to the "further developments" in this Court's evolving jurisprudence. *Ante*, at 561. Specifically, the concurrence believes it should have been clear after *Hogan* that "[t]he difficulty with [Virginia's] position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women." *Ante*, at 562. If only, the concurrence asserts, Virginia had "made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation." *Ante*, at 563. That is to say, the concurrence believes that after our decision in *Hogan* (which held a program of the Mississippi University for Women to be unconstitutional—without any reliance on the fact that there was no corresponding Mississippi all-men's program), the Commonwealth should have known that what this Court expected of it was . . . yes!, the creation of a state all-women's program. Any lawyer who gave that advice to the Commonwealth

ought to have been either disbarred or committed. (The proof of that pudding is today's 6-Justice majority opinion.) And any Virginia politician who proposed such a step when there were already four 4-year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs, see n. 3, *supra*) ought to have been recalled.

In any event, "diversity in the form of single-sex, as well as coeducational, institutions of higher learning" *is* "available to women as well as to men" in Virginia. *Ante*, at 564. The concurrence is able to assert the contrary only by disregarding the four all-women's private colleges in Virginia (generously assisted by public funds) and the Commonwealth's longstanding policy of coordinating public with private educational offerings, see *supra*, at 579, 581–582, and n. 2, 583–584, and n. 3. According to the concurrence, the *reason* Virginia's assistance to its four all-women's private colleges does not count is that "[t]he private women's colleges are treated by the State *exactly* as all other private schools are treated." *Ante*, at 564. But if Virginia cannot get *credit* for assisting women's education if it only treats women's private schools as it does all other private schools, then why should it get *blame* for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement.

IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

A

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—ask-

ing whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to *other* public schools at all. "We address specifically and only an educational opportunity recognized . . . as 'unique.' " *Ante*, at 534, n. 7.

The Supreme Court of the United States does not sit to announce "unique" dispositions. Its principal function is to establish *precedent*—that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the "*rationale* upon which the Court based the results of its earlier decisions." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 66–67 (1996) (emphasis added). That is the principal reason we publish our opinions.

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. See *supra*, at 571–574. Indeed, the Court indicates that if any program restricted to one sex is "uniqu[e]," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. *Ante*, at 542. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.[8]

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead.

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[8] In this regard, I note that the Court—which I concede is under no obligation to do so—provides no example of a program that *would* pass muster under its reasoning today: not even, for example, a football or wrestling program. On the Court's theory, any woman ready, willing, and physically able to participate in such a program would, *as a constitutional matter*, be entitled to do so.

The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the record evidence—indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "suppor[t] [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, *that cannot be replicated in a coeducational setting.*" 766 F. Supp., at 1415 (emphasis added). "The evidence in th[is] case," for example, "is virtually uncontradicted" to that effect. *Ibid.* Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on *Hogan*, see *Garrett* v. *Board of Ed. of School Dist. of Detroit*, 775 F. Supp. 1004, 1006 (ED Mich. 1991), and the

Detroit Board of Education voted to abandon the litigation and thus abandon the plan, see Detroit Plan to Aid Blacks with All-Boy Schools Abandoned, Los Angeles Times, Nov. 8, 1991, p. A4, col. 1. Today's opinion assures that no such experiment will be tried again.

B

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College—which designed and runs VWIL—notes that private institutions of higher education in the 1990–1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including financial aid to students.* See Brief for Mary Baldwin College as *Amicus Curiae* 22, n. 13 (citing U. S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics, p. 38 and Note (1993)). Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today's decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex. See Note, The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy, 64 S. Cal. L. Rev. 461, 476 (1991). See also *Bob Jones Univ.* v. *United States,* 461 U. S. 574 (1983).

The Court adverts to private single-sex education only briefly, and only to make the assertion (mentioned above) that "[w]e address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique.'" *Ante,* at 534, n. 7. As I have already remarked, see *supra,* at 596, that assurance assures nothing, unless it is to be taken as a promise that in the future

the Court will disclaim the reasoning it has used today to destroy VMI. The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not thereby necessarily converted into state actors to which the Equal Protection Clause is then applicable. See Brief for United States in No. 94–2107, at 35–37 (discussing *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982), and *Blum* v. *Yaretsky*, 457 U. S. 991 (1982)). That is true. It is also virtually meaningless.

The issue will be not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution by providing state support to single-sex colleges. For example, in *Norwood* v. *Harrison*, 413 U. S. 455 (1973), we saw no room to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Id.*, at 465 (quoting *Lee* v. *Macon County Bd. of Ed.*, 267 F. Supp. 458, 475–476 (MD Ala. 1967)); see also *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); *Grove City College* v. *Bell*, 465 U. S. 555, 565 (1984) (case arising under Title IX of the Education Amendments of 1972 and stating that "[t]he economic effect of direct and indirect assistance often is indistinguishable"). When the Government was pressed at oral argument concerning the implications of these cases for private single-sex education if government-provided single-sex education is unconstitu-

tional, it stated that the implications will not be so disastrous, since States *can* provide funding to *racially* segregated private schools, "depend[ing] on the circumstances," Tr. of Oral Arg. 56. I cannot imagine what those "circumstances" might be, and it would be as foolish for private-school administrators to think that that assurance from the Justice Department will outlive the day it was made, as it was for VMI to think that the Justice Department's "unequivoca[l]" support for an intermediate-scrutiny standard in this litigation would survive the Government's loss in the courts below.

The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this litigation is "unique"? I would not advise the foundation of any new single-sex college (especially an all-male one) with the expectation of being allowed to receive any government support; but it is too soon to abandon in despair those single-sex colleges already in existence. It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

* * *

Justice Brandeis said 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) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "'more perfect Union,'" *ante*, at 558 (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. See, *e. g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *Romer* v. *Evans*, 517 U. S. 620 (1996). The sphere of self-government reserved to the people of the Republic is progressively narrowed.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982). Many of the points made in his dissent apply with equal force here—in particular, the criticism of judicial opinions that purport to be "narro[w]" but whose "logic" is "sweepin[g]." *Id.*, at 745–746, n. 18. But there is one statement with which I cannot agree. Justice Powell observed that the Court's decision in *Hogan*, which struck down a single-sex program offered by the Mississippi University for Women, had thereby "[l]eft without honor . . . an element of diversity that has characterized much of American education and enriched much of American life." *Id.*, at 735. Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI stu-

dents (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled "The Code of a Gentleman":

> "Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.
>
> "A Gentleman . . .
>
> "Does not discuss his family affairs in public or with acquaintances.
>
> "Does not speak more than casually about his girl friend.
>
> "Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.
>
> "Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.
>
> "Does not hail a lady from a club window.
>
> "A gentleman never discusses the merits or demerits of a lady.
>
> "Does not mention names exactly as he avoids the mention of what things cost.
>
> "Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.
>
> "Does not display his wealth, money or possessions.
>
> "Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

"Does not slap strangers on the back nor so much as lay a finger on a lady.

"Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

"Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

"A Gentleman respects the reserves of others, but demands that others respect those which are his.

"A Gentleman can become what he wills to be. . . ."

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

Syllabus

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION

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

No. 95–489. Argued April 15, 1996—Decided June 26, 1996

Before the Colorado Republican Party selected its 1986 senatorial candidate, its Federal Campaign Committee (Colorado Party), a petitioner here, bought radio advertisements attacking the Democratic Party's likely candidate. The Federal Election Commission (FEC) brought suit charging that the Colorado Party had violated the "Party Expenditure Provision" of the Federal Election Campaign Act of 1971 (FECA), 2 U. S. C. § 441a(d)(3), which imposes dollar limits upon political party "expenditure[s] in connection with the general election campaign of a [congressional] candidate." The Colorado Party defended in part by claiming that the expenditure limitations violated the First Amendment as applied to its advertisements, and filed a counterclaim seeking to raise a facial challenge to the provision as a whole. The District Court interpreted the "in connection with" language narrowly and held that the provision did not cover the expenditure at issue. It therefore entered summary judgment for the Colorado Party, dismissing the counterclaim as moot. In ordering judgment for the FEC, the Court of Appeals adopted a somewhat broader interpretation of the provision, which, it said, both covered this expenditure and satisfied the Constitution.

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

59 F. 3d 1015, vacated and remanded.

JUSTICE BREYER, joined by JUSTICE O'CONNOR and JUSTICE SOUTER, concluded that the First Amendment prohibits application of the Party Expenditure Provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate. Pp. 613–623.

(a) The outcome is controlled by this Court's FECA case law. After weighing the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views, against a "compelling" governmental interest in protecting the electoral system from the appearance and reality of corruption, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 14–23 *(per curiam)*, the Court has ruled unconstitutional FECA provisions that, *inter alia*, limited the right of individuals,

id., at 39–51, and political committees, *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 497, to make "independent" expenditures not coordinated with a candidate or a candidate's campaign, but has permitted other FECA provisions that imposed *contribution* limits both when an individual or political committee contributed money directly to a candidate, and when they contributed indirectly by making expenditures that they coordinated with the candidate, see *Buckley*, *supra*, at 23–36, 46–48. The summary judgment record indicates that the expenditure here at issue must be treated, for constitutional purposes, as an "independent" expenditure entitled to First Amendment protection, not as an indirect campaign contribution subject to regulation. There is uncontroverted direct evidence that the Colorado Party developed its advertising campaign independently and not pursuant to any understanding with a candidate. Since the Government does not point to evidence or legislative findings suggesting any special corruption problem in respect to political parties' independent expenditures, the Court's prior cases forbid regulation of such expenditures. Pp. 613–619.

(b) The Government's argument that this expenditure is not "independent," but is rather a "coordinated expenditure," which this Court has treated as a "contribution" that Congress may constitutionally regulate, is rejected. The summary judgment record shows no actual coordination with candidates as a matter of fact. The Government's claim for deference to FEC interpretations rendering *all* party expenditures "coordinated" is unpersuasive. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 28–29, n. 1, distinguished. These regulations and advisory opinions do not represent an empirical judgment by the FEC that all party expenditures are coordinated with candidates or that party independent and coordinated expenditures cannot be distinguished in practice. Also unconvincing are the Government's contentions that the Colorado Party has conceded that the expenditure here is "coordinated," and that such coordination exists because a party and its candidate are, in some sense, identical. Pp. 619–623.

(c) Because this expenditure is "independent," the Court need not reach the broader question argued by the Colorado Party: whether, in the special case of political parties, the First Amendment also forbids congressional efforts to limit coordinated expenditures. While the Court is not deprived of jurisdiction to consider this facial challenge by the failure of the parties and the lower courts to focus specifically on the complex issues involved in determining the constitutionality of political parties' coordinated expenditures, that lack of focus provides a prudential reason for the Court not to decide the broader question. This is

the first case to raise the question, and the Court should defer action until the lower courts have considered it in light of this decision. Pp. 623–626.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded that, on its face, FECA violates the First Amendment when it restricts as a "contribution" a political party's spending "in cooperation, consultation, or concert, with . . . a candidate." 2 U. S. C. § 441a(a)(7)(B)(i). The Court in *Buckley* v. *Valeo*, 424 U. S. 1 *(per curiam)*, had no occasion to consider limitations on political parties' expenditures, *id.*, at 58, n. 66, and its reasoning upholding ordinary contribution limitations should not be extended to a case that does. *Buckley*'s central holding is that spending money on one's own speech must be permitted, *id.*, at 44–58, and that is what political parties do when they make the expenditures that § 441a(a)(7)(B)(i) restricts as "contribution[s]." Party spending "in cooperation, consultation, or concer[t] with" a candidate is indistinguishable in substance from expenditures by the candidate or his campaign committee. The First Amendment does not permit regulation of the latter, see *id.*, at 54–59, and it should not permit this regulation of the former. Pp. 626–631.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded in Parts I and III that 2 U. S. C. § 441a(d)(3) is unconstitutional not only as applied to petitioners, but also on its face. Pp. 631–634, 644–648.

(a) The Court should decide the Colorado Party's facial challenge to § 441a(d)(3), addressing the constitutionality of limits on coordinated expenditures by political parties. That question is squarely before the Court, and the principal opinion's reasons for not reaching it are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving the question. Reaching the facial challenge will make clear the circumstances under which political parties may engage in political speech without running afoul of § 441a(d)(3). Pp. 631–634.

(b) Section 441a(d)(3) cannot withstand a facial challenge under the framework established by *Buckley* v. *Valeo*, 424 U. S. 1 *(per curiam)*. The anticorruption rationale that the Court has relied on is inapplicable in the specific context of campaign funding by political parties, since there is only a minimal threat of corruption when a party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger lies in Government suppression of such activity. Pp. 644–648.

Syllabus

JUSTICE THOMAS also concluded in Part II that, in resolving the facial challenge, the *Buckley* framework should be rejected because there is no constitutionally significant difference between campaign contributions and expenditures: Both involve core expression and basic associational rights that are central to the First Amendment. Curbs on such speech must be strictly scrutinized. See, *e. g.*, *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 501. Section 441a(d)(3)'s limits on independent and coordinated expenditures fail strict scrutiny because the statute is not narrowly tailored to serve the compelling governmental interest in preventing the fact or appearance of "corruption," which this Court has narrowly defined as a "financial *quid pro quo:* dollars for political favors," *id.*, at 497. Contrary to the Court's ruling in *Buckley*, *supra*, at 28, bribery laws and disclosure requirements present less restrictive means of preventing corruption than does § 441a(d)(3), which indiscriminately covers many conceivable instances in which a party committee could exceed spending limits without any intent to extract an unlawful commitment from a candidate. Pp. 640–644.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 626. THOMAS, J., filed an opinion concurring in the judgment and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined as to Parts I and III, *post*, p. 631. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 648.

Jan Witold Baran argued the cause for petitioners. With him on the briefs were *Thomas W. Kirby*, *Carol A. Laham*, and *Michael E. Toner*.

Solicitor General Days argued the cause for respondent. With him on the brief were *Deputy Solicitor General Bender*, *Malcolm L. Stewart*, *Lawrence M. Noble*, *Richard B. Bader*, and *Rita A. Reimer*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *David H. Remes*, *David H. Miller*, *Arthur B. Spitzer*, *Steven R. Shapiro*, *Joel M. Gora*, and *Arthur N. Eisenberg;* for the Democratic National Committee et al. by *Joseph E. Sandler* and *Robert F. Bauer;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.*, and *Richard E. Coleson;* and for the Washington Legal

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE SOUTER join.

In April 1986, before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candidate. The Federal Election Commission (FEC) charged that this "expenditure" exceeded the dollar limits that a provision of the Federal Election Campaign Act of 1971 (FECA or Act) imposes upon political party "expenditure[s] in connection with" a "general election campaign" for congressional office. 90 Stat. 486, as amended, 2 U. S. C. § 441a(d)(3). This case focuses upon the constitutionality of those limits as applied to this case. We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate.

Foundation et al. by *Benjamin L. Ginsberg*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the Brennan Center for Justice by *Burt Neuborne;* and for Common Cause et al. by *Roger M. Witten*, *Donald J. Simon*, and *Alan Morrison*.

Briefs of *amici curiae* were filed for the State of Kentucky et al. by *A. B. Chandler III*, Attorney General of Kentucky, *Pamela J. Murphy*, Deputy Attorney General, *Morgan G. Ransdell*, Assistant Attorney General, *Sheryl G. Snyder*, *Richard Blumenthal*, Attorney General of Connecticut, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Tom Udall*, Attorney General of New Mexico, *W. A. Drew Edmondson*, Attorney General of Oklahoma, and *Darrell V. McGraw, Jr.*, Attorney General of West Virginia; for the Committee for Party Renewal et al. by *E. Mark Braden* and *Stephen E. Gottlieb;* and for the Republican National Committee by *George J. Terwilliger III*, *John P. Connors*, *E. Duncan Getchell, Jr.*, *Robert L. Hodges*, and *Darryl S. Lew*.

I

To understand the issues and our holding, one must begin with FECA as it emerged from Congress in 1974. That Act sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. See *Buckley* v. *Valeo*, 424 U. S. 1, 25–27 (1976) *(per curiam)*. It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PAC's), and political parties could *contribute* to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could *spend*, even on their own, to help a candidate win election. See 18 U. S. C. §§ 608, 610 (1970 ed., Supp. IV).

This Court subsequently examined several of the Act's provisions in light of the First Amendment's free speech and association protections. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480 (1985) *(NCPAC); California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182 (1981); *Buckley*, *supra*. In these cases, the Court essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a "compelling" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption. See *Massachusetts Citizens for Life*, *supra*, at 256–263; *NCPAC*, *supra*, at 493–501; *California Medical Assn.*, *supra*, at 193–199; *Buckley*, 424 U. S., at 14–23. After doing so, the Court found that the First Amendment prohibited some of FECA's provisions, but permitted others.

Most of the provisions this Court found unconstitutional imposed *expenditure* limits. Those provisions limited candidates' rights to spend their own money, *id.*, at 51–54, limited a candidate's campaign expenditures, *id.*, at 54–58, limited the right of individuals to make "independent" expenditures (not coordinated with the candidate or candidate's campaign), *id.*, at 39–51, and similarly limited the right of political committees to make "independent" expenditures, *NCPAC*, *supra*, at 497. The provisions that the Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i). See *Buckley*, *supra*, at 23–36. See also 424 U. S., at 46–48; *California Medical Assn.*, *supra*, at 193–199 (limits on contributions to political committees). Consequently, for present purposes, the Act now prohibits individuals and political committees from making direct, or indirect, contributions that exceed the following limits:

> (a) For any "person": $1,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; $20,000 to the national committees of a political party in any year; but all within an overall limit (for any individual in any year) of $25,000. 2 U. S. C. §§ 441a(a)(1), (3).
>
> (b) For any "multicandidate political committee": $5,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; and $15,000 to the national committees of a political party in any year. § 441a(a)(2).

FECA also has a special provision, directly at issue in this case, that governs contributions and expenditures by political parties. § 441a(d). This special provision creates, in part, an *exception* to the above contribution limits. That

is, without special treatment, political parties ordinarily would be subject to the general limitation on contributions by a "multicandidate political committee" just described. See § 441a(a)(4). That provision, as we said in subsection (b) above, limits annual contributions by a "multicandidate political committee" to no more than $5,000 to any candidate. And as also mentioned above, this contribution limit governs not only direct contributions but also indirect contributions that take the form of coordinated expenditures, defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." § 441a(a)(7)(B)(i). Thus, ordinarily, a party's coordinated expenditures would be subject to the $5,000 limitation.

However, FECA's special provision, which we shall call the "Party Expenditure Provision," creates a *general exception* from this contribution limitation, and from any other limitation on expenditures. It says:

> "Notwithstanding any other provision of law with respect to *limitations on expenditures or limitations on contributions*, . . . political party [committees] . . . may make *expenditures* in connection with the general election campaign of candidates for Federal office . . . ." § 441a(d)(1) (emphasis added).

After exempting political parties from the general contribution and expenditure limitations of the statute, the Party Expenditure Provision then imposes a *substitute limitation* upon party "expenditures" in a senatorial campaign equal to the greater of $20,000 or "2 cents multiplied by the voting age population of the State," § 441a(d)(3)(A)(i), adjusted for inflation since 1974, § 441a(c). The provision permitted a political party in Colorado in 1986 to spend about $103,000 in connection with the general election campaign of a candidate for the United States Senate. See FEC Record, vol. 12, no. 4, p. 1 (Apr. 1986). (A different provision, not at issue

in this case, § 441a(d)(2), limits party expenditures in connection with Presidential campaigns. Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns.)

In January 1986, Timothy Wirth, then a Democratic Congressman, announced that he would run for an open Senate seat in November. In April, before either the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee (Colorado Party or Party), a petitioner here, bought radio advertisements attacking Congressman Wirth. The State Democratic Party complained to the FEC. It pointed out that the Colorado Party had previously assigned its $103,000 general election allotment to the National Republican Senatorial Committee, leaving it without any permissible spending balance. See *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27 (1981) (state party may appoint national senatorial campaign committee as agent to spend its Party Expenditure Provision allotment). It argued that the purchase of radio time was an "expenditure in connection with the general election campaign of a candidate for Federal office," § 441a(d)(3), which, consequently, exceeded the Party Expenditure Provision limits.

The FEC agreed with the Democratic Party. It brought a complaint against the Colorado Party, charging a violation. The Colorado Party defended in part by claiming that the Party Expenditure Provision's expenditure limitations violated the First Amendment—a charge that it repeated in a counterclaim that said the Colorado Party intended to make other "expenditures directly in connection with" senatorial elections, App. 68, ¶ 48, and attacked the constitutionality of the entire Party Expenditure Provision. The Federal District Court interpreted the provision's words "'in connection with' the general election campaign of a candidate" narrowly, as meaning only expenditures for advertis-

ing using " 'express words of advocacy of election or defeat.' " 839 F. Supp. 1448, 1455 (Colo. 1993) (quoting *Buckley*, 424 U. S., at 46, n. 52). See also *Massachusetts Citizens for Life*, 479 U. S., at 249. As so interpreted, the court held, the provision did not cover the expenditures here. The court entered summary judgment for the Colorado Party and dismissed its counterclaim as moot.

Both sides appealed. The Government, for the FEC, argued for a somewhat broader interpretation of the statute—applying the limits to advertisements containing an "electioneering message" about a "clearly identified candidate," FEC Advisory Op. 1985–14, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5819, p. 11,185 (May 30, 1985)—which, it said, both covered the expenditure and satisfied the Constitution. The Court of Appeals agreed. It found the Party Expenditure Provision applicable, held it constitutional, and ordered judgment in the FEC's favor. 59 F. 3d 1015, 1023–1024 (CA10 1995).

We granted certiorari primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment "either facially or as applied." Pet. for Cert. i. For reasons we shall discuss in Part IV, *infra*, we consider only the latter question—whether the Party Expenditure Provision as applied here violates the First Amendment. We conclude that it does.

II

The summary judgment record indicates that the expenditure in question is what this Court in *Buckley* called an "independent" expenditure, not a "coordinated" expenditure that other provisions of FECA treat as a kind of campaign "contribution." See *Buckley*, *supra*, at 36–37, 46–47, 78; *NCPAC*, 470 U. S., at 498. The record describes how the expenditure was made. In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the Party had not yet selected a

senatorial nominee from among the three individuals vying for the nomination. App. 195–196. He added that he arranged for the development of the script at his own initiative, *id.*, at 200, that he, and no one else, approved it, *id.*, at 199, that the only other politically relevant individuals who might have read it were the Party's executive director and political director, *ibid.*, and that all relevant discussions took place at meetings attended only by Party staff, *id.*, at 204.

Notwithstanding the above testimony, the Government argued in District Court—and reiterates in passing in its brief to this Court, Brief for Respondent 27, n. 20—that the deposition showed that the Party had coordinated the advertisement with its candidates. It pointed to Callaway's statement that it was the practice of the Party to "coordinat[e] with the candidate" "campaign strategy," App. 195, and for Callaway to be "as involved as [he] could be" with the individuals seeking the Republican nomination, *ibid.*, by making available to them "all of the assets of the party," *id.*, at 195–196. These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate. We can find no "genuine" issue of fact in this respect. Fed. Rule Civ. Proc. 56(e); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 586–587 (1986). And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

So treated, the expenditure falls within the scope of the Court's precedents that extend First Amendment protection to independent expenditures. Beginning with *Buckley*, the Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views

independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *NCPAC*, *supra*, at 497. This difference has been grounded in the observation that restrictions on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, *supra*, at 20–21, because the symbolic communicative value of a contribution bears little relation to its size, 424 U. S., at 21, and because such limits leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *id.*, at 28. At the same time, reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors. *Id.*, at 26–27.

In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech." *Id.*, at 19. And at the same time, the Court has concluded that limitations on independent expenditures are less directly related to preventing corruption, since "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . 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." *Id.*, at 47.

Given these established principles, we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating

a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. See, *e. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989).

We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction. When this Court considered, and held unconstitutional, limits that FECA had set on certain independent expenditures by PAC's, it reiterated *Buckley*'s observation that "the absence of prearrangement and coordination" does not eliminate, but it does help to "alleviate," any "danger" that a candidate will understand the expenditure as an effort to obtain a "*quid pro quo*." See *NCPAC,* 470 U. S., at 498. The same is true of independent party expenditures.

We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U. S. C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See § 431(8)(B). Any contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations. § 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are

also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2). The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties. Cf. *California Medical Assn.*, 453 U. S., at 197–199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on *contributions* to PAC's). But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitations on *expenditures*. *Buckley*, 424 U. S., at 44. See also *id.*, at 46–47, 51; *NCPAC*, *supra*, at 498. Contributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, *supra*, at 44–48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, *supra*, at 45–46; *NCPAC*, *supra*, at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is

necessary to combat a substantial danger of corruption of the electoral system.

The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured" (citation and internal quotation marks omitted)); *NCPAC*, *supra*, at 498. To the contrary, this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. See *Buckley*, *supra*, at 57. In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections. See *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S., at 41 (Party Expenditure Provision was intended to "assur[e] that political parties will continue to have an important role in federal elections"); S. Rep. No. 93–689, p. 7 (1974) ("[A] vigorous party system is vital to American politics . . . . [P]ooling resources from many small contributors is a legitimate function and an integral part of party politics"); *id.*, at 7–8, 15.

We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties. Having concluded this, we need not consider the Party's further claim that the statute's "in connection with" language, and

the FEC's interpretation of that language, are unconstitutionally vague. Cf. *Buckley*, *supra*, at 40–44.

III

The Government does not deny the force of the precedent we have discussed. Rather, it argued below, and the lower courts accepted, that the expenditure in this case should be treated under those precedents, not as an "independent expenditure," but rather as a "coordinated expenditure," which those cases have treated as "contributions," and which those cases have held Congress may constitutionally regulate. See, *e. g.*, *Buckley*, *supra*, at 23–38.

While the District Court found that the expenditure in this case was "coordinated," 839 F. Supp., at 1453, it did not do so based on any factual finding that the Party had consulted with any candidate in the making or planning of the advertising campaign in question. Instead, the District Court accepted the Government's argument that all party expenditures should be treated as if they had been coordinated *as a matter of law*, "[b]ased on Supreme Court precedent and the Commission's interpretation of the statute," *ibid.* The Court of Appeals agreed with this legal conclusion. 59 F. 3d, at 1024. Thus, the lower courts' "finding" of coordination does not conflict with our conclusion, *supra*, at 613–614, that the summary judgment record shows no actual coordination as a matter of fact. The question, instead, is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are "coordinated." We believe it did.

In support of its argument, the Government points to a set of legal materials, based on FEC interpretations, that seem to say or imply that *all* party expenditures are "coordinated." These include: (1) an FEC regulation that forbids political parties to make any "independent expenditures . . . in connection with" a "general election campaign," 11 CFR § 110.7(b)(4) (1995); (2) FEC Advisory Opinions that use the

word "coordinated" to describe the Party Expenditure Provision's limitations, see, *e. g.*, FEC Advisory Op. 1984–15, 1 CCH Fed. Election Camp. Fin. Guide ¶ 5766, p. 11,069 (May 31, 1984) (AO 1984–15); FEC Advisory Op. 1988–22, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5932, p. 11,471, n. 4 (July 5, 1988) (AO 1988–22); (3) one FEC Advisory Opinion that says explicitly in a footnote that "coordination with candidates is presumed and 'independence' precluded," *ibid.*; and (4) a statement by this Court that "[p]arty committees are considered incapable of making 'independent' expenditures," *Democratic Senatorial Campaign Comm., supra,* at 28–29, n. 1.

The Government argues, on the basis of these materials, that the FEC has made an "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election." Brief for Respondent 27. The FEC materials, however, do not make this empirical judgment. For the most part those materials use the word "coordinated" as a description that does not necessarily deny the possibility that a party could *also* make independent expenditures. See, *e. g.*, AO 1984–15, ¶ 5766, at 11,069. We concede that one Advisory Opinion says, in a footnote, that "coordination with candidates is presumed." AO 1988–22, ¶ 5932, at 11,471, n. 4. But this statement, like the others, appears without any internal or external evidence that the FEC means it to embody an *empirical* judgment (say, that parties, in fact, hardly ever spend money independently) or to represent the outcome of an empirical investigation. Indeed, the statute does not require any such investigation, for it applies *both* to coordinated and to independent expenditures alike. See § 441a(d)(3) (a "political party . . . may not make *any* expenditure" in excess of the limits (emphasis added)). In any event, language in other FEC Advisory Opinions suggests the opposite, namely, that sometimes, in fact, parties do make independent expendi-

tures. See, *e. g.*, AO 1984–15, ¶ 5766, at 11,069 ("Although consultation or coordination with the candidate is permissible, it is not required"). In these circumstances, we cannot take the cited materials as an empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate. That being so, we need not hold, on the basis of these materials, that the expenditures here were "coordinated."

The Government does not advance any other legal reason that would require us to accept the FEC's characterization. The FEC has not claimed, for example, that, administratively speaking, it is more difficult to separate a political party's "independent," from its "coordinated," expenditures than, say, those of a PAC. Cf. 11 CFR § 109.1 (1995) (distinguishing between independent and coordinated expenditures by other political groups). Nor can the FEC draw significant legal support from the footnote in *Democratic Senatorial Campaign Comm.*, 454 U. S., at 28–29, n. 1, given that this statement was dicta that purported to describe the regulatory regime as the FEC had described it in a brief.

Nor does the fact that the Party Expenditure Provision fails to distinguish between coordinated and independent expenditures indicate a congressional judgment that such a distinction is impossible or untenable in the context of political party spending. Instead, the use of the unmodified term "expenditure" is explained by Congress' desire to limit *all* party expenditures when it passed the 1974 amendments, just as it had limited all expenditures by individuals, corporations, and other political groups. See 18 U. S. C. §§ 608(e), 610 (1970 ed., Supp. IV); *Buckley*, 424 U. S., at 39.

Finally, we recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the characterization cannot help the Government prove its case. An agency's simply calling an independent expenditure a "coordinated expendi-

ture" cannot (for constitutional purposes) make it one. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 429 (1963) (the government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards* v. *South Carolina*, 372 U. S. 229, 235–238 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

The Government also argues that the Colorado Party has conceded that the expenditures are "coordinated." But there is no such concession in respect to the underlying facts. To the contrary, the Party's "Questions Presented" in its petition for certiorari describes the expenditure as one "the party has not coordinated with its candidate." See Pet. for Cert. i. In the lower courts the Party did accept the FEC's terminology, but it did so in the context of legal arguments that did not focus upon the constitutional distinction that we now consider. See Reply Brief for Petitioners 9–10, n. 8 (denying that the FEC's labels can control constitutional analysis). The Government has not referred us to any place where the Party conceded away or abandoned its legal claim that Congress may not limit the uncoordinated expenditure at issue here. And, in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts. Cf. *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 447 (1993); *Massachusetts* v. *United States*, 333 U. S. 611, 623–628 (1948); *Young* v. *United States*, 315 U. S. 257, 259 (1942) (recognizing that "our judgments are precedents" and that the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

Finally, the Government and supporting *amici* argue that the expenditure is "coordinated" because a party and its candidate are identical, *i. e.*, the party, in a sense, "is" its candidates. We cannot assume, however, that this is so. See, *e. g.*, W. Keefe, Parties, Politics, and Public Policy in America

59–74 (5th ed. 1988) (describing parties as "coalitions" of differing interests). Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other. See § 441a(a)(2)(B). See also 11 CFR §§ 110.2, 110.3(b) (1995). And we are not certain whether a metaphysical identity would help the Government, for in that case one might argue that the absolute identity of views and interests eliminates any potential for corruption, as would seem to be the case in the relationship between candidates and their campaign committees. Cf. *Buckley*, *supra*, at 54–59 (Congress may not limit expenditures by candidate/campaign committee); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790 (1978) (where there is no risk of "corruption" of a candidate, the Government may not limit even contributions).

IV

The Colorado Party and supporting *amici* have argued a broader question than we have decided, for they have claimed that, in the special case of political parties, the First Amendment forbids congressional efforts to limit coordinated expenditures as well as independent expenditures. Because the expenditure before us is an independent expenditure we have not reached this broader question in deciding the Party's "as applied" challenge.

We recognize that the Party filed a counterclaim in which it sought to raise a facial challenge to the Party Expenditure Provision as a whole. But that counterclaim did not focus specifically upon coordinated expenditures. See App. 68–69. Nor did its summary judgment affidavits specifically allege that the Party intended to make coordinated expenditures exceeding the statute's limits. See *id.*, at 159, ¶ 4. While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as overbroad or as unconstitutional in all applications, it does provide a prudential reason for this Court not to

decide the broader question, especially since it may not be necessary to resolve the entire current dispute. If, in fact, the Party wants to make only independent expenditures like those before us, its counterclaim is mooted by our resolution of its "as applied" challenge. Cf. *Renne* v. *Geary*, 501 U. S. 312, 323–324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503–504 (1985).

More importantly, the opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that *in fact* are coordinated, nor did they examine, in that context, relevant similarities or differences with similar expenditures made by individuals or other political groups. Indeed, to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment, even though this Court's prior cases have permitted regulation of similarly coordinated expenditures by individuals and other political groups. See *Buckley*, 424 U. S., at 46–47. This issue is complex. As JUSTICE KENNEDY points out, *post*, at 629–630, party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills, see *Buckley*, *supra*, at 46). Moreover, political parties also share relevant features with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will "work to further" a particular "political agenda," which activity would benefit from coordination with those candidates. *Post*, at 630. See, *e. g.*, *NCPAC*, 470 U. S., at 490 (describing the purpose and activities of the National Conservative PAC); *id.*, at 492 (coordinated expenditures by PAC's are

subject to FECA contribution limitations). Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits.

But the focus of this litigation, and of the lower court opinions, has not been on such issues, but rather on whether the Government may conclusively deem independent party expenditures to be coordinated. This lack of focus may reflect, in part, the litigation strategy of the parties. The Government has denied that any distinction can be made between a party's independent and its coordinated expenditures. The Colorado Party, for its part, did not challenge a different provision of the statute—a provision that imposes a $5,000 limit on any contribution by a "multicandidate political committee" (including a coordinated expenditure) and which would apply to party coordinated expenditures if the entire Party Expenditure Provision were struck from the statute as unconstitutional. See §§ 441a(a)(2), (4), (7)(B)(i). Rather than challenging the constitutionality of this provision as well, thereby making clear that it was challenging Congress' authority to regulate in-fact coordinated party expenditures, the Party has made an obscure severability argument that would leave party coordinated expenditures exempt from that provision. See Reply Brief for Petitioners 11, n. 9. While these strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

Finally, we note that neither the parties nor the lower courts have considered whether or not Congress would have wanted the Party Expenditure Provision's limitations to stand were they to apply only to coordinated, and not to independent, expenditures. See *Buckley*, *supra*, at 108; *NCPAC*, *supra*, at 498. This nonconstitutional ground for exempting party coordinated expenditures from FECA limitations

should be briefed and considered before addressing the constitutionality of such regulation. See *United States* v. *Locke*, 471 U. S. 84, 92, and n. 9 (1985).

JUSTICE THOMAS disagrees and would reach the broader constitutional question notwithstanding the above prudential considerations. In fact, he would reach a great number of issues neither addressed below, nor presented by the facts of this case, nor raised by the parties, for he believes it appropriate here to overrule *sua sponte* this Court's entire campaign finance jurisprudence, developed in numerous cases over the last 20 years. See *post*, at 635–644. Doing so seems inconsistent with this Court's view that it is ordinarily "inappropriate for us to reexamine" prior precedent "without the benefit of the parties' briefing," since the "principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties." *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, 856 (1996). In our view, given the important competing interests involved in campaign finance issues, we should proceed cautiously, consistent with this precedent, and remand for further proceedings.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in the judgment and dissenting in part.

In agreement with JUSTICE THOMAS, *post*, at 631–634, I would hold that the Colorado Republican Party (Party), in its pleadings in the District Court and throughout this litigation, has preserved its claim that the constraints imposed by the Federal Election Campaign Act of 1971 (FECA), both on its face and as interpreted by the Federal Elections Commission (FEC), violate the First Amendment.

In the principal opinion's view, the FEC's conclusive presumption that all political party spending relating to identified candidates is "coordinated" cannot be squared with the First Amendment. *Ante*, at 619–623. The principal opinion finds the presumption invalid, and I agree with much of the reasoning behind that conclusion. The quarrel over the FEC's presumption is beside the point, however, for under the statute it is both burdensome and quite unrealistic for a political party to attempt the expenditure of funds on a candidate's behalf (or against other candidates) without running afoul of FECA's spending limitations.

Indeed, the principal opinion's reasoning with respect to the presumption illuminates the deficiencies in the statutory provision as a whole as it constrains the speech and political activities of political parties. The presumption is a logical, though invalid, implementation of the statute, which restricts as a "contribution" a political party's spending "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U. S. C. § 441a(a)(7)(B)(i). While the statutory provision applies to any "person," its obvious purpose and effect when applied to political parties, as the FEC's presumption reflects, is to restrict any party's spending in a specific campaign for or against a candidate and so to burden a party in expending its own money for its own speech.

The central holding in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, is that spending money on one's own speech must be permitted, *id.*, at 44–58, and this is what political parties do when they make the expenditures FECA restricts. FECA calls spending of this nature a "contribution," § 441a(a)(7)(B)(i), and it is true that contributions can be restricted consistent with *Buckley*, *supra*, at 23–38. As the principal opinion acknowledges, however, and as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis. *Ante*, at

621–622. See also, *e. g., Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). In *Buckley*, we concluded that contribution limitations imposed only "marginal restriction[s]" on the contributor's First Amendment rights, 424 U. S., at 20, because certain attributes of contributions make them less like "speech" for First Amendment purposes:

> "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*, at 21 (footnote omitted).

We had no occasion in *Buckley* to consider possible First Amendment objections to limitations on spending by parties. *Id.*, at 58, n. 66. While our cases uphold contribution limitations on individuals and associations, see *id.*, at 23–38; *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 193–199 (1981) (plurality opinion), political party spending "in cooperation, consultation, or concert with" a candi-

date does not fit within our description of "contributions" in *Buckley*. In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. See, *e. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957). Cf. *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 250–251 (1996) (KENNEDY, J., dissenting). A party performs this function, in part, by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122 (1981). Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.

It makes no sense, therefore, to ask, as FECA does, whether a party's spending is made "in cooperation, consultation, or concert with" its candidate. The answer in most cases will be yes, but that provides more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending, which bears little resemblance to the contributions discussed in *Buckley*. *Supra*, at 627–628 and this page. Party spending "in cooperation, consultation, or concert with" its candidates of necessity "communicate[s] the underlying basis for the support," 424 U. S., at 21, *i. e.*, the hope

that he or she will be elected and will work to further the party's political agenda.

The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," *ibid.*, since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. See *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 494–495 (1985).

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter, see 424 U. S., at 54–59, and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.

I would resolve the Party's First Amendment claim in accord with these principles rather than remit the Party to further protracted proceedings. Because the principal opinion would do otherwise, I concur only in the judgment.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join as to Parts I and III, concurring in the judgment and dissenting in part.

I agree that petitioners' rights under the First Amendment have been violated, but I think we should reach the facial challenge in this case in order to make clear the circumstances under which political parties may engage in political speech without running afoul of 2 U. S. C. § 441a(d)(3). In resolving that challenge, I would reject the framework established by *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, for analyzing the constitutionality of campaign finance laws and hold that § 441a(d)(3)'s limits on independent and coordinated expenditures fail strict scrutiny. But even under *Buckley*, § 441a(d)(3) cannot stand, because the anticorruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation.

I

As an initial matter, I write to make clear that we should decide the Colorado Republican Party's (Party's) facial challenge to § 441a(d)(3) and thus address the constitutionality of limits on coordinated expenditures by political parties. JUSTICE BREYER's reasons for not reaching the facial constitutionality of the statute are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving that question.

After the Federal Election Commission (FEC) brought this action against the Party, the Party counterclaimed that "the limits on its expenditures in connection with the general

election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U. S. C. § 441a(d) are unconstitutional, both facially and as applied." App. 68. Though JUSTICE BREYER faults the Party for not "focus[ing] specifically upon coordinated expenditures," *ante*, at 623, the term "expenditures" certainly includes both coordinated as well as independent expenditures.[1] See 2 U. S. C. § 431(9)(A) ("The term 'expenditure' includes . . . *any* purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" (emphasis added)). Moreover, at the time the Party filed its counterclaim, all party expenditures were treated by law as coordinated, see *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 28–29, n. 1 (1981), so a reference to expenditures by a party was tantamount to a reference to coordinated expenditures.

Given the liberal nature of the rules governing civil pleading, see Fed. Rule Civ. Proc. 8, the Party's straightforward allegation of the unconstitutionality of § 441a(d)(3)'s expenditure limits clearly suffices to raise the claim that neither independent nor coordinated expenditures may be regulated consistently with the First Amendment. Indeed, that is precisely how the Court of Appeals appears to have read the counterclaim. The court expressly said that it was "analyzing the constitutionality of limits on coordinated expenditures by political committees," 59 F. 3d 1015, 1024 (CA10 1995), under § 441a(d)(3).

For the same reasons, the fact that the Party's summary judgment affidavits did not "specifically allege," *ante*, at 623, that the Party intended to make coordinated expenditures is also immaterial. The affidavits made clear that, but for

[1] JUSTICE BREYER acknowledges as much when he asserts earlier in his opinion that "the unmodified term 'expenditure'" reflects a congressional intent "to limit *all* party expenditures." *Ante*, at 621 (emphasis in original).

§ 441a(d)(3), the Party would spend in excess of the limits imposed by that statute, see App. 159 ("[T]he State Party intends to pay for communications within the spending limits of [§ 441]. . . . However, the State Party would also like to pay for communications which costs *[sic]* exceed the spending limits of [§ 441a(d)], but will not do so due to the deterrent and chilling effect of the statute"), as did the Party's brief in this Court, see Brief for Petitioners 23–24 ("The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by § 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement actions").

Finally, though JUSTICE BREYER notes that this is the first Federal Election Campaign Act of 1971 (FECA) case to raise the constitutional validity of limits on coordinated expenditures, see *ante*, at 624, that is, at best, an argument against granting certiorari. It is too late for arguments like that now. The case is here, and we needlessly protract this litigation by remanding this important issue to the Court of Appeals. Nor is the fact that the "issue is complex," *ibid.*, a good reason for avoiding it. We do not sit to decide only easy cases. And while it may be true that no court has ever asked whether expenditures that are "*in fact*" coordinated may be regulated under the First Amendment, see *ibid.*, I do not see how the existence of an "in fact" coordinated expenditure would change our analysis of the facial constitutionality of § 441a(d)(3), since courts in facial challenges under the First Amendment routinely consider applications of the relevant statute other than the application before the court. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). Whether or not there are facts in the record to support the finding that this particular expenditure was actually coordinated with a candidate, we are not, contrary to the suggestion of JUSTICE BREYER, incapable of considering the Government's interest in regulating such expenditures

and testing the fit between that end and the means used to achieve it.[2]

The validity of § 441a(d)(3)'s controls on coordinated expenditures is an open question that, if left unanswered, will inhibit the exercise of legitimate First Amendment activity nationwide. All JUSTICE BREYER resolves is that when a political party spends money in support of a candidate (or against his opponent) and the Government cannot thereafter prove any coordination between the party and the candidate, the party cannot be punished by the Government for that spending. This settles little, if anything. Parties are left to wonder whether their speech is protected by the First Amendment when the Government can show—presumably with circumstantial evidence—a link between the party and the candidate with respect to the speech in question. And of course, one of the main purposes of a political party is to support its candidates in elections.

The constitutionality of limits on coordinated expenditures by political parties is squarely before us. We should address this important question now, instead of leaving political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage.

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[2] JUSTICE BREYER's remaining arguments for avoiding the facial challenge are straw men. See *ante*, at 625 (if § 441a(d)(3) were invalidated in its entirety, other FECA provisions that the Party has not challenged might apply to coordinated party expenditures); *ibid.* (if § 441a(d)(3) were upheld as to coordinated expenditures but invalidated as to independent expenditures, issues of severability would be raised). That resolution of the primary question in this case (the constitutionality of § 441a(d)(3) with respect to all expenditures) might generate issues not previously considered (such as severability) is no reason for not deciding the question itself. Without suggesting that remand is the only appropriate way to deal with possible corollary matters in this case or that these arguments have merit, I point out that we can, of course, decide the central question without ruling on the issues that concern JUSTICE BREYER.

II

A

Critical to JUSTICE BREYER's reasoning is the distinction between contributions[3] and independent expenditures that we first drew in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," *id.*, at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," *id.*, at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entai[l] only a marginal restriction upon the contributor's ability to engage in free communication," *id.*, at 20–21. This conclusion was supported mainly by two assertions about the nature of contributions: First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. *Id.*, at 21. Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures. See, *e. g.*, *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U. S. 238, 259–260, 261–262 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm. (NCPAC)*, 470 U. S. 480, 497 (1985);

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[3] Coordinated expenditures are by statute categorized as contributions. See 2 U. S. C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate").

California Medical Assn. v. *Federal Election Comm'n*, 453 U. S. 182, 196 (1981) (plurality opinion).

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Buckley* v. *Valeo*, 424 U. S., at 241 (concurring in part and dissenting in part).[4] Contributions and expenditures both involve core First Amendment expression because they further the "[d]iscussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id.*, at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966), just as an expenditure does.[5]

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[4] Three Members of the *Buckley* Court thought the distinction untenable at the time, see 424 U. S., at 241 (Burger, C. J., concurring in part and dissenting in part); *id.*, at 261 (White, J., concurring in part and dissenting in part); *id.*, at 290 (Blackmun, J., concurring in part and dissenting in part), and another Member disavowed it subsequently, see *Federal Election Comm'n* v. *NCPAC*, 470 U. S. 480, 518–521 (1985) (Marshall, J., dissenting). Cf. *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 678 (1990) (STEVENS, J., concurring) (stating that distinction "should have little, if any, weight in reviewing corporate participation in candidate elections").

[5] See H. Alexander, Money in Politics 234 (1972): "The constitutional arguments against limiting campaign spending also apply against limiting contributions; specifically, it is the right of an individual to spend his money to support a congenial viewpoint . . . . Some views are heard only if interested individuals are willing to support financially the candidate or committee voicing the position. To be widely heard, mass communica-

Giving and spending in the electoral process also involve basic associational rights under the First Amendment. See BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1064 (1985) (hereinafter BeVier). As we acknowledged in *Buckley*, "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" 424 U. S., at 15 (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958)). Political associations allow citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment. *Federal Election Comm'n* v. *NCPAC*, *supra*, at 494. If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy. See *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 296 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association"). And if an individual cannot be subject to such limits, neither can political associations be limited in their ability to give as a means of furthering their members' viewpoints. As we have said, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (plurality opinion).[6]

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tions may be necessary, and they are costly. By extension, then, the contribution of money is a contribution to freedom of political debate."

[6] To illustrate the point that giving and spending in the political process implicate the same First Amendment values, I note that virtually everything JUSTICE BREYER says about the importance of free independent expenditures applies with equal force to coordinated expenditures and contributions. For instance, JUSTICE BREYER states that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic

Turning from similarities to differences, I can discern only one potentially meaningful distinction between contributions and expenditures. In the former case, the funds pass through an intermediary—some individual or entity responsible for organizing and facilitating the dissemination of the message—whereas in the latter case they may not necessarily do so. But the practical judgment by a citizen that another person or an organization can more effectively deploy funds for the good of a common cause than he can ought not deprive that citizen of his First Amendment rights. Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance. As one commentator cautioned, "let us not lose sight of the speech." Powe, Mass Speech and the Newer First Amendment, 1982 S. Ct. Rev. 243, 258.

Echoing the suggestion in *Buckley* that contributions have less First Amendment value than expenditures because they do not involve speech by the donor, see 424 U. S., at 21, the Court has sometimes rationalized limitations on contributions by referring to contributions as "speech by proxy." See, *e. g.*, *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S., at 196 (Marshall, J.) (plurality opinion). The "speech by proxy" label is, however, an ineffective tool for distinguishing contributions from expenditures. Even in the case of a direct expenditure, there is usually some go-

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task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure." *Ante*, at 615–616. "Coordinated" expression by political parties, of course, shares those precise attributes. The fact that an expenditure is prearranged with the candidate—presumably to make it more effective in the election—does not take away from its fundamental democratic purposes.

between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station. See Powe, *supra*, at 258–259. To call a contribution "speech by proxy" thus does little to differentiate it from an expenditure. See *Buckley* v. *Valeo*, *supra*, at 243–244, and n. 7 (Burger, C. J., concurring in part and dissenting in part). The only possible difference is that contributions involve an extra step in the proxy chain. But again, that is a difference in form, not substance.

Moreover, we have recently recognized that where the "proxy" speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights. In *Federal Election Comm'n* v. *NCPAC*, we explained:

> "[T]he 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organizatio[n] and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U. S., at 495.

The other justification in *Buckley* for the proposition that contribution caps only marginally restrict speech—that is, that a contribution signals only general support for the candidate but indicates nothing about the reasons for that support—is similarly unsatisfying. Assuming the assertion is descriptively accurate (which is certainly questionable), it still cannot mean that giving is less important than spending in terms of the First Amendment. A campaign poster that reads simply "We support candidate Smith" does not seem to me any less deserving of constitutional protection than one that reads "We support candidate Smith because we like

his position on agriculture subsidies." Both express a political opinion. Even a pure message of support, unadorned with reasons, is valuable to the democratic process.

In sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it, as JUSTICE BREYER and JUSTICE KENNEDY do.

B

Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech are central to the First Amendment. Curbs on protected speech, we have repeatedly said, must be strictly scrutinized. See *Federal Election Comm'n* v. *NCPAC*, *supra*, at 501; *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S., at 294; *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978).[7] I am convinced that under tradi-

[7] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court purported to scrutinize strictly the contribution provisions as well as the expenditure rules. See *id.*, at 23 (FECA's contribution and expenditures limits "both implicate fundamental First Amendment interests"); *id.*, at 25 (contribution limits, like expenditure limits, are " 'subject to the closest scrutiny' " (citation omitted)). It has not gone unnoticed, however, that we seemed more forgiving in our review of the contribution provisions than of the expenditure rules. See, *e. g.*, *California Medical Assn.* v. *Federal Election Comm'n*,

tional strict scrutiny, broad prophylactic caps on both spending and giving in the political process, like § 441a(d)(3), are unconstitutional.

The formula for strict scrutiny is, of course, well established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest. In the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption, see *Federal Election Comm'n* v. *NCPAC*, 470 U. S., at 496–497, and we have narrowly defined "corruption" as a "financial *quid pro quo:* dollars for political favors," *id.*, at 497.[8] As for the means-ends fit under strict scrutiny, we have specified that "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Comm'n* v. *MCFL*, 479 U. S., at 265.

In *Buckley*, we expressly stated that the means adopted must be "closely drawn to avoid unnecessary abridgment" of First Amendment rights. 424 U. S., at 25. But the *Buckley* Court summarily rejected the argument that, because less restrictive means of preventing corruption existed—for instance, bribery laws and disclosure requirements—FECA's contribution provisions were invalid. Bribery laws, the Court said, "deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.*, at 28, suggesting that those means were inade-

453 U. S. 182, 196 (1981) (plurality opinion) (contributions are "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection"). But see *id.*, at 201–202 (Blackmun, J., concurring in part and concurring in judgment) (under *Buckley*, there is no lesser standard of review for contributions as opposed to expenditures).

[8] As I explain in Part III, *infra*, the interest in preventing corruption is inapplicable when the subject of the regulation is a political party. My analysis here is more general, however, and applies to all individuals and entities subject to campaign finance limits.

quate to serve the governmental interest. With respect to disclosure rules, the Court admitted that they serve "many salutary purposes" but said that Congress was "entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant." *Ibid.* Finally, the Court noted that contribution caps leave people free to engage in independent political speech, to volunteer their services, and to contribute money to a "limited but nonetheless substantial extent." *Ibid.*

In my opinion, FECA's monetary caps fail the narrow tailoring test. Addressing the constitutionality of FECA's contribution caps, the *Buckley* appellants argued:

> "If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." Brief for Appellants in *Buckley* v. *Valeo*, O. T. 1975, Nos. 75–436 and 75–437, pp. 117–118.

The *Buckley* appellants were, to my mind, correct. Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions.

Section 441a(d)(3), in particular, suffers from this infirmity. It flatly bans all expenditures by all national and state party committees in excess of certain dollar limits, without any evidence that covered committees who exceed those limits are in fact engaging, or likely to engage, in bribery or any-

thing resembling it. See *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 689 (1990) (SCALIA, J., dissenting) (where statute "extends to speech that has the mere *potential* for producing social harm" it should not be held to satisfy the narrow tailoring requirement (emphasis in original)). Thus, the statute indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate. Cf. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 637 (1980) (State may not, in effort to stop fraud in charitable solicitations, "lump" truly charitable organizations "with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other"). As one commentator has observed: "[I]t must not be forgotten that a large number of contributions are made without any hope of specific gain: for the promotion of a program, because of enthusiasm for a candidate, or to promote what the giver vaguely conceives to be the national interest." L. Overacker, Money in Elections 192 (1974).

In contrast, federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage. Cf. *Schaumburg* v. *Citizens for a Better Environment*, *supra*, at 637–638 (explaining that "less intrusive" means of preventing fraud in charitable solicitation are "the penal laws [that can be] used to punish such conduct directly" and "disclosure of the finances of charitable organizations"). In light of these alternatives, wholesale limitations that cover contributions having nothing to do with bribery—but with speech central to the First Amendment—are not narrowly tailored.

Buckley's rationale for the contrary conclusion, see *supra*, at 641–642, is faulty. That bribery laws are not completely effective in stamping out corruption is no justification for the

conclusion that prophylactic controls on funding activity are narrowly tailored. The First Amendment limits Congress to legislative measures that do not abridge the Amendment's guaranteed freedoms, thereby constraining Congress' ability to accomplish certain goals. Similarly, that other modes of expression remain open to regulated individuals or groups does not mean that a statute is the least restrictive means of addressing a particular social problem. A statute could, of course, be more restrictive than necessary while still leaving open some avenues for speech.[9]

III

Were I convinced that the *Buckley* framework rested on a principled distinction between contributions and expenditures, which I am not, I would nevertheless conclude that § 441a(d)(3)'s limits on political parties violate the First Amendment. Under *Buckley* and its progeny, a substantial threat of corruption must exist before a law purportedly

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[9] JUSTICE STEVENS submits that we should "accord special deference to [Congress'] judgment on questions related to the extent and nature of limits on campaign spending," *post,* at 650, a stance that the Court of Appeals also adopted, see 59 F. 3d 1015, 1024 (CA10 1995). This position poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse. There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. See generally BeVier 1074–1081. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. See *id.,* at 1075 ("'Courts must police inhibitions on . . . political activity because we cannot trust elected officials to do so'" (emphasis deleted)) (quoting J. Ely, Democracy and Distrust 106 (1980)). See also R. Winter, Political Financing and the Constitution, 486 Annals Am. Acad. Pol. & Soc. Sci. 34, 40, 48 (1986). Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups. See BeVier 1078–1080. When Congress seeks to ration political expression in the electoral process, we ought not simply acquiesce in its judgment.

aimed at the prevention of corruption will be sustained against First Amendment attack.[10] Just as some of the monetary limits in the *Buckley* line of cases were held to be invalid because the Government interest in stemming corruption was inadequate under the circumstances to justify the restrictions on speech, so too is § 441a(d)(3) invalid.[11]

The Government asserts that the purpose of § 441a(d)(3) is to prevent the corruption of candidates and elected representatives by party officials. The Government does not explain precisely what it means by "corruption," however;[12] the closest thing to an explanation the Government offers is that "corruption" is "'the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.'" Brief for Respondent 35 (quoting *Buckley* v. *Valeo*, 424 U. S., at 25). We so defined

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[10] See *Buckley* v. *Valeo*, 424 U. S., at 45–47 (striking down limits on independent expenditures because the "advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption"); *Federal Election Comm'n* v. *MCFL*, 479 U. S. 238, 263 (1986) (invalidating caps on campaign expenditures by incorporated political associations because spending by such groups "does not pose [any] threat" of corruption); *Federal Election Comm'n* v. *NCPAC*, 470 U. S., at 498 (striking down limits on independent expenditures by political action committees because "a *quid pro quo* for improper commitments" in that context was a "hypothetical possibility"); *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 297 (1981) (stating that "*Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures*" because anticorruption rationale is inapplicable); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790 (1978) (concluding that limits on referendum speech by corporations violate First Amendment because "[t]he risk of corruption . . . simply is not present").

[11] While JUSTICE BREYER chides me for taking the position that I would not adhere to *Buckley*, see *ante*, at 626, and suggests that my approach to this case is thus insufficiently "cautiou[s]," *ibid.*, he ignores this Part of my opinion, in which I explain why limits on coordinated expenditures are unconstitutional *even under the* Buckley *line of precedent*.

[12] Nor, for that matter, does JUSTICE BREYER explain what sorts of *quid pro quos* a party could extract from a candidate. Cf. *ante*, at 615.

corruption in *Buckley* for purposes of reviewing ceilings on giving or spending by individuals, groups, political committees, and candidates. See *id.*, at 23, 35, 39. But we did not in that case consider the First Amendment status of FECA's provisions dealing with political parties. See *id.*, at 58, n. 66, 59, n. 67.

As applied in the specific context of campaign funding by political parties, the anticorruption rationale loses its force. See Nahra, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities, 56 Ford. L. Rev. 53, 105–106 (1987). What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process." *Federal Election Comm'n* v. *NCPAC*, 470 U. S., at 497. For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from *Federal Election Comm'n* v. *NCPAC:* "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id.*, at 498. Cf. *Federal Election Comm'n* v. *MCFL*, 479 U. S., at 263 (suggesting that "[v]oluntary political associations do not . . . present the specter of corruption").

The structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the threat of individuals or other groups doing so. See Nahra, *supra*, at

97–98 (citing F. Sorauf, Party Politics in America 15–18 (5th ed. 1984)). American political parties, generally speaking, have numerous members with a wide variety of interests, Nahra, *supra,* at 98, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is significantly diffused. For this reason, as the Party's *amici* argue, see Brief for Committee for Party Renewal et al. as *Amicus Curiae* 16, campaign funds donated by parties are considered to be some of "the cleanest money in politics." J. Bibby, Campaign Finance Reform, 6 Commonsense 1, 10 (Dec. 1983). And, as long as the Court continues to permit Congress to subject individuals to limits on the amount they can give to parties, and those limits are uniform as to all donors, see 2 U. S. C. § 441a(a)(1), there is little risk that an individual donor could use a party as a conduit for bribing candidates.

In any event, the Government, which bears the burden of "demonstrat[ing] that the recited harms are real, not merely conjectural," *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 664 (1994), has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures. Cf. *ante,* at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"). And insofar as it appears that Congress did not actually enact § 441a(d)(3) in order to stop corruption by political parties "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," *ibid.* (citing *Buckley* v. *Valeo, supra,* at 57), the statute's ceilings on coordinated expenditures are as unwarranted as the caps on independent expenditures.

In sum, there is only a minimal threat of "corruption," as we have understood that term, when a political party spends to support its candidate or to oppose his competitor, whether

or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to the Republic lies in Government suppression of such activity. Under *Buckley* and our subsequent cases, § 441a(d)(3)'s heavy burden on First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.

* * *

To conclude, I would find § 441a(d)(3) unconstitutional not just as applied to petitioners, but also on its face. Accordingly, I concur only in the Court's judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In my opinion, all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a "contribution" to his or her campaign. I therefore disagree with the conclusion reached in Part III of the principal opinion.

I am persuaded that three interests provide a constitutionally sufficient predicate for federal limits on spending by political parties. First, such limits serve the interest in avoiding both the appearance and the reality of a corrupt political process. A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend. The provisions at issue are appropriately aimed at reducing that threat. The fact that the party in this case had not yet chosen its nominee at the time it broadcast the challenged advertisements is immaterial to the analysis. Although the Democratic and Republican nominees

for the 1996 Presidential race will not be selected until this summer, current advertising expenditures by the two national parties are no less contributions to the campaigns of the respective frontrunners than those that will be made in the fall.

Second, these restrictions supplement other spending limitations embodied in the Federal Election Campaign Act of 1971, which are likewise designed to prevent corruption. Individuals and certain organizations are permitted to contribute up to $1,000 to a candidate. 2 U. S. C. § 441a(a)(1)(A). Since the same donors can give up to $5,000 to party committees, § 441a(a)(1)(C), if there were no limits on party spending, their contributions could be spent to benefit the candidate and thereby circumvent the $1,000 cap. We have recognized the legitimate interest in blocking similar attempts to undermine the policies of the Act. See *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 197–199 (1981) (plurality opinion) (approving ceiling on contributions to political action committees to prevent circumvention of limitations on individual contributions to candidates); *id.*, at 203 (Blackmun, J., concurring in part and concurring in judgment); *Buckley* v. *Valeo*, 424 U. S. 1, 38 (1976) *(per curiam)* (approving limitation on total contributions by an individual in connection with an election on same rationale).

Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." *Id.*, at 263 (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising,

and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment. See *id.*, at 262–266.

Congress surely has both wisdom and experience in these matters that is far superior to ours. I would therefore accord special deference to its judgment on questions related to the extent and nature of limits on campaign spending.* Accordingly, I would affirm the judgment of the Court of Appeals.

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*One irony of the case is that both the Democratic National Party and the Republican National Party have sided with petitioners in challenging a law that Congress has the obvious power to change. See Brief for Democratic National Committee as *Amicus Curiae*; Brief for Republican National Committee as *Amicus Curiae*.

Syllabus

FELKER *v.* TURPIN, WARDEN

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

No. 95–8836 (A–890). Argued June 3, 1996—Decided June 28, 1996

After he was convicted of murder and other crimes and sentenced to death by a Georgia state court, petitioner was denied relief on direct appeal, in two rounds of state collateral proceedings, and in a first round of federal habeas corpus proceedings. While he was awaiting execution, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (Act), Title I of which, as here pertinent, requires dismissal of a claim presented in a state prisoner's second or successive federal habeas application if the claim was also presented in a prior application, 28 U. S. C. § 2244(b)(1); compels dismissal of a claim that was not presented in a prior federal application, unless certain conditions apply, § 2244(b)(2); creates a "gatekeeping" mechanism, whereby the prospective applicant files in the court of appeals a motion for leave to file a second or successive habeas application in the district court, and a three-judge panel determines whether the application makes a prima facie showing that it satisfies § 2244(b)'s requirements, § 2244(b)(3); and declares that a panel's grant or denial of authorization to file "shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari," § 2244(b)(3)(E). Petitioner filed a motion for leave to file a second federal habeas petition, which the Eleventh Circuit denied on the grounds, *inter alia*, that the claims to be raised therein had not been presented in his first petition and did not meet § 2244(b)(2)'s conditions. Petitioner then filed in this Court a pleading styled a "Petition for Writ of Habeas Corpus [and] for Appellate or Certiorari Review . . . ." The Court granted certiorari, ordering briefing on the extent to which Title I's provisions apply to a habeas petition filed in this Court, whether application of the Act suspended habeas in this case, and whether Title I, especially the provision to be codified at § 2244(b)(3)(E), unconstitutionally restricts the Court's jurisdiction.

Held:

1. The Act does not preclude this Court from entertaining an application for habeas corpus relief, although it does affect the standards governing the granting of such relief. Pp. 658–663.

(a) Title I does not deprive this Court of jurisdiction to entertain habeas petitions filed as original matters pursuant to 28 U. S. C. §§ 2241

and 2254. No Title I provision mentions the Court's authority to entertain such original petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes the Court from reviewing, by appeal or certiorari, the latter courts' decisions exercising the "gatekeeping" function for second habeas petitions, it makes no mention of the Court's original habeas jurisdiction. Thus, the Court declines to find a repeal of § 2241 by implication. See *Ex parte Yerger*, 8 Wall. 85, 105. This conclusion obviates any claim by petitioner under the Constitution's Exceptions Clause, Art. III, § 2, which provides, *inter alia*, that, "[i]n all . . . Cases . . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions . . . as the Congress shall make." Since the Act does not repeal the Court's authority to entertain a habeas petition, there can be no plausible argument that it deprives the Court of appellate jurisdiction in violation of that Clause. Pp. 658–662.

(b) Title I changes the standards governing this Court's consideration of habeas petitions by imposing new requirements under 28 U. S. C. § 2254(a), which limits the Court's authority to grant relief to state prisoners. Section 2244(b)(3)'s "gatekeeping" system does not apply to the Court because it is limited to applications "filed in the district court." There is no such limitation, however, on the restrictions imposed by §§ 2244(b)(1) and (2), and those restrictions inform the Court's authority to grant relief on original habeas petitions, whether or not the Court is bound by the restrictions. Pp. 662–663.

2. The Act does not violate the Constitution's Suspension Clause, Art. I, § 9, cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended." The new restrictions on successive habeas petitions constitute a modified res judicata rule, a restraint on what is called in habeas practice "abuse of the writ." The doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. *McCleskey* v. *Zant*, 499 U. S. 467, 489. The new restrictions are well within the compass of this evolutionary process and do not amount to a "suspension" of the writ. Pp. 663–664.

3. The petition for an original writ of habeas corpus is denied. Petitioner's claims do not satisfy the § 2244(b)(2) requirements, let alone this Court's Rule 20.4(a), which requires that the habeas petitioner show "exceptional circumstances" justifying the issuance of the writ and says that habeas relief is rarely granted. Petitioner's claims here do not materially differ from numerous other claims made by successive habeas petitioners that the Court has had occasion to review on stay applications. Pp. 664–665.

Certiorari dismissed for want of jurisdiction; writ of habeas corpus denied.

Syllabus

REHNQUIST, C. J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 665. SOUTER, J., filed a concurring opinion, in which STEVENS and BREYER, JJ., joined, *post*, p. 666.

Henry P. Monaghan argued the cause for petitioner. With him on the brief were *Stephen C. Bayliss*, *Mary Elizabeth Wells*, and *Mark Evan Olive*.

Susan V. Boleyn, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With her on the briefs were *Michael J. Bowers*, Attorney General, *Mary Beth Westmoreland*, Deputy Attorney General, *Paula K. Smith*, Senior Assistant Attorney General, and *Paige Reese Whitaker*, Assistant Attorney General.

Solicitor General Days argued the cause for the United States as *amicus curiae*. With him on the brief were *Acting Assistant Attorney General Keeney*, *Deputy Solicitor General Dreeben*, *James A. Feldman*, *Malcolm L. Stewart*, *Robert J. Erickson*, and *David S. Kris*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Washington Legal Foundation et al. by *Ronald D. Maines*, *Paul G. Cassell*, *Daniel J. Popeo*, and *Paul D. Kamenar;* and for *Senator Orrin G. Hatch*, *pro se*, et al.

Briefs of *amici curiae* were filed for the State of Alabama et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, and *Stuart A. Cole*, *Stuart W. Harris*, and *Jon C. Walden*, Assistant Attorneys General, *Dan Morales*, Attorney General of Texas, *Jorge Vega*, First Assistant Attorney General, *Drew T. Durham*, Deputy Attorney General, and *Margaret Portman Griffey*, *John Jacks*, and *Dana E. Parker*, Assistant Attorneys General, *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Donald E. De Nicola*, Supervising Deputy Attorney General, and *Dane R. Gillette*, Senior Assistant Attorney General, *Jeff Sessions*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Gale A. Norton*, Attorney General of Colorado, *John M. Bailey*, Chief State's Attorney of Connecticut, *M. Jane Brady*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Margery S. Bronster*, Attorney General of Hawaii, *Allan G. Lance*, Attorney General of Idaho, *Jim Ryan*, Attorney General of Illinois, *A. B. Chandler III*, Attorney General of Kentucky, *Scott Harshbarger*, Attorney General of Massachusetts, *Mike Moore*, Attorney General of Mississippi, *Jeremiah W. (Jay) Nixon*,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (Act) works substantial changes to chapter 153 of Title 28 of the United States Code, which authorizes federal courts to grant the writ of habeas corpus. Pub. L. 104–132, 110 Stat. 1217. We hold that the Act does not preclude this Court from entertaining an application for habeas corpus relief, although it does affect the standards governing the granting of such relief. We also conclude that the availability of such relief in this Court obviates any claim by petitioner under the Exceptions Clause of Article III, § 2, of the Constitution, and that the operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. I, § 9.

I

On a night in 1976, petitioner approached Jane W. in his car as she got out of hers. Claiming to be lost and looking for a party nearby, he used a series of deceptions to induce Jane to accompany him to his trailer home in town. Peti-

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Attorney General of Missouri, *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, *Dennis C. Vacco*, Attorney General of New York, *Michael F. Easley*, Attorney General of North Carolina, *W. A. Drew Edmondson*, Attorney General of Oklahoma, *Theodore R. Kolongoski*, Attorney General of Oregon, *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, *Jeffrey B. Pine*, Attorney General of Rhode Island, *Mark W. Barnett*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jan Graham*, Attorney General of Utah, *Christine O. Gregoire*, Attorney General of Washington, *James E. Doyle*, Attorney General of Wisconsin, and *William U. Hill*, Attorney General of Wyoming; for the American Civil Liberties Union by *Steven R. Shapiro;* for the Criminal Justice Legal Foundation et al. by *Kent S. Scheidegger;* and for the National District Attorneys Association by *Lynn Abraham* and *Ronald Eisenberg.*

tioner forcibly subdued her, raped her, and sodomized her. Jane pleaded with petitioner to let her go, but he said he could not because she would notify the police. She escaped later, when petitioner fell asleep. Jane notified the police, and petitioner was eventually convicted of aggravated sodomy and sentenced to 12 years' imprisonment.

Petitioner was paroled four years later. On November 23, 1981, he met Joy Ludlam, a cocktail waitress, at the lounge where she worked. She was interested in changing jobs, and petitioner used a series of deceptions involving offering her a job at "The Leather Shoppe," a business he owned, to induce her to visit him the next day. The last time Joy was seen alive was the evening of the next day. Her dead body was discovered two weeks later in a creek. Forensic analysis established that she had been beaten, raped, and sodomized, and that she had been strangled to death before being left in the creek. Investigators discovered hair resembling petitioner's on Joy's body and clothes, hair resembling Joy's in petitioner's bedroom, and clothing fibers like those in Joy's coat in the hatchback of petitioner's car. One of petitioner's neighbors reported seeing Joy's car at petitioner's house the day she disappeared.

A jury convicted petitioner of murder, rape, aggravated sodomy, and false imprisonment. Petitioner was sentenced to death on the murder charge. The Georgia Supreme Court affirmed petitioner's conviction and death sentence, *Felker* v. *State*, 252 Ga. 351, 314 S. E. 2d 621, and we denied certiorari, 469 U. S. 873 (1984). A state trial court denied collateral relief, the Georgia Supreme Court declined to issue a certificate of probable cause to appeal the denial, and we again denied certiorari. *Felker* v. *Zant*, 502 U. S. 1064 (1992).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging that (1) the State's evidence was insuffi-

cient to convict him; (2) the State withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963); (3) petitioner's counsel rendered ineffective assistance at sentencing; (4) the State improperly used hypnosis to refresh a witness' memory; and (5) the State violated double jeopardy and collateral estoppel principles by using petitioner's crime against Jane W. as evidence at petitioner's trial for crimes against Joy Ludlam. The District Court denied the petition. The United States Court of Appeals for the Eleventh Circuit affirmed, 52 F. 3d 907, extended on denial of petition for rehearing, 62 F. 3d 342 (1995), and we denied certiorari, 516 U. S. 1133 (1996).

The State scheduled petitioner's execution for the period May 2–9, 1996. On April 29, 1996, petitioner filed a second petition for state collateral relief. The state trial court denied this petition on May 1, and the Georgia Supreme Court denied certiorari on May 2.

On April 24, 1996, the President signed the Act into law. Title I of this Act contained a series of amendments to existing federal habeas corpus law. The provisions of the Act pertinent to this case concern second or successive habeas corpus applications by state prisoners. Section 106(b) specifies the conditions under which claims in second or successive applications must be dismissed, amending 28 U. S. C. § 2244(b) to read:

> "(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."

Title 28 U. S. C. § 2244(b)(3) (1994 ed., Supp. II) creates a "gatekeeping" mechanism for the consideration of second or successive applications in district court. The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A). A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" § 2244(b). § 2244(b)(3)(C); see §§ 2244(b)(3)(B), (D). Section 2244(b)(3)(E) specifies that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

On May 2, 1996, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a motion for stay of execution and a motion for leave to file a second or successive federal habeas corpus petition under § 2254. Petitioner sought to raise two claims in his second petition, the first being that the state trial court violated due process by equating guilt "beyond a reasonable doubt" with "moral certainty" of guilt in *voir dire* and jury instructions. See *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. He also alleged that qualified experts, reviewing the forensic evidence after his conviction, had established that Joy must have died during a period when petitioner was under police surveillance for Joy's disappearance and thus had a valid

alibi. He claimed that the testimony of the State's forensic expert at trial was suspect because he is not a licensed physician, and that the new expert testimony so discredited the State's testimony at trial that petitioner had a colorable claim of factual innocence.

The Court of Appeals denied both motions the day they were filed, concluding that petitioner's claims had not been presented in his first habeas petition, that they did not meet the standards of § 2244(b)(2), and that they would not have satisfied pre-Act standards for obtaining review on the merits of second or successive claims. 83 F. 3d 1303 (CA11 1996). Petitioner filed in this Court a pleading styled a "Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution." On May 3, we granted petitioner's stay application and petition for certiorari. We ordered briefing on the extent to which the provisions of Title I of the Act apply to a petition for habeas corpus filed in this Court, whether application of the Act suspended the writ of habeas corpus in this case, and whether Title I of the Act, especially the provision to be codified at § 2244(b)(3)(E), constitutes an unconstitutional restriction on the jurisdiction of this Court. 517 U. S. 1182 (1996).

II

We first consider to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U. S. C. §§ 2241 and 2254. We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions.

A

Section 2244(b)(3)(E) prevents this Court from reviewing a court of appeals order denying leave to file a second ha-

beas petition by appeal or by writ of certiorari. More than a century ago, we considered whether a statute barring review by appeal of the judgment of a circuit court in a habeas case also deprived this Court of power to entertain an original habeas petition. *Ex parte Yerger*, 8 Wall. 85 (1869). We consider the same question here with respect to § 2244(b)(3)(E).

Yerger's holding is best understood in the light of the availability of habeas corpus review at that time. Section 14 of the Judiciary Act of 1789 authorized all federal courts, including this Court, to grant the writ of habeas corpus when prisoners were "in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.[1] Congress greatly expanded the scope of federal habeas corpus in 1867, authorizing federal courts to grant the writ, "in addition to the authority already conferred by law," "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.[2] Before the Act of 1867, the only instances in which a federal court could issue the writ to produce a state prisoner were if the prisoner was "necessary to be brought into court to testify," Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82, was "committed . . . for any act done . . . in pursuance of a law of the United States," Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634–635, or was a "subjec[t] or citize[n] of a foreign

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[1] Section 14 is the direct ancestor of 28 U. S. C. § 2241, subsection (a) of which now states in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

[2] This language from the 1867 Act is the direct ancestor of § 2241(c)(3), which states: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States."

State, and domiciled therein," and held under state law, Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–540.

The Act of 1867 also expanded our statutory appellate jurisdiction to authorize appeals to this Court from the final decision of any circuit court on a habeas petition. 14 Stat. 386. This enactment changed the result of *Barry* v. *Mercein*, 5 How. 103 (1847), in which we had held that the Judiciary Act of 1789 did not authorize this Court to conduct appellate review of circuit court habeas decisions. However, in 1868, Congress revoked the appellate jurisdiction it had given in 1867, repealing "so much of the [Act of 1867] as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States." Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

In *Yerger*, we considered whether the Act of 1868 deprived us not only of power to hear an appeal from an inferior court's decision on a habeas petition, but also of power to entertain a habeas petition to this Court under § 14 of the Act of 1789. We concluded that the 1868 Act did not affect our power to entertain such habeas petitions. We explained that the 1868 Act's text addressed only jurisdiction over appeals conferred under the Act of 1867, not habeas jurisdiction conferred under the Acts of 1789 and 1867. We rejected the suggestion that the Act of 1867 had repealed our habeas power by implication. *Yerger*, 8 Wall., at 105. Repeals by implication are not favored, we said, and the continued exercise of original habeas jurisdiction was not "repugnant" to a prohibition on review by appeal of circuit court habeas judgments. *Ibid.*

Turning to the present case, we conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *Yerger*. No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consider-

ation of original habeas petitions in the courts of appeals.[3] Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28—its descendant, n. 1, *supra*—by implication now.

This conclusion obviates one of the constitutional challenges raised. The critical language of Article III, § 2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court's original jurisdiction, "[i]n all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Previous decisions construing this clause have said that while our appellate powers "are given by the constitution," "they are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject." *Durousseau* v. *United States*, 6 Cranch 307, 314 (1810); see also *United States* v. *More*, 3 Cranch 159, 172–173 (1805). The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for

[3] Section 103 of the Act amends Federal Rule of Appellate Procedure 22(a) to read: "An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ."

habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

B

We consider next how Title I affects the requirements a state prisoner must satisfy to show he is entitled to a writ of habeas corpus from this Court. Title I of the Act has changed the standards governing our consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners. Our authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court."[4] § 2254(a). Several sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well.

Section 2244(b) addresses second or successive habeas petitions. Section 2244(b)(3)'s "gatekeeping" system for second petitions does not apply to our consideration of habeas petitions because it applies to applications "filed in the district court." § 2244(b)(3)(A). There is no such limitation, however, on the restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2). These restrictions apply without qualification to any "second or successive habeas corpus application under section 2254." §§ 2244(b)(1), (2).

[4] As originally enacted in 1948, 28 U. S. C. § 2254 specified that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U. S. C. § 2254 (1946 ed., Supp. III). The reviser's notes, citing *Ex parte Hawk*, 321 U. S. 114 (1944) *(per curiam)*, indicated that "[t]his new section is declaratory of existing law as affirmed by the Supreme Court." Reviser's Note following 28 U. S. C. § 2254, p. 1109 (1946 ed., Supp. III). *Hawk* was one of a series of opinions in which we applied the exhaustion requirement first announced in *Ex parte Royall*, 117 U. S. 241 (1886), to deny relief to applicants seeking writs of habeas corpus from this Court.

Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.

III

Next, we consider whether the Act suspends the writ of habeas corpus in violation of Article I, § 9, clause 2, of the Constitution. This Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The writ of habeas corpus known to the Framers was quite different from that which exists today. As we explained previously, the first Congress made the writ of habeas corpus available only to prisoners confined under the authority of the United States, not under state authority. *Supra*, at 659–660; see *Ex parte Dorr*, 3 How. 103 (1844). The class of judicial actions reviewable by the writ was more restricted as well. In *Ex parte Watkins*, 3 Pet. 193 (1830), we denied a petition for a writ of habeas corpus from a prisoner "detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases." *Id.*, at 202. Reviewing the English common law which informed American courts' understanding of the scope of the writ, we held that "[t]he judgment of the circuit court in a criminal case is of itself evidence of its own legality," and that we could not "usurp that power by the instrumentality of the writ of habeas corpus." *Id.*, at 207.

It was not until 1867 that Congress made the writ generally available in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Supra*, at 659. And it was not until well into this century that this Court interpreted that provision to allow a final judgment of conviction in a state court to be collaterally attacked on habeas. See, *e. g.*, *Waley* v. *Johnston*, 316 U. S. 101 (1942) *(per curiam); Brown* v. *Allen*, 344 U. S. 443 (1953). But we assume,

for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789. See *Swain* v. *Pressley*, 430 U. S. 372 (1977); *id.*, at 384 (Burger, C. J., concurring in part and concurring in judgment).

The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court. But this requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U. S. C. § 2254 Rule 9(b). The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996).

The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.*, at 489. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9.

IV

We have answered the questions presented by the petition for certiorari in this case, and we now dispose of the petition

for an original writ of habeas corpus. Our Rule 20.4(a) delineates the standards under which we grant such writs:

> "A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.' If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."

Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ.

* * *

The petition for writ of certiorari is dismissed for want of jurisdiction. The petition for an original writ of habeas corpus is denied.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

While I join the Court's opinion, I believe its response to the argument that the Act has deprived this Court of appel-

late jurisdiction in violation of Article III, § 2, is incomplete. I therefore add this brief comment.

As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus. It does, however, except the category of orders entered by the courts of appeals pursuant to 28 U. S. C. § 2244(b)(3) (1994 ed., Supp. II) from this Court's statutory jurisdiction to review cases in the courts of appeals pursuant to 28 U. S. C. § 1254(1). The Act does not purport to limit our jurisdiction under that section to review interlocutory orders in such cases, to limit our jurisdiction under § 1254(2), or to limit our jurisdiction under the All Writs Act, 28 U. S. C. § 1651.

Accordingly, there are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, § 2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review. In this case the Court correctly denies the writ of habeas corpus because petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act, including the standards governing the court of appeals' gatekeeping function.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring.

I join the Court's opinion. The Court holds today that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1217, precludes our review, by "certio-

rari" or by "appeal," over the courts of appeals's "gatekeeper" determinations. See 28 U. S. C. § 2244(b)(3)(E) (1994 ed., Supp. II). The statute's text does not necessarily foreclose all of our appellate jurisdiction, see, *e. g.*, 28 U. S. C. § 1254(2) (certified questions from courts of appeals); § 1651(a) (authority to issue appropriate writs in aid of another exercise of appellate jurisdiction); this Court's Rule 20.3 (procedure for petitions for extraordinary writs), nor has Congress repealed our authority to entertain original petitions for writs of habeas corpus.[1] Because petitioner sought only a writ of certiorari (which Congress has foreclosed) and a writ of habeas corpus (which, even applying the traditional criteria, we would choose to deny, see *ante*, at 664–665), I have no difficulty with the conclusion that the statute is not on its face, or as applied here, unconstitutional. I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.[2] The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard.

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[1] Such a petition is commonly understood to be "original" in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153.

[2] See, *e. g.*, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–1365 (1953) (articulating "essential functions" limitation on the Exceptions Clause); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 160–167 (1960) (same); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 896–899 (1984) (taking a broad view of Congress's authority, but noting ongoing scholarly debate); Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 828–837 (1994) (noting that the "essential functions" argument may find textual support, with respect to the lower federal courts, in the requirement of Art. I, § 8, cl. 9, that such courts be "inferior to the supreme Court").

Syllabus

BOARD OF COUNTY COMMISSIONERS, WABAUNSEE COUNTY, KANSAS *v.* UMBEHR

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

No. 94–1654. Argued November 28, 1995—Decided June 28, 1996

During the term of his at-will contract with Wabaunsee County, Kansas (County), to haul trash, respondent Umbehr was an outspoken critic of petitioner Board of County Commissioners (Board). After the commissioners voted to terminate (or prevent the automatic renewal of) the contract, allegedly because they took Umbehr's criticism badly, he brought this suit against two of them under 42 U. S. C. § 1983. The District Court granted them summary judgment, but the Tenth Circuit reversed in relevant part and remanded, holding that the First Amendment protects independent contractors from governmental retaliation against their speech, and that the extent of that protection must be determined by weighing the government's interests as contractor against the free speech interests at stake in accordance with the balancing test applied in the government employment context under *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568.

Held: The First Amendment protects independent contractors from the termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of the freedom of speech, and the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of that protection. Pp. 673–686.

(a) Because of the obvious similarities between government employees and government contractors with respect to this issue, the Court is guided by its government employment precedents. Among other things, those precedents have recognized that government workers are constitutionally protected from dismissal for publicly or privately criticizing their employer's policies, see, *e. g.*, *Perry* v. *Sindermann*, 408 U. S. 593, but have also acknowledged that the First Amendment does not guarantee absolute freedom of speech, see, *e. g.*, *Connick* v. *Myers*, 461 U. S. 138, 146, and have required a fact-sensitive and deferential weighing of the government employer's legitimate interests against its employees' First Amendment rights, see, *e. g.*, *Pickering*, *supra*, at 568. The parties' attempts to differentiate between inde-

pendent contractors and government employees are unavailing. Each of their arguments for and against the imposition of liability has some force, but all of them can be accommodated by applying the existing government employee framework. Moreover, application of the nuanced *Pickering* approach is superior to a bright-line rule giving the government *carte blanche* to terminate independent contractors for exercising their speech rights. Although both the individual's and the government's interests are typically—though not always—somewhat less strong in an independent contractor case, the fact that such contractors are similar in most relevant respects to government employees compels the conclusion that the same form of balancing analysis should apply to each. Pp. 673–681.

(b) Neither the dissent's fears of excessive litigation, nor its assertion that the allocation of government contracts on the basis of political bias is a longstanding tradition, can deprive independent contractors of protection. Its own description of "lowest-responsible-bidder" requirements in a wide range of government contracting laws voluntarily adopted by federal and state authorities suggests that government contracting norms incompatible with political bias have proliferated without unduly burdening the government, and such laws have a long history. Pp. 681–685.

(c) Because the courts below assumed that Umbehr's termination (or nonrenewal) was in retaliation for his protected speech activities, and did not pass on the balance between the government's interests and his free speech interests, the conclusion that independent contractors do enjoy some First Amendment protection requires affirmance of the Tenth Circuit's decision to remand the case. To prevail, Umbehr must show initially that the termination of his contract was motivated by his speech on a matter of public concern, see *Connick*, *supra*, at 146; he must therefore prove more than the mere fact that he criticized the Board members before he was terminated. If he can do so, the Board will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287. The Board will also prevail if it can demonstrate that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake. See, *e. g.*, *Pickering*, *supra*, at 568. And, if Umbehr prevails, evidence that the Board members discovered facts after termination that would have led to a later termination anyway, and evidence of mitigation of his loss by means of subsequent trash hauling contracts with cities in the County, would be relevant in assessing the appropriate remedy. Because

Umbehr's suit concerns the termination or nonrenewal of a pre-existing commercial relationship with the government, this Court need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship. Pp. 685–686.

44 F. 3d 876, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court with respect to Parts I, II–A, II–B–2, and III, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and the opinion of the Court with respect to Part II–B–1, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 686.

Donald Patterson argued the cause for petitioner. With him on the briefs was *Steve R. Fabert.*

Robert A. Van Kirk argued the cause for respondent. With him on the brief was *Richard H. Seaton.*

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Bender*, *Cornelia T. L. Pillard*, *William Kanter*, and *Robert D. Kamenshine.**

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case requires us to decide whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech.

I

Under state law, Wabaunsee County, Kansas (County), is obliged to provide for the disposal of solid waste generated

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Robin L. Dahlbert*, *Marjorie Heins*, and *Steven R. Shapiro;* and for the Planned Parenthood Federation of America, Inc., by *Bruce J. Ennis, Jr.*, *Anthony C. Epstein*, *Julie M. Carpenter*, *Nory Miller*, *Roger K. Evans*, *Dara Klassel*, and *Eve W. Paul.*

†THE CHIEF JUSTICE joins all but Part II–B–1 of this opinion.

within its borders. In 1981, and, after renegotiation, in 1985, the County contracted with respondent Umbehr for him to be the exclusive hauler of trash for cities in the County at a rate specified in the contract. Each city was free to reject or, on 90 days' notice, to opt out of, the contract. By its terms, the contract between Umbehr and the County was automatically renewed annually unless either party terminated it by giving notice at least 60 days before the end of the year or a renegotiation was instituted on 90 days' notice. Pursuant to the contract, Umbehr hauled trash for six of the County's seven cities from 1985 to 1991 on an exclusive and uninterrupted basis.

During the term of his contract, Umbehr was an outspoken critic of petitioner, the Board of County Commissioners of Wabaunsee County (Board), the three-member governing body of the County. Umbehr spoke at the Board's meetings, and wrote critical letters and editorials in local newspapers regarding the County's landfill user rates, the cost of obtaining official documents from the County, alleged violations by the Board of the Kansas Open Meetings Act, the County's alleged mismanagement of taxpayers' money, and other topics. His allegations of violation of the Kansas Open Meetings Act were vindicated in a consent decree signed by the Board's members. Umbehr also ran unsuccessfully for election to the Board.

The Board's members allegedly took Umbehr's criticism badly, threatening the official county newspaper with censorship for publishing his writings. In 1990, they voted, 2 to 1, to terminate (or prevent the automatic renewal of) Umbehr's contract with the County. That attempt at termination failed because of a technical defect, but in 1991, the Board succeeded in terminating Umbehr's contract, again by a 2 to 1 vote. Umbehr subsequently negotiated new contracts with five of the six cities that he had previously served.

In 1992, Umbehr brought this suit against the two majority Board members in their individual and official capacities

under Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, alleging that they had terminated his government contract in retaliation for his criticism of the County and the Board. The Board members moved for summary judgment. The District Court assumed that Umbehr's contract was terminated in retaliation for his speech, and that he suffered consequential damages. But it held that "the First Amendment does not prohibit [the Board] from considering [Umbehr's] expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term," because, as an independent contractor, Umbehr was not entitled to the First Amendment protection afforded to public employees. *Umbehr* v. *McClure,* 840 F. Supp. 837, 839 (Kan. 1993). It also held that the claims against the Board members in their *individual* capacities would be barred by qualified immunity, *id.*, at 841, a ruling which was affirmed on appeal and which is not at issue here.

The United States Court of Appeals for the Tenth Circuit reversed (except as to qualified immunity), holding that "an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be," and that the extent of protection is to be determined by weighing the government's interests as contractor against the free speech interests at stake in accordance with the balancing test that we used to determine government employees' First Amendment rights in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). 44 F. 3d 876, 883 (CA10 1995). It therefore remanded the official capacity claims to the District Court for further proceedings, including consideration of whether the termination was in fact retaliatory. The Board members who were the original defendants in this suit subsequently resigned their positions on the Board, so in this Court, the Board was substituted for them as petitioner. See this Court's Rule 35.3.

We granted certiorari to resolve a conflict between the Courts of Appeals regarding whether, and to what extent, independent contractors are protected by the First Amendment. The Fifth and Eighth Circuits agree with the Tenth Circuit. See *Blackburn* v. *Marshall*, 42 F. 3d 925, 931–935 (CA5 1995); *Copsey* v. *Swearingen*, 36 F. 3d 1336, 1344 (CA5 1994); *North Mississippi Communications, Inc.* v. *Jones*, 792 F. 2d 1330 (CA5 1986); *Smith* v. *Cleburne County Hospital*, 870 F. 2d 1375, 1381 (CA8), cert. denied, 493 U. S. 847 (1989); but see *Sweeney* v. *Bond*, 669 F. 2d 542 (CA8), cert. denied, 459 U. S. 878 (1982). See also *Abercrombie* v. *Catoosa*, 896 F. 2d 1228, 1233 (CA10 1990) (allowing an independent contractor to sue for termination based on his speech and political activities). The Third and Seventh Circuits have, however, held that an independent contractor who does not have a property interest in his contract with the government has no right not to have that contract terminated in retaliation for his exercise of First Amendment freedoms of political affiliation and participation. See *Horn* v. *Kean*, 796 F. 2d 668 (CA3 1986) (en banc); *O'Hare Truck Service, Inc.* v. *Northlake*, 47 F. 3d 883 (CA7 1995), reversed, *post*, p. 712; *Downtown Auto Parks, Inc.* v. *Milwaukee*, 938 F. 2d 705 (CA7), cert. denied, 502 U. S. 1005 (1991); *Triad Assocs., Inc.* v. *Chicago Housing Authority*, 892 F. 2d 583 (CA7 1989), cert. denied, 498 U. S. 845 (1990).

We agree with the Tenth Circuit that independent contractors are protected, and that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection. We therefore affirm.

II

A

This Court has not previously considered whether, and to what extent, the First Amendment restricts the freedom of

federal, state, or local governments to terminate their relationships with independent contractors because of the contractors' speech. We have, however, considered the same issue in the context of government *employees*' rights on several occasions. The similarities between government employees and government contractors with respect to this issue are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all. But either type of relationship provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, "are often in the best position to know what ails the agencies for which they work," *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994) (plurality opinion). Because of these similarities, we turn initially to our government employment precedents for guidance.

Those precedents have long since rejected Justice Holmes' famous dictum, that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892). Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," *Laird* v. *Tatum*, 408 U. S. 1, 11 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit, *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). We have held that government workers are constitutionally protected from dismissal for re-

fusing to take an oath regarding their political affiliation, see, *e. g.*, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967), for publicly or privately criticizing their employer's policies, see *Perry*, *supra; Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977); *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410 (1979), for expressing hostility to prominent political figures, see *Rankin* v. *McPherson*, 483 U. S. 378 (1987), or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party, see, *e. g.*, *Branti* v. *Finkel*, 445 U. S. 507 (1980). See also *United States* v. *Treasury Employees*, 513 U. S. 454 (1995) (Government employees are protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 234 (1977) (government employment cannot be conditioned on making or not making financial contributions to particular political causes).

While protecting First Amendment freedoms, we have, however, acknowledged that the First Amendment does not create property or tenure rights, and does not guarantee absolute freedom of speech. The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern. See *Connick* v. *Myers*, 461 U. S. 138, 146 (1983) (speech on merely private employment matters is unprotected). To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination. If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. See *Mt. Healthy*, *supra*, at 287. And even termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong.

Government employees' First Amendment rights depend on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U. S., at 568. In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 U. S., at 675 (plurality opinion). We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Id.*, at 673; accord, *Treasury Employees*, *supra*, at 475.

The parties each invite us to differentiate between independent contractors and employees. The Board urges us not to "extend" the First Amendment rights of government employees to contractors. Umbehr, joined by the Solicitor General as *amicus curiae*, contends that, on proof of viewpoint-based retaliation for contractors' political speech, the government should be required to justify its actions as narrowly tailored to serve a compelling state interest.

Both parties observe that independent contractors in general, and Umbehr in particular, work at a greater remove from government officials than do most government employees. In the Board's view, the key feature of an independent contractor's contract is that it does not give the government the right to supervise and control the details of how work is done. The Board argues that the lack of day-to-day control accentuates the government's need to have the work done by someone it trusts, cf. *Branti*, *supra*, at 518 (certain positions in government employment implicate such a need for trust that their award on the basis of party political affiliation is

justified), and to resort to the sanction of termination for unsatisfactory performance.* Umbehr, on the other hand, argues that the government interests in maintaining harmonious working environments and relationships recognized in our government employee cases are attenuated where the contractor does not work at the government's workplace and does not interact daily with government officers and employees. He also points out that to the extent that he is publicly perceived as an *independent* contractor, any government concern that his political statements will be confused with the government's political positions is mitigated. The Board and the dissent, *post*, at 697–699, retort that the cost of fending off litigation, and the potential for government contracting practices to ossify into prophylactic rules to avoid potential litigation and liability, outweigh the interests of independent contractors, who are typically less financially dependent on their government contracts than are government employees.

Each of these arguments for and against the imposition of liability has some force. But all of them can be accommodated by applying our existing framework for government employee cases to independent contractors. *Mt. Healthy* assures the government's ability to terminate contracts so long as it does not do so in retaliation for protected First Amendment activity. *Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests.

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*The Board also asserts that state and local government decisions on individual contracts are insulated by the Tenth Amendment or legislative immunity from constitutional scrutiny and liability. See Brief for Petitioner 23–26, 37. The Tenth Amendment claim was not raised in its petition, so we do not address it. See this Court's Rule 14.1(a). Because only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants only in their *individual* capacities, see, *e. g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 166 (1993), the legislative immunity claim is moot.

The dangers of burdensome litigation and the *de facto* imposition of rigid contracting rules necessitate attentive application of the *Mt. Healthy* requirement of proof of causation and substantial deference, as mandated by *Pickering*, *Connick*, and *Waters*, to the government's reasonable view of its legitimate interests, but not a *per se* denial of liability. Nor can the Board's and the dissent's generalization that independent contractors may be less dependent on the government than government employees, see *post*, at 696, justify denial of all First Amendment protection to contractors. The tests that we have established in our government employment cases must be judicially administered with sensitivity to governmental needs, but First Amendment rights must not be neglected.

Umbehr's claim that speech threatens the government's interests as contractor less than its interests as employer will also inform the application of the *Pickering* test. Umbehr is correct that if the Board had exercised sovereign power against him as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest. But in this case, as in government employment cases, the Board exercised contractual power, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated. Deference is therefore due to the government's reasonable assessments of its interests *as contractor*.

We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors. There is ample reason to believe that such a nuanced approach, which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees. The bright-line rule proposed by the Board and

the dissent would give the government *carte blanche* to terminate independent contractors for exercising First Amendment rights. And that bright-line rule would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake. See Comment, Political Patronage in Public Contracting, 51 U. Chi. L. Rev. 518, 520 (1984) ("[N]o legally relevant distinction exists between employees and contractors in terms either of the government's interest in using patronage or of the employee or contractor's interest in free speech"); cf. *Perry*, 408 U. S., at 597 (the prohibition of unconstitutional conditions on speech applies "regardless of the public employee's contractual or other claim to a job"). Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, see *Logue* v. *United States*, 412 U. S. 521, 532 (1973) (noting that independent contractors are often employed to perform "tasks that would . . . otherwise be performed by salaried Government employees"), is an enterprise that we have consistently eschewed. See, *e. g.*, *Lefkowitz* v. *Turley*, 414 U. S. 70, 83 (1973) (in the context of the privilege against self-incrimination, "[w]e fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor"); cf. *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, *ante*, at 622 (opinion of BREYER, J.) ("[T]he government 'cannot foreclose the exercise of [First Amendment] rights by mere labels' ") (quoting *NAACP* v. *Button*, 371 U. S. 415, 429 (1963)); *Escobedo* v. *Illinois*, 378 U. S. 478, 486 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell* v. *Benson*, 285 U. S. 22, 53 (1932) ("[R]egard must be had, . . . in . . . cases where constitutional limits are invoked, not to mere matters of form

but to the substance of what is required"); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 235 (1897) ("In determining what is due process of law regard must be had to substance, not to form"); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 299 (1989) (O'CONNOR, J., concurring in part and dissenting in part) ("[T]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law").

Furthermore, the arguments made by both parties demonstrate that it is far from clear, as a general matter, whether the balance of interests at stake is more favorable to the government in independent contractor cases than in employee cases. Our unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, *Speiser* v. *Randall*, 357 U. S. 513 (1958), users of public facilities, *e. g., Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 390–394 (1993); *Healy* v. *James*, 408 U. S. 169 (1972), and recipients of small government subsidies, *e. g., FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984), who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing. The First Amendment permits neither the firing of janitors nor the discriminatory pricing of state lottery tickets based on the government's disagreement with certain political expression. Independent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government. The Board's and the dissent's assertion, *post*, at 687, 696–697, that the decision below represents an unwarranted "extension" of

special protections afforded to government employees is, therefore, not persuasive.

B

1

The dissent's fears of excessive litigation, see *post*, at 697–699, cannot justify a special exception to our unconstitutional conditions precedent to deprive independent government contractors of protection. Nor can its assertion that the allocation of government contracts on the basis of political bias is a "long and unbroken tradition of our people." *Post*, at 688. We do not believe that tradition legitimizes patronage contracting, regardless of whether one approaches the role of tradition in First Amendment adjudication from the perspective of Part I of the *Rutan* dissent, see *post*, at 687 (quoting *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62, 95 (1990) (SCALIA, J., dissenting)) (a practice that "'bears the endorsement of a long tradition of *open*, *widespread*, *and unchallenged* use that dates back to the beginning of the Republic'" is presumed constitutional) (emphasis added), or from that of Justice Holmes, compare *post*, at 690 (quoting Holmes' discussion of traditional usage of legal terminology in a tax case) with *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting) (rejecting both the self-interested "logi[c]" and the long history of the suppression of free speech, including the Sedition Act of 1798 and "the common law as to seditious libel," in favor of the true "theory of our Constitution," which values free speech as essential to, not subject to the vicissitudes of, our political system).

The examples to which the dissent cites, *post*, at 688–690, are not, in our view, "'the stuff out of which the Court's principles are to be formed,'" *post*, at 687 (quoting *Rutan*, *supra*, at 96 (SCALIA, J., dissenting)). Consider, for example, the practice of "courtroom patronage," whereby "[e]lected judges, who owe their nomination and election to the party, give the organization lucrative refereeships, trusteeships,

and receiverships which often yield legal fees unjustified by the work required," M. Tolchin & S. Tolchin, To The Victor: Political Patronage from the Clubhouse to the White House 15 (1971); see also Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 367, 371 (1972) (similar), or the award of "gift[s]" to political supporters under the guise of research grants, Tolchin, *supra*, at 61, or the allocation of contracts based on "contributions resulting from the compound of bribery and extortion" and "kickbacks," A. Heard, The Costs of Democracy 143, 144 (1960), or the practice of "'beer politics,'" whereby "wholesale liquor licenses issued by the state were traded for campaign contributions," *id.*, at 144, or the extortion of political support and "campaign contributions" on pain of being branded a "Communist," R. Caro, The Power Broker: Robert Moses and the Fall of New York 726 (1975), or the "favorable consideration in the courts or by public agencies" expected in one city by the clients of "'political' attorneys with part-time public jobs," Wolfinger, *supra*, at 389, or the question reportedly asked by a party official of a businessman who was reluctant to contribute to a mayoralty campaign, "'Look, you [expletive deleted], do you want a snow-removal contract or don't you?,'" *id.*, at 368. These examples, cited by the dissent, many of which involve patronage in employment and appointments rather than in contracting, cf. Comment, Political Patronage, at 518, n. 4 ("[P]atronage systems have traditionally centered around the distribution of government *jobs*" (emphasis added)), may suggest that abuses of power in the name of patronage are not "highly unusual," *post*, at 710. It may also be the case that the victims whose speech is chilled and whose contributions are extracted by such government action are often "'honorable and prudent businessmen.'" *Post*, at 689 (quoting Heard, *supra*, at 145). But the dissent's examples do not establish an "open and unchallenged" tradition of allocating government contracts on the basis of political bias—much

less on the basis of disapproval of political speech. The dissent's own sources note that the patronage practices that they report were denied and disavowed by their alleged practitioners, see Wolfinger, *supra*, at 367, n. 2, 372–373, n. 11, that they were most significant in secret and specialized contexts such as defense contracting that "operat[e] in an atmosphere uninhibited by the usual challenges of representative government," Tolchin, *supra*, at 233, and that in many cases they were illegal, see Heard, *supra*, at 143–144, n. 4. We of course agree with the dissent that mere "obnoxious[ness]," *post*, at 690, and criminality do not make a practice unconstitutional. Nor, however, do the dissent's examples of covert, widely condemned, and sometimes illegal government action legitimize the government discrimination based on the viewpoint of one's speech or one's political affiliations that is involved here.

2

The dissent's own description of the "lowest-responsible-bidder" and other, similar requirements covering a wide range of government contracts that the Federal Government, all 50 States, and many local government authorities, have voluntarily adopted, see *post*, at 690–695, at least suggests that government contracting norms incompatible with political bias have proliferated without unduly burdening the government. In fact, lowest- and lowest-responsible-bidder requirements have a long history, as a survey of 19th century state constitutions and federal territorial legislation reveals. See, *e. g.*, Ala. Const., Art. IV, § 30 (1875), in 1 Federal and State Constitutions 161 (F. Thorpe ed. 1909); Civil Government in Alaska Act, Tit. I, § 2 (1900), in *id.*, at 243; Ark. Const., Art. XIX, §§ 15, 16 (1874), in *id.*, at 366; Colo. Const., Art. V, § 29 (1876), in *id.*, at 485; Del. Const., Art. XV, § 8 (1897), in *id.*, at 631; Permanent Government for District of Columbia Act, § 5 (1878), in *id.*, at 645–646; Ill. Const., Art. III, § 39 (1848), in 2 *id.*, at 991; Ill. Const., Art. IV, § 25 (1870), in *id.*, at 1022; Kan. Const., Art. XVI, § 2 (1858), in *id.*, at

1236; Ky. Const., § 247 (1890), in 3 *id.*, at 1353; La. Const., Art. 42 (1879), in *id.*, at 1447–1478; La. Const., Art. 44 (1898), in *id.*, at 1529; Mich. Const., Art. IV, § 22 (1850), in 4 *id.*, at 1948–1949; Miss. Const., Art. 4, § 107 (1890), in *id.*, at 2102; Mont. Const., Art. V, § 30 (1889), in *id.*, at 2308; Neb. Const., Art. II, § 23 (1866–1867), in *id.*, at 2353; Ohio Const., Art. XV, § 2 (1851), in 5 *id.*, at 2932; Pa. Const., Art. III, § 12 (1873), in *id.*, at 3127; Tex. Const., Art. XVI, § 21 (1876), in 6 *id.*, at 3658–3659; W. Va. Const., Art. VI, § 34 (1872), in 7 *id.*, at 4044; Wis. Const., Art. IV, § 25 (1848), in *id.*, at 4083; Wyo. Const., Art. III, § 31 (1889), in *id.*, at 4124; see also Ky. Const., § 164 (1890), in 3 *id.*, at 1341 ("highest and best bidder" rule for municipal and local franchise awards); Miss. Const., Art. I, § 5 (1817, 1832), in 4 *id.*, at 2033, 2049 ("[N]o person shall be molested for his opinions on any subject whatsoever, nor suffer any civil or political incapacity, or acquire any civil or political advantage, in consequence of such opinions, except in cases provided for in this constitution"). We are aware of no evidence of excessive or abusive litigation under such provisions. And, unlike the dissent, *post*, at 699–700, we do not believe that a deferentially administered requirement that the government not unreasonably terminate its commercial relationships on the basis of speech or political affiliation poses a greater threat to legitimate government interests than the complex and detailed array of modern statutory and regulatory government contracting rules.

In sum, neither the Board nor Umbehr have persuaded us that there is a "difference of constitutional magnitude," *Lefkowitz*, 414 U. S., at 83, between independent contractors and employees in this context. Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically—though not always—somewhat less strong in the independent contractor case.

We therefore conclude that the same form of balancing analysis should apply to each.

III

Because the courts below assumed that Umbehr's termination (or nonrenewal) was in retaliation for his protected speech activities, and because they did not pass on the balance between the government's interests and the free speech interests at stake, our conclusion that independent contractors do enjoy some First Amendment protection requires that we affirm the Tenth Circuit's decision to remand the case. To prevail, Umbehr must show that the termination of his contract was motivated by his speech on a matter of public concern, an initial showing that requires him to prove more than the mere fact that he criticized the Board members before they terminated him. If he can make that showing, the Board will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). The Board will also prevail if it can persuade the District Court that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake. And, if Umbehr prevails, evidence that the Board members discovered facts after termination that would have led to a later termination anyway, and evidence of mitigation of his loss by means of his subsequent contracts with the cities, would be relevant in assessing what remedy is appropriate.

Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

Subject to these limitations and caveats, however, we recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights. The judgment of the Court of Appeals is, therefore, affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.*

Taken together, today's decisions in *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, p. 668, and *O'Hare Truck Service, Inc.* v. *City of Northlake*, *post*, p. 712, demonstrate why this Court's Constitution-making process can be called "reasoned adjudication" only in the most formalistic sense.

I

Six years ago, by the barest of margins, the Court expanded *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Branti* v. *Finkel*, 445 U. S. 507 (1980), which had held that public employees cannot constitutionally be fired on the basis of their political affiliation, to establish the new rule that *applicants* for public employment cannot constitutionally be *rejected* on the basis of their political affiliation. *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990). The four dissenters argued that "the desirability of patronage is a policy question to be decided by the people's representatives" and "a political question if there ever was one." *Id.*, at 104, 114 (SCALIA, J., dissenting). They were "convinced" that *Elrod* and *Branti* had been "wrongly decided," 497 U. S., at 114; indeed, that those cases were "not only wrong, not only recent, not only contradicted by a long prior tradition, but also . . . unworkable in practice" and therefore "should be overruled," *id.*,

*[This opinion applies also to No. 95–191, *O'Hare Truck Service, Inc.* v. *City of Northlake*, *post*, p. 712.]

at 110–111. At the very least, the dissenters maintained, *Elrod* and *Branti* "should not be extended beyond their facts." 497 U. S., at 114.

Today, with the addition to the Court of another Justice who believes that we have no basis for proscribing as unconstitutional practices that do not violate any explicit text of the Constitution and that have been regarded as constitutional ever since the framing, see, *e. g.*, *Bennis* v. *Michigan*, 516 U. S. 442, 454–455 (1996) (THOMAS, J., concurring), one would think it inconceivable that *Elrod* and *Branti* would be extended *far* beyond *Rutan* to the massive field of all government contracting. Yet amazingly, that is what the Court does in these two opinions—and by lopsided votes, at that. It is profoundly disturbing that the varying political practices across this vast country, from coast to coast, can be transformed overnight by an institution whose conviction of what the Constitution means is so fickle.

The basic reason for my dissent today is the same as one of the reasons I gave (this one not joined by JUSTICE O'CONNOR) in *Rutan:*

> "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices is to be figured out. When it appears that the latest 'rule,' or 'three-part test,' or 'balancing test' devised by the Court has placed us on a collision course with such a landmark practice, it is the

> former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court." 497 U. S., at 95–96 (dissenting opinion) (footnote omitted).

There can be no dispute that, like rewarding one's allies, the correlative act of refusing to reward one's opponents—and at bottom *both* of today's cases involve exactly that—is an American political tradition as old as the Republic. This is true not only with regard to employment matters, as Justice Powell discussed in his dissenting opinions in *Elrod*, *supra*, at 377–379, and *Branti*, *supra*, at 522, n. 1, but also in the area of government contracts, see, *e. g.*, M. Tolchin & S. Tolchin, To the Victor: Political Patronage from the Clubhouse to the White House 14–15, 61, 233–241, 273–277 (1971); A. Heard, The Costs of Democracy 143–145 (1960); R. Caro, The Power Broker: Robert Moses and the Fall of New York 723–726, 738, 740–741, 775, 799, 927 (1975); M. Royko, Boss: Richard J. Daley of Chicago 69 (1971); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 367–368, 372, 389 (1972); The Bond Game Remains the Same, Nat. L. J., July 1, 1996, pp. A1, A20–A21. If that long and unbroken tradition of our people does not decide these cases, then what does? The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a "law abridging the freedom of speech" is either a matter of history or else it is a matter of opinion. Why are not libel laws such an "abridgment"? The only satisfactory answer is that they never were. What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the

text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?

The Court seeks to avoid the charge that it ignores the centuries-old understandings and practices of our people by recounting, *Umbehr*, *ante*, at 681–683, shocking examples of raw political patronage in contracting, most of which would be unlawful under the most rudimentary bribery law. (It selects, of course, only the worst examples from the sources I have cited, omitting the more common practices that permit one author to say, with undeniable accuracy, that "honorable and prudent businessmen competing for government ventures make campaign contributions" out of "a desire to do what [is] thought necessary to remain eligible," and that "[m]any contractors routinely do so to both parties." Heard, *supra*, at 145.) These "examples of covert, widely condemned, and sometimes illegal government action," it says, do not "legitimize the government discrimination." *Umbehr*, *ante*, at 683. But of course it is not the *county's* or *city's* burden (or mine) to "legitimize" all patronage practices; it is Umbehr's and O'Hare's (and the Court's) to show that all patronage practices are *not only* "illegitimate" in some vague moral or even precise legal sense, but *that they are unconstitutional.* It suffices to demonstrate the error of the Court's opinions that *many* contracting patronage practices have been open, widespread, and unchallenged since the beginning of the Republic; and that those that *have* been objected to have not been objected to *on constitutional grounds.* That the Court thinks it relevant that many patronage practices are "covert, widely condemned and sometimes illegal" merely displays its persistent tendency to equate those many things that are or should be proscribed as a matter of social policy with those few things that *we* have the power to proscribe under the Constitution. The relevant and inescapable point is this: No court ever held,

and indeed no one ever thought, prior to our decisions in *Elrod* and *Branti*, that patronage contracting could violate *the First Amendment.* The Court's attempt to contest this point, or at least to becloud the issue, by appeal to obnoxious and universally condemned patronage practices simply displays the feebleness of its case.

In each case today, the Court observes that we "have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Umbehr*, *ante*, at 674 (quoting *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892)); see *O'Hare*, *post*, at 716–717 (quoting same). But this activist Court also repeatedly rejects a more important aphorism of Justice Holmes, which expresses a fundamental philosophy that was once an inseparable part of our approach to constitutional law. In a case challenging the constitutionality of a federal estate tax on the ground that it was an unapportioned direct tax in violation of Article I, § 9, Justice Holmes wrote:

> "[The] matter . . . is disposed of . . . , not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . . *Upon this point a page of history is worth a volume of logic.*" *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921) (emphasis added).

II

The Court's decision to enter this field cannot be justified by the consideration (if it were ever a justification) that the democratic institutions of government have not been paying adequate attention to the problems it presents. The American people have evidently decided that political influence in government contracting, like many other things that are

entirely constitutional, is not entirely desirable, and so they have set about passing laws to prohibit it in some but not all instances. As a consequence, government contracting is subject to the most extraordinary number of laws and regulations at the federal, state, and local levels.

The United States Code contains a categorical statutory prohibition on political contributions by those negotiating for or performing contracts with the Federal Government, 2 U. S. C. § 441c, competitive bidding requirements for contracts with executive agencies, 41 U. S. C. §§ 252–253, public corruption and bribery statutes, *e. g.*, 18 U. S. C. § 201, and countless other statutory requirements that restrict Government officials' discretion in awarding contracts. "There are already over four thousand individual statutory provisions that affect the [Defense Department's] procurement process." Pyatt, Procurement Competition at Work: The Navy's Experience, 6 Yale J. Reg. 319, 319–320 (1989). Federal regulations are even more widespread. As one handbook in the area has explained, "[t]heir procedural and substantive requirements dictate, to an oftentimes astonishing specificity, how the entire contracting process will be conducted." ABA General Practice Section, Federal Procurement Regulations: Policy, Practice and Procedures 1 (1987). That is why it is no surprise in this area to find a 253-page book just setting forth "fundamentals," E. Massengale, Fundamentals of Federal Contract Law (1991), or a mere "deskbook" that runs 436 pages, ABA Section of Public Contract Law, Government Contract Law: The Deskbook for Procurement Professionals (1995). Such "summaries" are indispensable when, for example, the regulations that constitute the "Federal Acquisition Regulations System" total some *5,037* pages of fine print. See Title 48 CFR (1995).

Similar systems of detailed statutes and regulations exist throughout the States. In addition to the various statutes criminalizing bribes to government officials and other forms

of public corruption, all 50 States have enacted legislation imposing competitive bidding requirements on various types of contracts with the government.[1] Government contract-

[1] See, *e. g.*, Ala. Code § 11–43C–70 (1989); *id.*, § 24–1–83 (1992); *id.*, § 41–16–20 (Supp. 1995); Alaska Stat. Ann. § 36.30.100 (1992); Ariz. Rev. Stat. Ann. § 41–2533 (1992); Ark. Code Ann. §§ 14–47–120, 14–47–138, 14–48–117, 14–48–129 (1987); Cal. Pub. Cont. Code Ann. §§ 10302, 10309, 10373, 10501, 10507.7, 20723, 20736, 20751, 20803, 20921, 21501, 21631 (West 1985 and Supp. 1996); Cal. Pub. Util. Code Ann. § 131285 (West 1991); Cal. Rev. & Tax. Code Ann. § 674 (West Supp. 1996); Colo. Rev. Stat. § 24–103–202 (Supp. 1995); Conn. Gen. Stat. § 4a–57 (Supp. 1996); Del. Code Ann., Tit. 9, § 671 (1989); *id.*, Tit. 29, § 6903(a) (1991); Fla. Stat. § 190.033 (Supp. 1996); *id.*, § 287.057 (1991 and Supp. 1996); Ga. Code Ann. § 2–10–10 (1990); *id.*, §§ 32–10–7, 32–10–68 (1991 and Supp. 1995); Haw. Rev. Stat. § 103D–302 (Supp. 1995); Idaho Code § 33–1510 (1995); *id.*, § 43–2508 (Supp. 1995); *id.*, § 50–1710 (1994); *id.*, § 67–5711C (1995); *id.*, § 67–5718 (1995, and 1996 Idaho Sess. Laws, ch. 198); Ill. Comp. Stat., ch. 50, § 20/20 (1993); *id.*, ch. 65, § 5/8–10–3 (1993); *id.*, ch. 70, §§ 205/25, 225/25, 265/25, 280/1–24, 280/2–24, 290/26, 310/5–24, 320/1–25, 320/2–25, 325/1–24, 325/2–24, 325/3–24, 325/5–24, 325/6–24, 325/7–24, 325/8–24, 340/25, 2305/11, 2405/11, 2805/14, 2905/5–4 (1993 and Supp. 1996); Ind. Code §§ 2–6–1.5–2, 10–7–2–28, 4–13.6–5–2, 8–16–3.5–5.5 (Supp. 1995); Iowa Code § 18.6 (1995); Kan. Stat. Ann. § 49–417(a) (Supp. 1990); *id.*, §§ 75–3739 to 75–3741 (1989 and Supp. 1990, and 1996 Kan. Sess. Laws, ch. 201); Ky. Rev. Stat. Ann. § 162.070 (Baldwin 1990); La. Rev. Stat. Ann. § 39:1594 (West 1989); Me. Rev. Stat. Ann., Tit. 5, §§ 1743, 1743–A (1989); Md. Ann. Code, Art. 25, § 3(*l*) (Supp. 1995, and 1996 Md. Laws, ch. 66); *id.*, Art. 25A, § 5(F) (Supp. 1995); Md. Nat. Res. Code Ann. §§ 3–103(g)(3), 8–1005(c) (Supp. 1995); Mass. Gen. Laws §§ 149–44A to 149–44M (1989 and Supp. 1996); Mich. Comp. Laws Ann. § 247.661c (West Supp. 1996); Minn. Stat. § 16B.07 (1988 and Supp. 1996); Miss. Code Ann. § 27–35–101 (1995); *id.*, §§ 31–7–13, 37–151–17 (Supp. 1995); Mo. Rev. Stat. §§ 34.040.1, 34.042.1, 68.055.1 (Supp. 1996); Mont. Code Ann. §§ 7–3–1323, 7–5–2301, 7–5–2302, 7–5–4302, 7–14–2404 (1995); Neb. Rev. Stat. §§ 81–885.55, 84–1603 (1994); Nev. Rev. Stat. § 332.065 (1984); N. H. Rev. Stat. Ann. § 28:8 (1988); *id.*, § 186–C:22(VI) (Supp. 1995); *id.*, § 228:4 (1993); N. J. Stat. Ann. § 28:1–7 (West 1981); N. M. Stat. Ann. § 13–1–102 (1992); N. Y. Alt. County Govt. Law § 401 (McKinney 1993); N. Y. Gen. Mun. Law § 103 (McKinney 1986 and Supp. 1996); N. C. Gen. Stat. § 133–10.1 (1995); *id.*, § 143–49 (1993); N. D. Cent. Code § 54–44.4–05 (Supp. 1995); Ohio Rev. Code Ann. §§ 307.90, 511.12 (1994); *id.*, § 3381.11 (1995); Okla. Stat., Tit. 11, § 24–114 (1994); *id.*, Tit. 52, § 318 (1991); *id.*, Tit. 61, § 101 (1989); Ore. Rev.

ing is such a standard area for state regulation that a model procurement code has been developed, which is set forth in a 265-page book complete with proposed statutes, regulations, and explanations. See ABA Section of Urban, State and Local Government Law, Model Procurement Code for State and Local Governments (1981). As of 1989, 15 States had enacted legislation based on the model code. See ABA Section of Urban, State and Local Government Law, Annotations to the Model Procurement Code vii–viii (2d ed. 1992) (and statutes cited).

By 1992, more than 25 local jurisdictions had also adopted legislation based on the Model Procurement Code, see *id.*, at ix, and thousands of other counties and municipalities have over time devised their own measures. New York City, for example, which "[e]ach year . . . enter[s] into approximately 40,000 contracts worth almost $6.5 billion," has regulated the public contracting process by a myriad of codes and regulations that seek to assure "scrupulous neutrality in choosing contractors and [consequently impose] multiple layers of investigation and accountability." Anechiarico & Jacobs, Purging Corruption from Public Contracting: The 'Solutions' Are Now Part of the Problem, 40 N. Y. L. S. L. Rev. 143, 143–144 (1995) (hereinafter Anechiarico & Jacobs).

These examples of federal, state, and local statutes, codes, ordinances, and regulations could be multiplied to fill many volumes. They are the way in which government contracts

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Stat. § 279.015 (1991); 53 Pa. Cons. Stat. § 23308.1 (Supp. 1996); R. I. Gen. Laws § 45–55–5 (Supp 1995); S. C. Code Ann. § 11–35–1520 (Supp. 1995); S. D. Codified Laws §§ 5–18–2, 5–18–3 (1994); *id.*, § 5–18–9 (Supp. 1996); *id.*, §§ 9–42–5, 11–7–44 (1995); *id.*, § 13–49–16, 42–7A–5 (1991); Tenn. Code Ann. §§ 12–3–202, 12–3–203, 12–3–1007 (1992 and Supp. 1995); Tex. Educ. Code Ann. § 51.907 (1987); Tex. Loc. Govt. Code Ann. §§ 252.021, 262.023, 262.027, 271.027, 375.221 (1988 and Supp. 1996); Utah Code Ann. § 17A–2–1195 (1991); Vt. Stat. Ann., Tit. 29, § 152(12) (1986); Va. Code Ann. §§ 11–41, 11–41.1 (1993); Wash. Rev. Code §§ 28A.160.140, 36.32.250 (Supp. 1996); W. Va. Code §§ 4–7–7, 5–6–7 (1994); Wis. Stat. § 30.32 (1989 and Supp. 1995); *id.*, § 60.47 (1988 and Supp. 1995); Wyo. Stat. § 35–2–429 (1994).

have been regulated, and the way in which public policy problems that arise in the area have been addressed, since the founding of the Republic. See, *e. g.*, Federal Procurement Regulations: Policy, Practice and Procedures, at 11–196 (describing the history of Federal Government procurement regulation). But these laws and regulations have brought to the field a degree of discrimination, discernment, and predictability that cannot be achieved by the blunt instrument of a constitutional prohibition.

Title 48 of the Code of Federal Regulations would not contain the 5,000+ pages it does if it did not make fine distinctions, permitting certain actions in some Government acquisition areas and prohibiting them in others. Similarly, many of the competitive bidding statutes that I have cited contain exceptions for, or are simply written not to include, contracts under a particular dollar amount,[2] or those covering certain subject matters,[3] or those that are time sensitive.[4] A politi-

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[2] See, *e. g.*, 41 U. S. C. §§ 252a(b), 403(11) (certain federal contracting laws rendered inapplicable "to a contract or subcontract that is not greater than" $100,000); Cal. Pub. Cont. Code Ann. § 10507.7 (West Supp. 1996) (lowest-responsible-bidder requirement for certain goods and materials only applicable to "contracts involving an [annual] expenditure of more than fifty thousand dollars"); Ill. Comp. Stat., ch. 50, § 20/20 (1993) (lowest-responsible-bidder requirement for certain construction contracts not applicable to contracts for more than $5,000); N. Y. Gen. Mun. Law § 103.1 (McKinney Supp. 1996) (not covering public-work contracts for $20,000 or less or purchase contracts for $10,000 or less); S. D. Codified Laws § 5–18–3 (Supp. 1996) (requiring competitive bidding process for certain public-improvement contracts "involv[ing] the expenditure of twenty-five thousand dollars or more"); Tex. Loc. Govt. Code Ann. § 262.023(a) (Supp. 1996) (applying only to "a contract that will require an expenditure exceeding $15,000").

[3] See, *e. g.*, Idaho Code § 33–1510 (1995); N. J. Stat. Ann. § 28:1–7 (West 1981); Ohio Rev. Code Ann. § 511.12 (Supp. 1995); Okla. Stat., Tit. 52, § 318 (1991); Utah Code Ann. § 17A–2–1195 (1991).

[4] See, *e. g.*, Del. Code Ann., Tit. 29, § 6903(a)(2) (1991); Fla. Stat. § 287.057(3)(a) (Supp. 1996); Minn. Stat. § 16B.08(6) (1988); N. H. Rev. Stat. Ann. § 228:4(I)(e) (1993); Tenn. Code Ann. §§ 12–3–202(3), 12–3–206 (1992).

cal unit's decision not to enact contracting regulations, or to suspend the regulations in certain circumstances, amounts to a decision to permit some degree of political favoritism. As I shall discuss shortly, *O'Hare*'s and *Umbehr*'s First Amendment permits no such selectivity—or at least none that can be known before litigation is over.

III

If inattention by the democratic organs of government is not a plausible reason for the Court's entry into the field, then what is? I believe the Court accepts (any sane person *must* accept) the premise that it is utterly impossible to erect, and enforce through litigation, a system in which *no* citizen is intentionally disadvantaged by the government because of his political beliefs. I say the Court accepts that, because the *O'Hare* opinion, in a rare brush with the real world, points out that "O'Hare was not part of a constituency that must take its chance of being favored or ignored in the larger political process—for example, by residing or doing business in a region the government rewards or spurns in the construction of public works." *Post*, at 720–721. Of course. Government favors those who agree with its political views, and disfavors those who disagree, every day—in where it builds its public works, in the kinds of taxes it imposes and collects, in its regulatory prescriptions, in the design of its grant and benefit programs—in a *million* ways, including the letting of contracts for government business. What good reason has the Court given for separating out this last way, and declaring it to be (as all the others for some reason are not) an "abridgment of the freedom of speech"?

As I have explained, I would separate the permissible from the impermissible on the basis of our Nation's traditions, which is what I believe sound constitutional adjudication requires. In *Elrod* and *Branti*, the Court rejected this criterion—but if what it said did not make good constitutional law, at least it made some sense: the loss of one's job

is a powerful price to pay for one's politics. But the Court then found itself on the fabled slippery slope that Justice Holmes's aphorism about history and logic warned about: one logical proposition detached from history leads to another, until the Court produces a result that bears no resemblance to the America that we know. The next step was *Rutan*, which extended the prohibition of political motivation from firing to hiring. The third step is today's *Umbehr*, which extends it to the termination of a government contract. And the fourth step (as I shall discuss anon) is today's *O'Hare*, which extends it to the refusal to enter into contractual relationships.

If it is to be possible to dig in our cleats at some point on this slope—before we end up holding that the First Amendment requires the city of Chicago to have as few potholes in Republican wards (if any) as in Democratic ones—would not the most defensible point of termination for this indefensible exercise be public employment? A public employee is always an individual, and a public employee below the highest political level (which is exempt from *Elrod*) is virtually always an individual who is not rich; the termination or denial of a public job is the termination or denial of a livelihood. A public contractor, on the other hand, is usually a corporation; and the contract it loses is rarely its entire business, or even an indispensable part of its entire business. As Judge Posner put it:

> "Although some business firms sell just to government, most government contractors also have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing

your job." *LaFalce* v. *Houston*, 712 F. 2d 292, 294 (CA7 1983).

Another factor that suggests we should stop this new enterprise at government employment is the much greater volume of litigation that its extension to the field of contracting entails. The government contracting decisions worth litigating about are much more numerous than the number of personnel hirings and firings in that category; and the litigation resources of contractors are infinitely more substantial than those of fired employees or rejected applicants. Anyone who has had even brief exposure to the intricacies of federal contracting law knows that a lawsuit is often used as a device to stay or frustrate the award of a contract to a competitor. See, *e. g.*, *Delta Data Systems Corp.* v. *Webster*, 744 F. 2d 197 (CADC 1984); *Delta Data Systems Corp.* v. *Webster*, 755 F. 2d 938 (CADC 1985). What the Court's decisions today mean is that all government entities, no matter how small, are at risk of § 1983 lawsuits for violation of constitutional rights, unless they adopt (at great cost in money and efficiency) the detailed and cumbersome procedures that make a claim of political favoritism (and a § 1983 lawsuit) easily defended against.

The Court's opinion in *O'Hare* shrugs off this concern with the response that "[w]e have no reason to believe that governments cannot bear a like burden [to that in the employment context] in defending against suits alleging the denial of First Amendment freedoms to public contractors." *Post*, at 724. The burden is, as I have suggested, likely much greater than that in the employment context; and the relevant question (if one rejects history as the determinant) is not simply whether the governments "can bear" it, but whether the inconvenience of bearing it is outbalanced by the degree of abridgment of supposed First Amendment rights (of corporate shareholders, for the most part) that

would occur if the burden were not imposed.[5] The Court in *Umbehr* dismisses the risk of litigation, not by analogy to the employment context, but by analogy to the many government-contracting laws of the type I have discussed. "We are aware," it says, "of no evidence of excessive or abusive litigation under such provisions." *Ante*, at 684. I am not sure the Court *would* be aware of such evidence if it existed, but if in fact litigation has been "nonexcessive" (a conveniently imprecise term) under these provisions, that is scant indication that it will be "nonexcessive" under the First Amendment. Uncertainty breeds litigation. Government-contracting laws are clear and detailed, and whether they have been violated is typically easy to as-

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[5] *O'Hare* makes a brief attempt to minimize the seriousness of the litigation concern, pointing out that "[t]he *amicus* brief filed on behalf of respondents' position represents that in the six years since our opinion in *[Rutan]* . . . only 18 suits alleging First Amendment violations in employment decisions have been filed against Illinois state officials." *Post*, at 724. In fact the brief said "*at least* eighteen cases," Brief for Illinois State Officials as *Amici Curiae* 3 (emphasis added), and that includes only suits against state officials, and not those against the officials of Illinois' 102 counties or its even more numerous municipalities. Those statistics pertain to *employment* suits, moreover—and as I have discussed, the contracting suits will be much more numerous.

O'Hare also says that "we have found no reported case in the Tenth Circuit involving a First Amendment patronage claim by an independent contractor in the six years since its Court of Appeals first recognized such claims, see *Abercrombie* v. *Catoosa*, 896 F. 2d 1228 (1990)." *Post*, at 724. With respect, *Abercrombie* (which discussed this issue in two short paragraphs) was such an obscure case that even the District Court in *Umbehr*, located in the Tenth Circuit, did not cite it, though it discussed cases in other jurisdictions. *Umbehr* v. *McClure*, 840 F. Supp. 837 (Kan. 1993). And when the Tenth Circuit reversed the District Court, it did not do so on the basis of *Abercrombie*—which, it noted, had "*simply assumed* that an independent contractor could assert a First Amendment retaliation claim" and had given "little reasoning" to the matter but merely so "suggested, without analysis." 44 F. 3d 876, 880 (1995) (emphasis added). *Abercrombie* was, in short, such a muffled clarion that even the courts did not hear it, much less the public at large.

certain: the contract was put out for bid, or it was not. *Umbehr*'s new First Amendment, by contrast, requires a sensitive "balancing" in each case; and the factual question whether political affiliation or disfavored speech was the reason for the award or loss of the contract will usually be litigable. In short, experience under the government-contracting laws has little predictive value.

The Court additionally asserts that the line cannot be drawn between employment and independent contracting, because "'the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.'" *Umbehr*, *ante*, at 680 (quoting *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 299 (1989) (O'CONNOR, J., concurring in part and dissenting in part)); see also *Umbehr*, *ante*, at 678–680 (citing other cases). That is not so. State law frequently plays a dispositive role in the issue whether a constitutional provision is applicable. In fact, before we invented the First Amendment right not to be fired for political views, most litigation in this very field of government employment revolved around the Fourteenth Amendment's Due Process Clause and asked whether the firing had deprived the plaintiff of a "property" interest without due process. And what is a property interest entitled to Fourteenth Amendment protection? "[P]roperty interests," we said, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . . If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's [federal constitutional] claim would be defeated." *Perry* v. *Sindermann*, 408 U. S. 593, 602, n. 7 (1972) (internal quotation marks and citation omitted). See also *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 280–281 (1977) (whether a government entity possesses Eleventh Amendment immunity "depends,

at least in part, upon the nature of the entity created by state law").

I have spoken thus far as though the only problem involved here were a practical one: as though, in the best of all possible worlds, if our judicial system and the resources of our governmental entities could only manage it, it would be *desirable* for an individual to suffer *no disadvantage whatever* at the hands of the government solely because of his political views—no denial of employment, no refusal of contracts, no discrimination in social programs, not even any potholes. But I do not believe that. The First Amendment guarantees that you and I can say and believe whatever we like (subject to a few tradition-based exceptions, such as obscenity and "fighting words") without going to jail or being fined. What it *ought* to guarantee beyond that is not at all the simple question the Court assumes. The ability to discourage eccentric views through the mild means that have historically been employed, and that the Court has now set its face against, may well be important to social cohesion. To take an uncomfortable example from real life: An organization (I shall call it the White Aryan Supremacist Party, though that was not the organization involved in the actual incident I have in mind) is undoubtedly entitled, under the Constitution, to maintain and propagate racist and antisemitic views. But when the Department of Housing and Urban Development lets out contracts to private security forces to maintain law and order in units of public housing, must it really treat this bidder the same as all others? Or may it determine that the views of this organization are not political views that it wishes to "subsidize" with public funds, nor political views that it wishes to hold up as an exemplar of the law to the residents of public housing?

The state and local regulation I described earlier takes account of this reality. Even where competitive-bidding requirements are applicable (which is far from always), they almost invariably require that a contract be awarded not to

the lowest bidder but to the "lowest *responsible* bidder."[6] "The word 'responsible' is as important as the word 'lowest,'" H. Cohen, Public Construction Contracts and the Law 81 (1961), and has been interpreted in some States to permit elected officials to exercise political discretion. "Some New York courts," for example, "have upheld agency refusals to award a contract to a low bidder because the contractor, while technically and financially capable, was not morally responsible." Anechiarico & Jacobs 146–147. In the leading case of *Picone* v. *New York*, 176 Misc. 967, 29 N. Y. S. 2d 539 (Sup. Ct. N. Y. Cty. 1941), the court stated that in determining whether a lowest bidder for a particular contract was the "lowest responsible bidder," New York City officials had permissibly considered "whether [the bidder] possessed integrity and moral worth." *Id.*, at 969, 29 N. Y. S. 2d, at 541. The New Jersey Supreme Court has similarly said: "It is settled that the legislative mandate that a bidder be 'responsible' embraces moral integrity just as surely as it embraces a capacity to supply labor and materials." *Trap Rock Industries, Inc.* v. *Kohl*, 59 N. J. 471, 481, 284 A. 2d 161, 166 (1971). In the future, presumably, this will be permitted only if the disfavored moral views of the bidder have never been verbalized, for otherwise the First Amendment will produce entitlement to the contract, or at least guarantee a lawsuit.

In treading into this area, "we have left the realm of law and entered the domain of political science." *Rutan*, 497 U. S., at 113 (SCALIA, J., dissenting). As Judge Posner rightly perceived, the issue that the Court today disposes of like some textbook exercise in logic "raises profound questions of political science that exceed judicial competence to answer." *LaFalce* v. *Houston*, 712 F. 2d, at 294.

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[6] See, *e. g.*, Cal. Pub. Cont. Code Ann. §§ 10302, 10507.7, 20803 (West 1985 and Supp. 1996); Ill. Comp. Stat., ch. 50, §§ 20/20, 25/3; *id.*, ch. 70, §§ 15/8, 15/9, 205/25, 220/1–24, 220/2–24 (1993); N. Y. Gen. Mun. Law § 103.1 (McKinney Supp. 1996).

IV

If, however, the Court is newly to announce that it has discovered that the granting or withholding of a contract is a First Amendment issue, a coherent statement of the new law is the least that those who labor in the area are entitled to expect. They do not get it from today's decisions, which contradict each other on a number of fundamental points.

The decision in *Umbehr* appears to be an improvement on our *Elrod-Branti-Rutan* trilogy in one sense. *Rutan*, the most recent of these decisions, provided that the government could justify patronage employment practices only if it proved that such patronage was "narrowly tailored to further vital governmental interests." 497 U. S., at 74. The four of us in dissent explained that "[t]hat strict-scrutiny standard finds no support in our cases," and we argued that, if the new constitutional right was to be invented, the criterion for violation should be "the test announced in *Pickering* [v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968)]." *Id.*, at 98, 100 (opinion of SCALIA, J.). It thus appears a happy development that the Court in *Umbehr* explicitly *rejects* the suggestion, urged by Umbehr and by the United States as *amicus curiae*, that "on proof of viewpoint-based retaliation for contractors' political speech, the government should be required to justify its actions as narrowly tailored to serve a compelling state interest," *ante*, at 676; accord, *ante*, at 678, and instead holds "that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of [independent contractors'] protection" under the First Amendment, *ante*, at 673. *Pickering* balancing, of course, requires a case-by-case assessment of the government's and the contractor's interests. "*Pickering* and its progeny . . . involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities." *United States* v. *Treasury Employees*, 513 U. S. 454, 466–467 (1995). See also *id.*, at 480–481 (O'CONNOR,

J., concurring in judgment in part and dissenting in part) (*Pickering* requires "case-by-case application"); *Rankin* v. *McPherson*, 483 U. S. 378, 388–392 (1987); *Connick* v. *Myers*, 461 U. S. 138, 150–154 (1983); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568–573 (1968). It is clear that this is what the Court's opinion in *Umbehr* anticipates: "a *fact-sensitive* and deferential weighing of the government's legitimate interests," *ante*, at 677 (emphasis added), which accords "[d]eference . . . to the government's reasonable assessments of its interests as contractor," *ante*, at 678 (emphasis deleted). "[S]uch a nuanced approach," *Umbehr* says, "which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule." *Ibid.*

What the Court sets down in *Umbehr*, however, it rips up in *O'Hare*. In Part III of that latter opinion, where the Court makes its application of the First Amendment to the facts of the case, there is to be found not a single reference to *Pickering*. See *post*, at 720–726. Indeed, what is quite astonishing, the Court concludes that it "need not inquire" into any government interests that patronage contracting may serve—even generally, much less in the particular case at hand—"for *Elrod* and *Branti* establish that patronage does not justify the coercion of a person's political beliefs and associations." *Post*, at 718. Leaving aside that there is no coercion here,[7] the assertion obviously contradicts the need for "balancing" announced in the companion *Umbehr* decision. This rejection of "balancing" is evident elsewhere in *O'Hare*—as when the Court rejects as irrelevant the Seventh

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[7] As the dissenters in *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990), agreed: "[I]t greatly exaggerates [the constraints entailed by patronage] to call them 'coercion' at all, since we generally make a distinction between inducement and compulsion. The public official offered a bribe is not 'coerced' to violate the law, and the private citizen offered a patronage job is not 'coerced' to work for the party." *Id.*, at 109–110 (SCALIA, J., dissenting).

Circuit's observation in *LaFalce* v. *Houston*, 712 F. 2d 292 (1983), that some contractors elect to "curr[y] favor with diverse political parties," on the ground that the fact "[t]hat some citizens [thus] find a way to mitigate governmental overreaching, or refrain from complaining, does not excuse wrongs done to those who exercise their rights." *Post*, at 724. But whether the government action at issue here *is* a "wrong" is precisely the issue in this case, which we thought (per *Umbehr*) was to be determined by "balancing."

One would have thought these two opinions the products of the courts of last resort of two different legal systems, presenting fertile material for a comparative-law course on freedom of speech were it not for a single paragraph in *O'Hare*, a veritable *deus ex machina* of legal analysis, which reconciles the irreconcilable. The penultimate paragraph of that portion of the *O'Hare* opinion which sets forth the general principles of law governing the case, see *post*, at 719, advises that henceforth "the freedom of speech" alluded to in the Bill of Rights will be divided into two categories: (1) the "right of free speech," where "we apply the balancing test from *Pickering*," and (since this "right of free speech" presumably does not exhaust the Free Speech Clause) (2) "political affiliation," where we apply the rigid rule of *Elrod* and *Branti*. The Court (or at least the *O'Hare* Court) says that "[t]here is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government." *Post*, at 719.

Frankly, the only "advantage" I can discern in this novel distinction is that it provides some explanation (no matter how difficult to grasp) of how these two opinions can issue from the same Court on the same day. It raises many questions. Does the "right of free speech" (category (1), that is) come into play if the contractor not only *is* a Republican, but *says*, "I am a Republican"? (At that point, of course,

the fatal need for "probing or testing" his allegiance disappears.) Or is the "right of free speech" at issue only if he goes still further, and says, "I believe in the principles set forth in the Republican platform"? Or perhaps one must decide whether the Rubicon between the "right of free speech" and the more protected "political affiliation" has been crossed on the basis of the contracting authority's *motivation*, so that it does not matter whether the contractor *says* he is a Republican, or even *says* that he believes in the Republican platform, so long as the reason he is disfavored is simply that (whatever he says or believes) he is a Republican. But the analysis would change, perhaps, if the contracting authority really has nothing against Republicans as such, but can't stand people who believe what the Republican platform stands for. Except perhaps it would *not* change if the contractor never actually *said* he was a Republican—or perhaps only if he never actually *said* that he believed in the Republican platform. The many variations will provide endless diversion for the courts of appeals.

If one is so sanguine as to believe that facts involving the "right of free speech" and facts involving "political affiliation" can actually be segregated into separate categories, there arises, of course, the problem of what to do when both are involved. One would expect the more rigid test (*Elrod* nonbalancing) to prevail. That is certainly what happens elsewhere in the law. If one is categorically liable for a *defamatory* statement, but liable for a *threatening* statement only if it places the subject in immediate fear of physical harm, an utterance that combines both ("Sir, I shall punch you in your lying mouth!") would be (at least as to the defamatory portion) categorically actionable. Not so, however, with our new First Amendment law. Where, we are told, "specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement," *balancing*

rather than categorical liability will be the result. *O'Hare*, *post*, at 719.

Were all this confusion not enough, the explanatory paragraph makes doubly sure it is not setting forth any comprehensible rule by adding, immediately after its description of how *Elrod*, rather than the *Pickering* balancing test, applies in "political affiliation" cases, the following: "It is true, on the other hand, . . . that the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed." *O'Hare*, *post*, at 719. As I said in *Rutan*, "[w]hat that means is anybody's guess." 497 U. S., at 111 (dissenting opinion). Worse still, we learn that *O'Hare* itself, where the Court does *not* conduct balancing, may "perhaps [be] includ[ed]" among "those many cases . . . which require balancing" because it is one of the "intermixed" cases I discussed in the paragraph immediately above. *Post*, at 719. Why, then, one is inclined to ask, did not the Court *conduct* balancing?

The answer is contained in the next brief paragraph of the *O'Hare* opinion:

> "The Court of Appeals, based on its understanding of the pleadings, considered this simply an affiliation case, and held, based on Circuit precedent, there was no constitutional protection for one who was simply an outside contractor. We consider the case in those same terms, but we disagree with the Court of Appeals' conclusion." *Post*, at 720.

This is a *deus ex machina* sent in to rescue the Court's *deus ex machina*, which was itself overwhelmed by the plot of this tragedy of inconsistency. Unfortunately, this *adjutor adjutoris* (to overextend, perhaps, my classical analogy) is also unequal to the task: The respondent in this case is entitled to defend the judgment in its favor on the basis of the facts *as they were alleged*, not as the Court of Appeals *took*

them to be. When, as here, "the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in petitioners' *complaint* as true and ask whether, in these circumstances, dismissal of the complaint was appropriate." *Berkovitz* v. *United States*, 486 U. S. 531, 540 (1988) (emphasis added). It is at least highly arguable that the complaint alleged what the Court calls a violation of the "right of free speech" rather than merely the right of "political affiliation." The count at issue was entitled **"FREEDOM OF SPEECH,"** see App. in No. 95–191, p. 15, and contended that petitioners had been retaliated against because of "the exercise of their constitutional right of freedom of speech," *id.*, at 17. One of the two central factual allegations is the following: "John A. Gratzianna openly supported Paxson's opponent for the office of Mayor. Campaign posters for Paxson's opponent were displayed at plaintiff O'Hare's place of business." *Id.*, at 16. It is particularly inexcusable to hide behind the Court of Appeals' treatment of this litigation as "simply an affiliation case," since when the Court of Appeals wrote its opinion the world had not yet learned that the Free Speech Clause is divided into the two categories of "right of free speech" and "political affiliation." As far as that court knew, it could have substituted "freedom of speech" for "freedom of political affiliation" whenever it used the term, with no effect on the outcome. It did not, in other words, remotely make a "finding" that the case involves only the right of political affiliation. Unavoidably, therefore, if what the *O'Hare* Court says in its first explanatory paragraph is to be believed—that is, what it says in the latter part of that paragraph, to the effect that "intermixed" cases are governed by *Pickering*—there is simply no basis for reversing the Court of Appeals *without* balancing, and directing that the case proceed, effectively depriving the city of its right to judgment on the pleadings.

Unless, of course, *Pickering* balancing can never support the granting of a motion to dismiss. That is the proposition

that today's *O'Hare* opinion, if it is not total confusion, must stand for. Nothing else explains how the Court can (1) assert that an "intermixed" case requires *Pickering* balancing, (2) acknowledge that the complaint here *may set forth* an "intermixed" case, and yet (3) reverse the dismissal without determining whether the complaint *does set forth* an "intermixed" case and, if so, proceeding to conduct at least a preliminary *Pickering* balancing. There is of course no reason in principle why this particular issue should be dismissal proof, and the consequence of making it so, given the burdens of pretrial discovery (to say nothing of trial itself) will be to make litigation on this subject even more useful as a device for harassment and weapon of commercial competition. It must be acknowledged, however, that proceeding this way in the present case has one unquestionable advantage: it leaves it entirely to the District Court to clean up, without any guidance or assistance from us, the mess that we have made—to figure out whether saying "Vote against Paxson," or "Paxson is a hack," or "Paxson's project for a 100,000-seat municipal stadium is wasteful," or whatever else Mr. Gratzianna's campaign posters might have said, removes this case from the Political Affiliation Clause of the Constitution and places it within the Right of Free Speech Clause.

One final observation about the sweep of today's holdings. The opinion in *Umbehr*, having swallowed the camel of First Amendment extension into contracting, in its penultimate paragraph demonstrates the Court's deep-down judicial conservatism by ostentatiously straining out the following gnat: "Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Ante*, at 685. The facts in *Umbehr*, of course, involved the termination of nothing so vague as a "commercial relationship with the government"; the Board

of Commissioners had terminated Umbehr's *contract.* The fuzzier terminology is used, presumably, because *O'Hare* did *not* involve termination of a contract. As far as appears, O'Hare had not paid or promised anything to be placed on a list of tow-truck operators who would be offered individual contracts as they came up. The company had no right to sue if the city failed to call it, nor the city any right to sue if the company turned down an offered tow. It had, in short, only what might be called (as an infinity of things might be called) "a pre-existing commercial relationship" with the city: it was one of the tow-truck operators they regularly called. The quoted statement in *Umbehr* invites the bar to believe, therefore, that the Court which declined to draw the line of First Amendment liability short of firing from government employment (*Elrod* and *Branti*), short of nonhiring for government employment *(Rutan),* short of termination of a government contract *(Umbehr),* and short of *denial* of a government contract to someone who had a "pre-existing commercial relationship with the government" *(O'Hare)* may take a firm stand against extending the Constitution into every little thing when it comes to denying a government contract to someone who had *no* "pre-existing commercial relationship." Not likely; in fact, not even believable.

This Court has begun to make a habit of disclaiming the natural and foreseeable jurisprudential consequences of its pathbreaking (*i. e.*, Constitution-making) opinions. Each major step in the abridgment of the people's right to govern themselves is portrayed as extremely limited or indeed *sui juris.* In *Romer* v. *Evans,* 517 U. S. 620, 632, 633 (1996), announced last month, the Court asserted that the Colorado constitutional amendment at issue was so distinctive that it "defies . . . conventional inquiry" and "confounds [the] normal process of judicial review." In *United States* v. *Virginia, ante,* at 534, n. 7, announced two days ago, the Court purported to address "specifically and only an educational opportunity recognized by the District Court and the Court of

Appeals as 'unique.'" And in the cases announced today, "we emphasize the limited nature of our decision." *Umbehr*, *ante*, at 685. The people should not be deceived. While the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress.

* * *

They say hard cases make bad law. The cases before the Court today set the blood boiling, with the arrogance that they seem to display on the part of elected officials. Shall the American System of Justice let insolent, petty-tyrant politicians get away with this? What one tends to forget is that we have heard only the plaintiffs' tale. These suits were dismissed before trial, so the "facts" the Court recites in its opinions assume the truth of the allegations made (or the preliminary evidence presented) by the plaintiffs. We have no idea whether the allegations are true or false—but if they are true, they are certainly highly unusual. Elected officials do not thrive on arrogance.

For every extreme case of the sort *alleged* here, I expect there are thousands of contracts awarded on a "favoritism" basis that no one would get excited about. The Democratic mayor gives the city's municipal bond business to what is known to be a solid Democratic law firm—taking it away from the solid Republican law firm that had the business during the previous, Republican, administration. What else is new? Or he declines to give the construction contract for the new municipal stadium to the company that opposed the bond issue for its construction, and that in fact tried to get the stadium built across the river in the next State. What else would you expect? Or he awards the cable monopoly, not to the (entirely responsible) Johnny-come-lately, but to the local company that has always been a "good citizen"—which means it has supported with money, and the personal efforts of its management, civic initiatives that the vast majority of the electorate favor, though some oppose. Hooray!

Favoritism such as this happens all the time in American political life, and no one has ever thought that it violated—of all things—the First Amendment to the Constitution of the United States.

The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize. Depending upon which of today's cases one chooses to consider authoritative, it has either *(O'Hare)* thrown out vast numbers of practices that are routine in American political life in order to get rid of a few bad apples; or *(Umbehr)* with the same purpose in mind subjected those routine practices to endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation.

I dissent.

Syllabus

O'HARE TRUCK SERVICE, INC., ET AL. *v.* CITY OF NORTHLAKE ET AL.

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

No. 95–191. Argued March 20, 1996—Decided June 28, 1996

Respondent city maintains a rotation list of available companies to perform towing services at its request. Until the events recounted here, the city's policy had been to remove companies from the list only for cause. Petitioner O'Hare Truck Service, Inc., was removed from the list after its owner, petitioner Gratzianna, refused to contribute to respondent mayor's reelection campaign and instead supported his opponent. Alleging that the removal was in retaliation for Gratzianna's campaign stance and caused petitioners to lose substantial income, petitioners filed this suit under 42 U. S. C. § 1983. The District Court dismissed the complaint in conformity with Seventh Circuit precedent that *Elrod* v. *Burns*, 427 U. S. 347 (plurality opinion), and *Branti* v. *Finkel*, 445 U. S. 507—in which the Court held that government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is an appropriate requirement for the job in question—do not extend to independent contractors. The Seventh Circuit affirmed.

Held: The protections of *Elrod* and *Branti* extend to an instance where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance. Pp. 716–726.

(a) In assessing when party affiliation, consistent with the First Amendment, may be an acceptable basis for terminating a public employee, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, *supra*, at 518. A different, though related, inquiry, the balancing test from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, is called for where a government employer takes adverse action on account of an employee or service provider's right of free speech. In *Elrod* and *Branti*, the raw test of political affiliation sufficed to show a constitutional violation. However, since the inquiry is whether the affiliation requirement is reasonable, it is inevitable that some case-by-case adjudication will be required even

where political affiliation was the test the government imposed. The analysis will also accommodate cases where instances of the employee's speech or expression are intermixed with a political affiliation requirement. Pp. 716–720.

(b) Despite respondents' argument that the principles of *Elrod* and *Branti* have no force here because an independent contractor's First Amendment rights, unlike a public employee's, must yield to the government's asserted countervailing interest in sustaining a patronage system, this Court cannot accept the proposition that those who perform the government's work outside the formal employment relationship are subject to the direct and specific abridgment of First Amendment rights described in petitioners' complaint. The government may not coerce support in the manner petitioners allege, unless it has some justification beyond dislike of the individual's political association. As respondents offer no other justification for their actions, the complaint states a First Amendment claim. Allowing the constitutional claim to turn on a distinction between employees and independent contractors would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs, *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, at 679. Accord, *Lefkowitz* v. *Turley*, 414 U. S. 70. Respondents present no convincing data to support their speculation that a difference of constitutional magnitude exists because independent contractors are less dependent on the government for income than employees are. There is little reason to suppose that a decision in petitioners' favor will lead to numerous lawsuits. While government officials may terminate at-will relationships, unmodified by any legal constraints, without cause, it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views, see *Perry* v. *Sindermann*, 408 U. S. 593, 597. In view of the large number of legitimate reasons why a contracting decision might be made, fending off baseless First Amendment lawsuits should not consume scarce government resources. If the government terminates its affiliation with a service provider for reasons unrelated to political association, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287, as, for example, where the provider is unreliable, or if the service provider's political "affiliation is an appropriate requirement for the effective performance" of the task in question, *Branti*, *supra*, at 518, there will be no First Amendment violation. The absolute right to enforce a patronage scheme as a means of retaining control over independent contractors and satisfying government officials' concerns about reliability has not been shown to be a necessary part of a legitimate political system in all instances. This was the determination controlling the Court's decisions in *Elrod*, *supra*, at 365–368, 372–373,

and *Branti*, *supra*, at 518–520. There is no basis for rejecting that reasoning in this context and drawing a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees. Pp. 720–726.

(c) The lower courts, upon such further proceedings as are deemed appropriate, should decide whether the case is governed by the *Elrod-Branti* rule or by the *Pickering* rule. P. 726.

47 F. 3d 883, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *ante,* p. 686.

Harvey Grossman argued the cause for petitioners. With him on the briefs were *Jane M. Whicher*, *Barbara P. O'Toole*, *Steven R. Shapiro*, *Michael P. McGovern*, *Colleen K. Connell*, and *Marc O. Beem.*

Gary M. Feiereisel argued the cause for respondents. With him on the brief was *Frank P. Kasbohm.**

JUSTICE KENNEDY delivered the opinion of the Court.

Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question. *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Branti* v. *Finkel*, 445 U. S. 507 (1980). We must decide whether the protections of *Elrod* and *Branti* extend to an independent contractor, who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is removed from an official list of contractors authorized to perform public services. Although the government has broad discretion in formulating its contracting policies, we hold that the protections of *Elrod* and

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**Robert A. Hirsch* filed a brief for the Towing & Recovery Association of America, Inc., as *amicus curiae* urging reversal.

Jeffrey D. Colman, *Edward J. Lewis II*, and *David Jiménez-Ekman* filed a brief for Illinois State Officials as *amicus curiae* urging affirmance.

Branti extend to an instance like the one before us, where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.

I

The suit having been dismissed by the District Court for failure to state a claim, the complaint's factual allegations are taken as true. *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993). John Gratzianna is the owner and operator of O'Hare Truck Service, which provides towing services in Cook and DuPage Counties, Illinois. Gratzianna and his company are petitioners here, and we sometimes refer to them as O'Hare.

The city of Northlake, a respondent in this Court, coordinates towing services through its Police Department and for at least 30 years has maintained a rotation list of available towing companies. When the police receive a tow request, they call the company next on the list to provide the service. Until the events recounted here, the city's policy had been to remove a tow truck operator from the rotation list only for cause. O'Hare had been on the list since 1965, performing towing services at the city's request. O'Hare and the city's former Mayor, Gene Doyle, had a mutual understanding that the city would maintain O'Hare's place on the rotation list so long as O'Hare provided good service. In 1989, soon after being elected Northlake's new Mayor, respondent Reid Paxson told Gratzianna he was pleased with O'Hare's work and would continue using and referring its services.

Four years later, when Paxson ran for reelection, his campaign committee asked Gratzianna for a contribution, which Gratzianna refused to make. Gratzianna instead supported the campaign of Paxson's opponent and displayed the opponent's campaign posters at O'Hare's place of business. Soon after, O'Hare was removed from the rotation list. We shall

assume, as the complaint alleges, that the removal was in retaliation for Gratzianna's stance in the campaign. Petitioners allege the retaliation caused them to lose substantial income.

O'Hare and Gratzianna sued in the United States District Court for the Northern District of Illinois, alleging infringement of First Amendment rights in violation of Rev. Stat. § 1979, 42 U. S. C. § 1983. In conformity with binding Seventh Circuit precedent, which does not extend *Elrod* and *Branti* to independent contractors, see, *e. g.*, *Downtown Auto Parks, Inc.* v. *Milwaukee*, 938 F. 2d 705, cert. denied, 502 U. S. 1005 (1991), the District Court dismissed the complaint, 843 F. Supp. 1231 (1994). The Court of Appeals for the Seventh Circuit affirmed, adhering to the view that "it should be up to the Supreme Court to extend *Elrod.*" 47 F. 3d 883, 885 (1995). (The Court of Appeals also affirmed dismissal of O'Hare's claim that respondents' failure to give it notice of removal from the list or provide a hearing on the matter deprived O'Hare of due process of law. That ruling is not before us.)

The Courts of Appeals take different positions concerning *Elrod* and *Branti*'s applicability to independent contractors. Compare 47 F. 3d 883 (1995) (opinion below); *Horn* v. *Kean*, 796 F. 2d 668 (CA3 1986) (en banc); *Sweeney* v. *Bond*, 669 F. 2d 542 (CA8), cert. denied *sub nom. Schenberg* v. *Bond*, 459 U. S. 878 (1982), with *Blackburn* v. *Marshall*, 42 F. 3d 925 (CA5 1995); *Abercrombie* v. *Catoosa*, 896 F. 2d 1228 (CA10 1990). We granted certiorari to resolve the conflict, 516 U. S. 1020, and now reverse.

II

The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics . . . he has no constitutional right to be

a policeman," *McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 220, 29 N. E. 517 (1892). A State may not condition public employment on an employee's exercise of his or her First Amendment rights. See, *e. g., Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U. S. 589 (1967); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563 (1968); *Perry* v. *Sindermann,* 408 U. S. 593 (1972). See also *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante,* at 674–675 (collecting cases). As we have said: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry* v. *Sindermann, supra,* at 597, quoting *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression.

In *Elrod* v. *Burns,* 427 U. S. 347 (1976), we considered whether to apply the principles of the unconstitutional conditions cases to public employees dismissed on account of their political association. In keeping with local tradition, a newly elected county sheriff had discharged non-civil-service employees because they were not members of his political party. It was by no means self-evident whether our First Amendment precedents applied, for as Justice Powell explained in dissent, *id.,* at 377–387, the patronage practices at issue had been sanctioned by history and had been thought by some to contribute to the effective operation of political parties. See also *Branti* v. *Finkel,* 445 U. S., at 522, n. 1, 527–532 (Powell, J., dissenting); *Rutan* v. *Republican Party of Ill.,* 497 U. S. 62, 104–109 (1990) (SCALIA, J., dissenting). If indeed those patronage practices fortify the party system, they may serve important First Amendment interests, since

parties promote and generate political discourse, see, *e. g.*, *Buckley* v. *Valeo,* 424 U. S. 1, 14–15 (1976) *(per curiam); Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107, 121–122 (1981).

We need not inquire, however, whether patronage promotes the party system or serves instead to entrench parties in power, see *Elrod* v. *Burns, supra,* at 364–373 (plurality opinion); *Rutan* v. *Republican Party of Ill., supra,* at 88–89, n. 4 (STEVENS, J., concurring), for *Elrod* and *Branti* establish that patronage does not justify the coercion of a person's political beliefs and associations. Although no opinion in *Elrod* commanded a majority of the Court, five Justices found common ground in the proposition that subjecting a nonconfidential, nonpolicymaking public employee to penalty for exercising rights of political association was tantamount to an unconstitutional condition under *Perry* v. *Sindermann, supra.* See *Elrod* v. *Burns, supra,* at 359 (plurality opinion) ("The threat of dismissal for failure to provide [support for the favored political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise"); 427 U. S., at 375 (Stewart, J., concurring in judgment) ("The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot").

Four Terms later, in *Branti* v. *Finkel, supra,* we reaffirmed *Elrod*'s common holding and said government termination of a public employee on account of his political affiliation brings our unconstitutional conditions cases into play, for "[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes," 445 U. S., at 515. We also modified the standard, announced in the two opinions supporting the *Elrod* judgment, for assess-

ing when party affiliation, consistent with the First Amendment, may be an acceptable basis for terminating a public employee: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U. S., at 518.

Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty., supra.* See generally *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, at 675–678. *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government. It is true, on the other hand, as we stated at the outset of our opinion, *supra*, at 714, that the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed. A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable. This case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in the administration

and awarding of contracts over the whole range of public works and the delivery of governmental services.

The Court of Appeals, based on its understanding of the pleadings, considered this simply an affiliation case, and held, based on Circuit precedent, there was no constitutional protection for one who was simply an outside contractor. We consider the case in those same terms, but we disagree with the Court of Appeals' conclusion.

III

There is no doubt that if Gratzianna had been a public employee whose job was to perform tow truck operations, the city could not have discharged him for refusing to contribute to Paxson's campaign or for supporting his opponent. In *Branti*, we considered it settled that to fire a public employee as a penalty for refusing a request for political and financial support would impose an unconstitutional condition on government employment. See 445 U. S., at 516. Respondents insist the principles of *Elrod* and *Branti* have no force here, arguing that an independent contractor's First Amendment rights, unlike a public employee's, must yield to the government's asserted countervailing interest in sustaining a patronage system. We cannot accept the proposition, however, that those who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgment of First Amendment rights described in this complaint. As respondents offer no justification for their actions, save for insisting on their right to condition a continuing relationship on political fealty, we hold that the complaint states an actionable First Amendment claim.

The complaint alleges imposition of a burden on an individual's right of political association, a concerted effort to coerce its relinquishment. O'Hare was not part of a constituency that must take its chance of being favored or ignored in the larger political process—for example, by residing or doing

business in a region the government rewards or spurns in the construction of public works. Gratzianna instead was targeted with a specific demand for political support. When Gratzianna refused, the city terminated a relationship that, based on longstanding practice, he had reason to believe would continue. We see nothing to distinguish this from the coercion exercised in our other unconstitutional conditions cases. See, *e. g.*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967) (teaching position conditioned upon nonmembership in "subversive" organizations); *Perry* v. *Sindermann*, 408 U. S. 593 (1972) (teaching position conditioned upon not criticizing college administration). Had Paxson or his backers solicited the contribution as a *quid pro quo* for not terminating O'Hare's arrangement with the city, they might well have violated criminal bribery statutes. Cf. Ill. Comp. Stat., ch. 720, §§ 5/33–1, 5/33–3; ch. 65, § 5/4–8–2 (1994). That Paxson may have steered clear of criminal liability, however, does little to diminish the attempted coercion of Gratzianna's political association, enforced by a tangible punishment. Our cases make clear that the government may not coerce support in this manner, unless it has some justification beyond dislike of the individual's political association. See, *e. g.*, *Branti* v. *Finkel*, 445 U. S., at 516–517.

Respondents say this case is different because it involves a claim by an independent contractor. We are not persuaded. A rigid rule "giv[ing] the government *carte blanche* to terminate independent contractors for exercising First Amendment rights . . . would leave [those] rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake." *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, at 679. It is true that the distinction between employees and independent contractors has deep roots in our legal tradition, see, *e. g.*, 9 W. Jaeger,

Williston on Contracts § 1012A (3d ed. 1967); 1 Restatement of Agency §§ 2, 220 (1933), and often serves as a line of demarcation for differential treatment of individuals who otherwise may be situated in similar positions, see, *e. g.*, *Community for Creative Non-Violence* v. *Reid,* 490 U. S. 730 (1989); *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U. S. 318 (1992); 2 Restatement (Second) of Torts § 409 (1964). We see no reason, however, why the constitutional claim here should turn on the distinction, which is, in the main, a creature of the common law of agency and torts. Recognizing the distinction in these circumstances would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs, *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, at 679. The fact of interference here is not altered by the circumstance that the victims are not classified as employees.

Our conclusion is in accord with *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973), where independent contractor status did not suffice to allow government to insist upon a waiver of the Fifth Amendment's privilege against self-incrimination. After reviewing our rulings extending the Fifth Amendment's privilege to government employees, we said that "[w]e fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Id.*, at 83.

Some Courts of Appeals, refusing to extend *Elrod* and *Branti* to independent contractors, find "a difference of constitutional magnitude" in the relative degree to which employees and contractors depend on government sources for their income. See *LaFalce* v. *Houston,* 712 F. 2d 292, 294 (CA7 1983) ("An independent contractor would tend we imagine to feel a somewhat lesser sense of dependency"), cert. denied, 464 U. S. 1044 (1984); *Horn* v. *Kean*, 796 F. 2d, at 675 (same). Respondents present no convincing data to support this speculation, however, and we doubt it is true for many service providers who come under the formal clas-

sification of "independent contractor," cf., *e. g.*, *Havekost* v. *United States Dept. of Navy*, 925 F. 2d 316 (CA9 1991) (worker was licensed grocery bagger at Navy commissary). The only statistics presented to us in the briefs are relevant to tow truck services, and these data point the other way. A national association of towing and recovery service operators, appearing as *amicus*, estimates that 75 percent of towing companies provide services in connection with government requests, the referrals generating between 30 and 60 percent of their gross revenues. Brief for Towing & Recovery Assn. of America, Inc., as *Amicus Curiae* 9. Petitioners, furthermore, allege a loss of substantial income due to their termination.

Perhaps some contractors are so independent from government support that the threat of losing business would be ineffective to coerce them to abandon political activities. The same might be true of certain public employees, however; they, too, might find work elsewhere if they lose their government jobs. If results were to turn on these sorts of distinctions, courts would have to inquire into the extent to which the government dominates various job markets as employer or as contractor. We have been, and we remain, unwilling to send courts down that path. See, *e. g.*, *Perry* v. *Sindermann*, *supra*, at 597–598. Courts are not well suited to the task of measuring levels of employee dependence, but there is a more fundamental concern. Independent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association.

Some Courts of Appeals surmise that independent contractors doing business with the government "are political hermaphrodites," *LaFalce* v. *Houston*, *supra*, at 294, who find it in their self-interest to stay on good terms with both major political parties and so are not at great risk of retaliation for political association. The facts here, if the allegations in the complaint are true, indicate this dubious course

of action may not be followed by many small independent contractors who are either unable or unwilling to maintain close ties to all the organized political forces in their communities. In all events, even if some independent contractors adjust to their precarious position by currying favor with diverse political parties, the question here concerns coercive government action taken against those who do not. That some citizens find a way to mitigate governmental overreaching, or refrain from complaining, does not excuse wrongs done to those who exercise their rights.

Respondents argue that any decision in O'Hare's favor will lead to numerous lawsuits, which will interfere with the sound administration of government contracting. We have little reason to accept the assessment. The *amicus* brief filed on behalf of respondents' position represents that in the six years since our opinion in *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990), which extended *Elrod* and *Branti* to public employment promotion, transfer, recall, and hiring decisions based on political affiliation, only 18 suits alleging First Amendment violations in employment decisions have been filed against Illinois state officials, Brief for Illinois State Officials as *Amicus Curiae* 3. Furthermore, we have found no reported case in the Tenth Circuit involving a First Amendment patronage claim by an independent contractor in the six years since its Court of Appeals first recognized such claims, see *Abercrombie* v. *Catoosa*, 896 F. 2d 1228 (1990). We have no reason to believe that governments cannot bear a like burden in defending against suits alleging the denial of First Amendment freedoms to public contractors, and we doubt that our decision today will lead to the imposition of a more extensive burden.

Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services. The Constitution accords government officials a large measure of freedom as they exercise the discretion inherent

in making these decisions. *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, *ante*, at 674. Interests of economy may lead a governmental entity to retain existing contractors or terminate them in favor of new ones without the costs and complexities of competitive bidding. A government official might offer a satisfactory justification, unrelated to the suppression of speech or associational rights, for either course of action. The first may allow the government to maintain stability, reward good performance, deal with known and reliable persons, or ensure the uninterrupted supply of goods or services; the second may help to stimulate competition, encourage experimentation with new contractors, or avoid the appearance of favoritism. These are choices and policy considerations that ought to remain open to government officials when deciding to contract with some firms and not others, provided of course the asserted justifications are not the pretext for some improper practice. In view of the large number of legitimate reasons why a contracting decision might be made, fending off baseless First Amendment lawsuits should not consume scarce government resources. If the government terminates its affiliation with a service provider for reasons unrelated to political association, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977), as, for example, where the provider is unreliable, or if the service provider's political "affiliation is an appropriate requirement for the effective performance" of the task in question, *Branti* v. *Finkel*, 445 U. S., at 518, there will be no First Amendment violation.

Respondents' theory, in essence, is that no justification is needed for their actions, since government officials are entitled, in the exercise of their political authority, to sever relations with an outside contractor for any reason including punishment for political opposition. Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow

that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views, see *Perry* v. *Sindermann*, 408 U. S., at 597.

The absolute right to enforce a patronage scheme, insisted upon by respondents as a means of retaining control over independent contractors, Brief for Respondents 13, and satisfying government officials' concerns about reliability, Tr. of Oral Arg. 34–39, has not been shown to be a necessary part of a legitimate political system in all instances. This was the determination controlling our decisions in *Elrod*, 427 U. S., at 365–368, 372–373 (plurality opinion), and *Branti*, *supra*, at 518–520, and we see no basis for rejecting that reasoning in this context. We decline to draw a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees.

IV

Upon such further proceedings as are deemed appropriate by the Court of Appeals or the District Court, including upon motion for summary judgment if there is no genuine issue as to material facts, the courts on remand should decide whether the case is governed by the *Elrod-Branti* rule or by the *Pickering* rule.

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.

[For dissenting opinion of JUSTICE SCALIA, see *ante*, p. 686.]

Syllabus

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 95–124. Argued February 21, 1996—Decided June 28, 1996*

These cases involve three sections of the Cable Television Consumer Protection and Competition Act of 1992 (Act), as implemented by Federal Communications Commission (FCC) regulations. Both § 10(a) of the Act—which applies to "leased access channels" reserved under federal law for commercial lease by parties unaffiliated with the cable television system operator—and § 10(c)—which regulates "public access channels" required by local governments for public, educational, and governmental programming—essentially permit the operator to allow or prohibit "programming" that it "reasonably believes . . . depicts sexual . . . activities or organs in a patently offensive manner." Under § 10(b), which applies only to leased access channels, operators are required to segregate "patently offensive" programming on a single channel, to block that channel from viewer access, and to unblock it (or later to reblock it) within 30 days of a subscriber's written request. Between 1984, when Congress authorized municipalities to require operators to create public access channels, and the Act's passage, federal law prohibited operators from exercising *any* editorial control over the content of programs broadcast over either type of access channel. Petitioners sought judicial review of §§ 10(a), (b), and (c), and the en banc Court of Appeals held that all three sections (as implemented) were consistent with the First Amendment.

Held: The judgment is affirmed in part and reversed in part.

56 F. 3d 105, affirmed in part and reversed in part.

JUSTICE BREYER delivered the opinion of the Court with respect to Part III, concluding that § 10(b) violates the First Amendment. That section's "segregate and block" requirements have obvious speech-restrictive effects for viewers, who cannot watch programs segregated on the "patently offensive" channel without considerable advance planning or receive just an occasional few such programs, and who may

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*Together with No. 95–227, *Alliance for Community Media et al.* v. *Federal Communications Commission et al.*, also on certiorari to the same court.

judge a program's value through the company it keeps or refrain from subscribing to the segregated channel out of fear that the operator will disclose its subscriber list. Moreover, § 10(b) is not appropriately tailored to achieve its basic, legitimate objective of protecting children from exposure to "patently offensive" materials. Less restrictive means utilized by Congress elsewhere to protect children from "patently offensive" sexual material broadcast on cable channels indicate that § 10(b) is overly restrictive while its benefits are speculative. These include some provisions of the Telecommunications Act of 1996, which utilizes blocking without written request, "V-chips," and other significantly less restrictive means, and the "lockbox" requirement that has been in place since the Cable Act of 1984. Pp. 753–760.

JUSTICE BREYER, joined by JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER, concluded in Parts I and II that § 10(a) is consistent with the First Amendment. Pp. 737–753.

(a) Close scrutiny demonstrates that § 10(a) properly addresses a serious problem without imposing, in light of the relevant competing interests, an unnecessarily great restriction on speech. First, the section comes accompanied with the extremely important child-protection justification that this Court has often found compelling. See, *e. g., Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 126. Second, § 10(a) arises in a very particular context—congressional *permission* for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control. The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), see H. R. Rep. No. 98–934, pp. 31–36, and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access). See *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 635–637. Third, the problem § 10(a) addresses is analogous to the "indecent" radio broadcasts at issue in *FCC* v. *Pacifica Foundation,* 438 U. S. 726, and the balance Congress struck here is commensurate with the balance the Court approved in that case. Fourth, § 10(a)'s permissive nature means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica.* The importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica;* and the flexibility inherent in an approach

that *permits* private cable operators to make editorial decisions, persuasively establishes that § 10(a) is a sufficiently tailored response to an extraordinarily important problem involving a complex balance of interests. *Sable*, *supra*, at 128, and *Turner*, *supra*, at 637–641, distinguished. Pp. 737–748.

(b) Petitioners' reliance on this Court's "public forum" cases is unavailing. It is unnecessary and unwise to decide whether or how to apply the public forum doctrine to leased access channels. First, it is not clear whether that doctrine should be imported wholesale into common carriage regulation of such a new and changing area. Second, although limited public forums are permissible, the Court has not yet determined whether the decision to limit a forum is necessarily subject to the highest level of scrutiny, and these cases do not require that it do so now. Finally, and most important, the features that make § 10(a) an acceptable constraint on speech also make it an acceptable limitation on access to the claimed public forum. Pp. 749–750.

(c) Section 10(a)'s definition of the materials it regulates is not impermissibly vague. Because the language used is similar to that adopted in *Miller* v. *California*, 413 U. S. 15, 24, as a "guidelin[e]" for state obscenity laws, it would appear to narrow cable operators' program-screening authority to materials that involve the same kind of sexually explicit materials that would be obscene under *Miller*, but that might have "serious literary, artistic, political or scientific value" or nonprurient purposes, *ibid.* That the definition is not overly broad is further indicated by this Court's construction of the phrase "patently offensive," see *Pacifica*, *supra*, at 748, 750, which would narrow the category late at night when the audience is basically adult, and by the fact that § 10(a) permits operators to screen programs only pursuant to a "written and published policy." The definition's "reasonabl[e] belie[f]" qualifier seems designed to provide a legal excuse for the operator's honest mistake, and it constrains the operator's discretion as much as it protects it. Pp. 750–753.

JUSTICE BREYER, joined by JUSTICE STEVENS and JUSTICE SOUTER, concluded in Part IV that § 10(c) violates the First Amendment. Section 10(c), although like § 10(a) a permissive provision, is different from § 10(a) for four reasons. First, cable operators have not historically exercised editorial control over public access channels, such that § 10(c)'s restriction on programmers' capacity to speak does not effect a countervailing removal of a restriction on cable operators' speech. Second, programming on those channels is normally subject to complex supervisory systems composed of both public and private elements, and § 10(c) is therefore likely less necessary to protect children. Third, the existence of a system that encourages and secures programming that the

community considers valuable strongly suggests that a "cable operator's veto" is more likely to erroneously exclude borderline programs that should be broadcast, than to achieve the statute's basic objective of protecting children. Fourth, the Government has not shown that there is a significant enough problem of patently offensive broadcasts to children, over public access channels, that justifies the restriction imposed by § 10(c). Consequently, § 10(c) violates the First Amendment. Pp. 760–766.

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, concurred in the judgment that § 10(c) is invalid, but for different reasons. Because the public access channels regulated by § 10(c) are required by local cable franchise authorities, those channels are "designated public forums," *i. e.*, property that the government has opened for expressive activity by the public. *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678. Section 10(c) vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. Where the government thus excludes speech from a public forum on the basis of its content, the Constitution requires that the regulation be given the most exacting scrutiny. See, *e. g.*, *ibid.* Section 10(c) cannot survive strict scrutiny. Although Congress has a compelling interest in protecting children from indecent speech, see, *e. g.*, *Sable Communications of Colo., Inc.* v. *FCC*, 492 U. S. 115, 126, § 10(c) is not narrowly tailored to serve that interest, since, among other things, there is no basis in the record establishing that § 10(c) is the least restrictive means to accomplish that purpose. See, *e. g.*, *id.*, at 128–130. The Government's argument for not applying strict scrutiny here, that indecent cablecasts are subject to the lower standard of review applied in *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748, is not persuasive, since that lower standard does not even apply to infringements on the liberties of cable operators, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637–641. There is less cause for a lower standard when the rights of cable programmers and viewers are at stake. Pp. 781–783, 791–794, 803–812.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, agreed that § 10(a) is constitutionally permissible. Cable operators are generally entitled to much the same First Amendment protection as the print media. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637, 639. Because *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, and *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, are therefore applicable, see *Turner*, *supra*, at 681–682 (O'CONNOR, J., concurring in part and dissenting in part), the cable operator's editorial rights have general primacy under the First Amendment over

Syllabus

the rights of programmers to transmit and of viewers to watch. None of the petitioners are cable operators; they are all cable viewers or access programmers or their representative organizations. Because the cable access provisions are part of a scheme that restricts operators' free speech rights and expands the speaking opportunities of programmers who have no underlying constitutional right to speak through the cable medium, the programmers cannot challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech." Sections 10(a) and (c) merely restore part of the editorial discretion an operator would have absent Government regulation. Pp. 812–826.

BREYER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined, an opinion with respect to Parts I, II, and V, in which STEVENS, O'CONNOR, and SOUTER, JJ., joined, and an opinion with respect to Parts IV and VI, in which STEVENS and SOUTER, JJ., joined. STEVENS, J., *post*, p. 768, and SOUTER, J., *post*, p. 774, filed concurring opinions. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 779. KENNEDY, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which GINSBURG, J., joined, *post*, p. 780. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 812.

I. Michael Greenberger argued the cause for petitioners. With him on the brief for the Alliance for Community Media et al., petitioners in No. 95–227, were *James N. Horwood*, *Andrew Jay Schwartzman*, *Gigi Sohn*, *Elliot Mincberg*, *Lawrence Ottinger*, *Thomas J. Mikula*, and *Mark S. Raffman*. *Robert T. Perry* and *Brian D. Graifman* filed briefs for the New York Citizens Committee for Responsible Media et al., petitioners in No. 95–227. *Charles S. Sims*, *Steven R. Shapiro*, and *Marjorie Heins* filed briefs for the American Civil Liberties Union et al., petitioners in No. 95–124.

Deputy Solicitor General Wallace argued the cause for respondents in both cases. With him on the briefs for the federal respondents were *Solicitor General Days*, *Assistant Attorney General Hunger*, *James A. Feldman*, *Barbara L. Herwig*, *Jacob M. Lewis*, *William E. Kennard*, and *Christopher J. Wright*. *Daniel L. Brenner*, *Neal M. Goldberg*, and

Diane B. Burstein filed a brief for the National Cable Television Association, Inc., respondent in both cases.†

JUSTICE BREYER announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, an opinion with respect to Parts I, II, and V, in which JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER join, and an opinion with respect to Parts IV and VI, in which JUSTICE STEVENS and JUSTICE SOUTER join.

These cases present First Amendment challenges to three statutory provisions that seek to regulate the broadcasting of "patently offensive" sex-related material on cable television. Cable Television Consumer Protection and Competition Act of 1992 (1992 Act or Act), 106 Stat. 1486, §§ 10(a), 10(b), and 10(c), 47 U. S. C. §§ 532(h), 532(j), and note following § 531. The provisions apply to programs broadcast over cable on what are known as "leased access channels" and "public, educational, or governmental channels." Two of the provisions essentially permit a cable system operator to prohibit the broadcasting of "programming" that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner." 1992

†Briefs of *amici curiae* urging reversal were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger* and *Margaret Jacobs;* and for the Association of American Publishers, Inc., by *R. Bruce Rich* and *Jonathan Bloom.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Dennis C. Vacco*, Attorney General, *Victoria A. Graffeo*, Solicitor General, *Barbara Billet*, Deputy Solicitor General, and *Stephen D. Houch* and *Theodore Zang, Jr.*, Assistant Attorneys General; for the Family Life Project of the American Center for Law and Justice by *Jay Alan Sekulow, James M. Henderson, Sr., Colby M. May, Keith A. Fournier*, and *Thomas P. Monaghan;* for the Family Research Council et al. by *Cathleen A. Cleaver* and *Bruce A. Taylor;* for Morality in Media, Inc., by *Paul J. McGeady* and *Robert W. Peters;* and for Time Warner Cable by *Stuart W. Gold* and *Rebeca L. Cutler.*

Len L. Munsil filed a brief for the National Family Legal Foundation as *amicus curiae.*

Act, § 10(a); see § 10(c). See also *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order*, 8 FCC Rcd 998 (1993) (First Report and Order); *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, Second Report and Order*, 8 FCC Rcd 2638 (1993) (Second Report and Order). The remaining provision requires cable system operators to segregate certain "patently offensive" programming, to place it on a single channel, and to block that channel from viewer access unless the viewer requests access in advance and in writing. 1992 Act, § 10(b); 47 CFR § 76.701(g) (1995).

We conclude that the first provision—which *permits* the operator to decide whether or not to broadcast such programs on *leased* access channels—is consistent with the First Amendment. The second provision, which *requires* leased channel operators to segregate and to block that programming, and the third provision, applicable to public, educational, and governmental channels, violate the First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to "patently offensive" material.

I

Cable operators typically own a physical cable network used to convey programming over several dozen cable channels into subscribers' houses. Program sources vary from channel to channel. Most channels carry programming produced by independent firms, including "many national and regional cable programming networks that have emerged in recent years," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 629 (1994), as well as some programming that the system operator itself (or an operator affili-

ate) may provide. Other channels may simply retransmit through cable the signals of over-the-air broadcast stations. *Ibid.* Certain special channels here at issue, called "leased channels" and "public, educational, or governmental channels," carry programs provided by those to whom the law gives special cable system access rights.

A "leased channel" is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About 10 to 15 percent of a cable system's channels would typically fall into this category. See 47 U. S. C. § 532(b). "[P]ublic, educational, or governmental channels" (which we shall call "public access" channels) are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way. See § 531; see also H. R. Rep. No. 98–934, p. 30 (1984) (authorizing local authorities to require creation of public access channels). Between 1984 and 1992, federal law (as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels. See 47 U. S. C. §§ 531(e) (public access), 532(c)(2) (leased access).

In 1992, in an effort to control sexually explicit programming conveyed over access channels, Congress enacted the three provisions before us. The first two provisions relate to leased channels. The first says:

> "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a)(2), 106 Stat. 1486.

The second provision, applicable only to leased channels, requires cable operators to segregate and to block similar programming if they decide to permit, rather than to prohibit, its broadcast. The provision tells the Federal Communications Commission (FCC or Commission) to promulgate regulations that will (a) require "programmers to inform cable operators if the program[ming] would be indecent as defined by Commission regulations"; (b) require "cable operators to place" such material "on a single channel"; and (c) require "cable operators to block such single channel unless the subscriber requests access to such channel in writing." 1992 Act, § 10(b)(1). The Commission issued regulations defining the material at issue in terms virtually identical to those we have already set forth, namely, as descriptions or depictions of "sexual or excretory activities or organs in a patently offensive manner" as measured by the cable viewing community. First Report and Order ¶¶ 33–38, at 1003–1004. The regulations require the cable operators to place this material on a single channel and to block it (say, by scrambling). They also require the system operator to provide access to the blocked channel "within 30 days" of a subscriber's written request for access and to reblock it within 30 days of a subscriber's request to do so. 47 CFR § 76.701(c) (1995).

The third provision is similar to the first provision, but applies only to public access channels. The relevant statutory section instructs the FCC to promulgate regulations that will

> "enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 1992 Act, § 10(c), 106 Stat. 1486.

The FCC, carrying out this statutory instruction, promulgated regulations defining "sexually explicit" in language almost identical to that in the statute's leased channel provision, namely, as descriptions or depictions of "sexual or excretory activities or organs in a patently offensive manner" as measured by the cable viewing community. See 47 CFR § 76.702 (1995) (incorporating definition from § 76.701(g)).

The upshot is, as we said at the beginning, that the federal law before us (the statute as implemented through regulations) now *permits* cable operators either to allow or to forbid the transmission of "patently offensive" sex-related materials over both leased and public access channels, and *requires* those operators, at a minimum, to segregate and to block transmission of that same material on leased channels.

Petitioners, claiming that the three statutory provisions, as implemented by the Commission regulations, violate the First Amendment, sought judicial review of the Commission's First Report and Order and its Second Report and Order in the United States Court of Appeals for the District of Columbia Circuit. A panel of that Circuit agreed with petitioners that the provisions violated the First Amendment. *Alliance for Community Media* v. *FCC*, 10 F. 3d 812 (1993). The entire Court of Appeals, however, heard the case en banc and reached the opposite conclusion. It held that all three statutory provisions (as implemented) were consistent with the First Amendment. *Alliance for Community Media* v. *FCC*, 56 F. 3d 105 (1995). Four of the eleven en banc appeals court judges dissented. Two of the dissenting judges concluded that all three provisions violated the First Amendment. Two others thought that either one, or two, but not all three of the provisions, violated the First Amendment. We granted certiorari to review the en banc court's First Amendment determinations.

II

We turn initially to the provision that *permits* cable system operators to prohibit "patently offensive" (or "indecent") programming transmitted over leased access channels. 1992 Act, § 10(a). The Court of Appeals held that this provision did not violate the First Amendment because the First Amendment prohibits only "Congress" (and, through the Fourteenth Amendment, a "State"), not private individuals, from "abridging the freedom of speech." Although the court said that it found no "state action," 56 F. 3d, at 113, it could not have meant that phrase literally, for, of course, petitioners attack (as "abridg[ing] . . . speech") a congressional statute—which, by definition, is an Act of "Congress." More likely, the court viewed this statute's "permissive" provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity.

We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor." Furthermore, as this Court has held, the editorial function itself is an aspect of "speech," see *Turner*, 512 U. S., at 636, and a court's decision that a private party, say, the station owner, is a "censor," could itself inter-

fere with that private "censor's" freedom to speak as an editor. Thus, not surprisingly, this Court's First Amendment broadcasting cases have dealt with governmental efforts to *restrict*, not governmental efforts to provide or to maintain, a broadcaster's freedom to pick and to choose programming. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973) (striking restrictions on broadcaster's ability to refuse to carry political advertising); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) (upholding restrictions on editorial authority); *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984) (striking restrictions); cf. *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530 (1980) (striking ban on political speech by public utility using its billing envelopes as a broadcast medium); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980) (striking restriction on public utility advertising).

Nonetheless, petitioners, while conceding that this is ordinarily so, point to circumstances that, in their view, make the analogy with private broadcasters inapposite and make these cases special ones, warranting a different constitutional result. As a practical matter, they say, cable system operators have considerably more power to "censor" program viewing than do broadcasters, for individual communities typically have only one cable system, linking broadcasters and other program providers with each community's many subscribers. See *Turner*, *supra*, at 633 (only one cable system in most communities; nationally more than 60% of homes subscribe to cable, which then becomes the primary or sole source of video programming in the overwhelming majority of these homes). Moreover, concern about system operators' exercise of this considerable power originally led government—local and federal—to insist that operators provide leased and public access channels free of operator editorial control. H. R. Rep. No. 98–934, at 30–31. To permit system operators to supervise programming on leased access channels will

create the very private-censorship risk that this anticensorship effort sought to avoid. At the same time, petitioners add, cable systems have two relevant special characteristics. They are unusually involved with government, for they depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services. And in respect to leased channels, their speech interests are relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies.

Under these circumstances, petitioners conclude, Congress' "permissive" law, *in actuality*, will "abridge" their free speech. And this Court should treat that law as a congressionally imposed, content-based, restriction unredeemed as a properly tailored effort to serve a "compelling interest." See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). They further analogize the provisions to constitutionally forbidden content-based restrictions upon speech taking place in "public forums" such as public streets, parks, or buildings dedicated to open speech and communication. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802 (1985); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); see also H. R. Rep. No. 98–934, *supra*, at 30 (identifying public access channels as the electronic equivalent of a "speaker's soap box"). And, finally, petitioners say that the legal standard the law contains (the "patently offensive" standard) is unconstitutionally vague. See, *e. g.*, *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676 (1968) (rejecting censorship ordinance as vague, even though it was intended to protect children).

Like petitioners, JUSTICES KENNEDY and THOMAS would have us decide these cases simply by transferring and applying literally categorical standards this Court has developed in other contexts. For JUSTICE KENNEDY, leased access

channels are like a common carrier, cablecast is a protected medium, strict scrutiny applies, § 10(a) fails this test, and, therefore, § 10(a) is invalid. *Post*, at 796–801, 805–807. For JUSTICE THOMAS, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. *Post*, at 816–817, 822–824. Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.

The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no law . . . abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. See, *e. g.*, *Schenck* v. *United States*, 249 U. S. 47, 51–52 (1919); *Abrams* v. *United States*, 250 U. S. 616, 627–628 (1919) (Holmes, J., dissenting); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 639 (1943); *Texas* v. *Johnson*, 491 U. S. 397, 418–420 (1989). At the same time, our cases have not left Congress or the States powerless to address the most serious problems. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special

circumstances of each field of application. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) (allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) (allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) (employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcast); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 231–232 (1987) (requiring "compelling state interest" and a "narrowly drawn" means in context of differential taxation of media); *Sable*, *supra*, at 126, 131 (applying "compelling interest," "least restrictive means," and "narrowly tailored" requirements to indecent telephone communications); *Turner*, 512 U. S., at 641 (using "heightened scrutiny" to address content-neutral regulations of cable system broadcasts); *Central Hudson Gas & Elec. Corp.*, 447 U. S., at 566 (restriction on commercial speech cannot be "more extensive than is necessary" to serve a "substantial" government interest).

This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. JUSTICES KENNEDY and THOMAS would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing

analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, see, *e. g.*, Telecommunications Act of 1996, 110 Stat. 56; S. Rep. No. 104–23 (1995); H. R. Rep. No. 104–204 (1995), we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. See *Columbia Broadcasting*, 412 U. S., at 102 ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); *Pacifica*, *supra*, at 748 ("We have long recognized that each medium of expression presents special First Amendment problems"). We therefore think it premature to answer the broad questions that JUSTICES KENNEDY and THOMAS raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum, compare *post*, at 791–793, 794 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), with *post*, at 826–829 (THOMAS, J., concurring in judgment in part and dissenting in part); whether public access channels are a public forum, *post*, at 791–792 (opinion of KENNEDY, J.); whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum, *post*, at 799–803 (opinion of KENNEDY, J.); whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum, *post*, at 797–798 (opinion of KENNEDY, J.); and whether the interests of the owners of communica-

tions media always subordinate the interests of all other users of a medium, *post*, at 816–817 (opinion of THOMAS, J.).

Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica;* and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.

First, the provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material. *Sable Communications*, 492 U. S., at 126; *Ginsberg* v. *New York*, 390 U. S. 629, 639–640 (1968); *New York* v. *Ferber*, 458 U. S. 747, 756–757 (1982).

Second, the provision arises in a very particular context—congressional *permission* for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control. The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), H. R. Rep. No. 98–934, at 31–36, and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned

the channels devoted to access). See *Turner*, 512 U. S., at 635–637.

Third, the problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of "indecent" materials, defined in part, like the provisions before us, to include

> " 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.' " 438 U. S., at 732 (quoting 56 F. C. C. 2d 94, 98 (1975)).

The Court found this ban constitutionally permissible primarily because "broadcasting is uniquely accessible to children" and children were likely listeners to the program there at issue—an afternoon radio broadcast. 438 U. S., at 749–750. In addition, the Court wrote, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," *id.*, at 748, "[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home," generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears, *ibid.;* and "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs" to hear similar performances, *id.*, at 750, n. 28.

All these factors are present here. Cable television broadcasting, including access channel broadcasting, is as "accessible to children" as over-the-air broadcasting, if not more so. See Heeter, Greenberg, Baldwin, Paugh, Srigley, & Atkin, Parental Influences on Viewing Style, in Cableviewing 140 (C. Heeter & B. Greenberg eds. 1988) (children spend more time watching television and view more channels

than do their parents, whether their household subscribes to cable or receives television over the air). Cable television systems, including access channels, "have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, *supra*, at 748. See Jost, The Future of Television, 4 The CQ Researcher 1131, 1146 (Dec. 23, 1994) (63% of American homes subscribe to cable); Greenberg, Heeter, D'Alessio, & Sipes, Cable and Noncable Viewing Style Comparisons, in Cableviewing, *supra*, at 207 (cable households spend more of their day, on average, watching television, and will watch more channels, than households without cable service). "Patently offensive" material from these stations can "confron[t] the citizen" in the "privacy of the home," *Pacifica*, *supra*, at 748, with little or no prior warning. Cableviewing, *supra*, at 217–218 (while cable subscribers tend to use guides more than do broadcast viewers, there was no difference among these groups in the amount of viewing that was planned, and, in fact, cable subscribers tended to sample more channels before settling on a program, thereby making them more, not less, susceptible to random exposure to unwanted materials). There is nothing to stop "adults who feel the need" from finding similar programming elsewhere, say, on tape or in theaters. In fact, the power of cable systems to control home program viewing is not absolute. Over-the-air broadcasting and direct broadcast satellites already provide alternative ways for programmers to reach the home and are likely to do so to a greater extent in the near future. See generally Telecommunications Act of 1996, § 201, 110 Stat. 107 (advanced television services), § 205 (direct broadcast satellite), § 302 (video programming by telephone companies), and § 304 (availability of navigation devices to enhance multichannel programming); L. Johnson, Toward Competition in Cable Television (1994).

Fourth, the permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*. The provision removes a restriction as to

some speakers—namely, cable operators. See *supra*, at 743. Moreover, although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban. In fact, a glance at the programming that cable operators allow on their own (nonaccess) channels suggests that this distinction is not theoretical, but real. See App. 393 (regular channel broadcast of Playboy and "Real Sex" programming). Finally, the provision's permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children. See First Report and Order ¶ 31, at 1003 (interpreting the Act's provisions to allow cable operators broad discretion over what to do with offensive materials). In all these respects, the permissive nature of the approach taken by Congress renders this measure appropriate as a means of achieving the underlying purpose of protecting children.

Of course, cable system operators may not always rearrange or reschedule patently offensive programming. Sometimes, as petitioners fear, they may ban the programming instead. But the same may be said of *Pacifica*'s ban. In practice, the FCC's daytime broadcast ban could have become a total ban, depending upon how private operators (programmers, station owners, networks) responded to it. They would have had to decide whether to reschedule the daytime show for nighttime broadcast in light of comparative audience demand and a host of other practical factors that similarly would determine the practical outcomes of the provisions before us. The upshot, in *both* cases, must be uncertainty as to practical consequences—of the governmental ban in the one case and of the permission in the other. That common uncertainty makes it difficult to say the provision here is, in any respect, *more* restrictive than the order in

Pacifica. At the same time, in the respects we discussed, the provision is significantly less restrictive.

The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.

Our basic disagreement with JUSTICE KENNEDY is narrow. Like him, we believe that we must scrutinize § 10(a) with the greatest care. Like JUSTICES KENNEDY and THOMAS, we believe that the interest of protecting children that § 10(a) purports to serve is compelling. But we part company with JUSTICE KENNEDY on two issues. First, JUSTICE KENNEDY's focus on categorical analysis forces him to disregard the cable system operators' interests. *Post*, at 805–806. We, on the other hand, recognize that in the context of cable broadcast that involves an access requirement (here, its partial removal), and unlike in most cases where we have explicitly required "narrow tailoring," the expressive interests of cable operators do play a legitimate role. Cf. *Turner*, 512 U. S., at 636–637. While we cannot agree with JUSTICE THOMAS that *everything* turns on the rights of the cable owner, see *post*, at 823–824, we also cannot agree with JUSTICE KENNEDY that we must ignore the expressive interests of cable operators altogether. Second, JUSTICE KENNEDY's application of a very strict "narrow tailoring" test depends upon an analogy with a category ("the public forum cases"), which has been distilled over time from the similarities of many cases. Rather than seeking an analogy to a category of cases, however, we have looked to the cases themselves. And, as we have said, we found that *Pacifica* provides the

closest analogy and lends considerable support to our conclusion.

Petitioners and JUSTICE KENNEDY, see *post*, at 797–798, 803–804, argue that the opposite result is required by two other cases: *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989), a case in which this Court found unconstitutional a statute that banned "indecent" telephone messages, and *Turner*, in which this Court stated that cable broadcast receives full First Amendment protection. See 512 U. S., at 637–641. The ban at issue in *Sable*, however, was not only a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us. See 492 U. S., at 128. The Court's distinction in *Turner*, furthermore, between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. See 512 U. S., at 637–641. While that distinction was relevant in *Turner* to the justification for structural regulations at issue there (the "must carry" rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all. See *supra*, at 744–745. JUSTICE KENNEDY would have us decide that *all* common carriage exclusions are subject to the highest scrutiny, see *post*, at 796–799, and then decide these cases on the basis of categories that provide imprecise analogies rather than on the basis of a more contextual assessment, consistent with our First Amendment tradition, of assessing whether Congress carefully and appropriately addressed a serious problem.

Petitioners also rely on this Court's "public forum" cases. They point to *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 45, a case in which this Court said that "public forums" are "places" that the government "has opened for use by the public as a place for expressive activity," or which "by long tradition . . . have been devoted to assembly and debate." *Ibid.* See also *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S., at 801 (assuming public forums may include "private property dedicated to public use"). They add that the Government cannot "enforce a content-based exclusion" from a public forum unless "necessary to serve a compelling state interest" and "narrowly drawn." *Perry*, *supra*, at 45. They further argue that the statute's permissive provisions unjustifiably exclude material, on the basis of content, from the "public forum" that the Government has created in the form of access channels. JUSTICE KENNEDY adds by analogy that the decision to exclude certain content from common carriage is similarly subject to strict scrutiny, and here does not satisfy that standard of review. See *post*, at 796–799, 805–807.

For three reasons, however, it is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to leased access channels. First, while it may be that content-based exclusions from the right to use common carriers could violate the First Amendment, see *post*, at 796–800 (opinion of KENNEDY, J.), it is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation. As discussed above, we are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area. See *supra*, at 739–743. Second, it is plain from this Court's cases that a public forum "may be created for a limited purpose." *Perry*, *supra*, at 46, n. 7; see also *Cornelius*, *supra*, at 802 ("[T]he government 'is not required to indefinitely retain the open character of the facility' ")

(quoting *Perry*, *supra*, at 46). Our cases have not yet determined, however, that government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious. Cf. *Perry*, *supra*, at 46, n. 7. But, at a minimum, these cases do not require us to answer it. Finally, and most important, the effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content. If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum or on use of a common carrier.

Consequently, if one wishes to view the permissive provisions before us through a "public forum" lens, one should view those provisions as *limiting* the otherwise totally open nature of the forum that leased access channels provide for communication of other than patently offensive sexual material—taking account of the fact that the limitation was imposed in light of experience gained from maintaining a *totally* open "forum." One must still ask whether the First Amendment forbids the limitation. But unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of these cases that we have already discussed—the Government's interest in protecting children, the "permissive" aspect of the statute, and the nature of the medium—sufficiently justify the "limitation" on the availability of this forum.

Finally, petitioners argue that the definition of the materials subject to the challenged provisions is too vague, thereby granting cable system operators too broad a program-

screening authority. Cf. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982) (citing *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972)) (vague laws may lead to arbitrary enforcement); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965) (uncertainty may perniciously chill speech). That definition, however, uses language similar to language previously used by this Court for roughly similar purposes.

The provisions, as augmented by FCC regulations, permit cable system operators to prohibit

> "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a), 106 Stat. 1486.

See also 47 CFR § 76.702 (1995) (reading approximately the same definition into § 10(c)). This language is similar to language adopted by this Court in *Miller* v. *California*, 413 U. S. 15, 24 (1973), as a "guidelin[e]" for identifying materials that States may constitutionally regulate as obscene. In *Miller*, the Court defined obscene sexual material (material that lacks First Amendment protection) in terms of

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work *depicts or describes, in a patently offensive way,* sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Ibid.* (emphasis added; internal quotation marks omitted).

The language, while vague, attempts to identify the category of materials that Justice Stewart thought could be described only in terms of "I know it when I see it." *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (concurring opinion). In

§ 10(a) and the FCC regulations, without *Miller*'s qualifiers, the language would seem to refer to material that would be offensive enough to fall within that category *but for* the fact that the material also has "serious literary, artistic, political or scientific value" or nonprurient purposes.

This history suggests that the statute's language aims at the kind of programming to which its sponsors referred—pictures of oral sex, bestiality, and rape, see 138 Cong. Rec. 981, 985 (1992) (statement of Sen. Helms)—and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction). Moreover, as this Court pointed out in *Pacifica*, what is "patently offensive" depends on context (the kind of program on which it appears), degree (not "an occasional expletive"), and time of broadcast (a "pig" is offensive in "the parlor" but not the "barnyard"). 438 U. S., at 748, 750. Programming at 2 o'clock in the morning is seen by a basically adult audience and the "patently offensive" must be defined with that fact in mind.

Further, the statute protects against overly broad application of its standards insofar as it permits cable system operators to screen programs only pursuant to a "written and published policy." 1992 Act, § 10(a), 106 Stat. 1486. A cable system operator would find it difficult to show that a leased access program prohibition reflects a rational "policy" if the operator permits similarly "offensive" programming to run elsewhere on its system at comparable times or in comparable ways. We concede that the statute's protection against overly broad application is somewhat diminished by the fact that it permits a cable operator to ban programming that the operator "*reasonably believes*" is patently offensive. *Ibid.* (emphasis added). But the "reasonabl[e] belie[f]" qualifier here, as elsewhere in the law, seems designed not to expand the category at which the law aims, but, rather, to provide a legal excuse, for (at least) one honest mistake, from liability that might otherwise attach. Cf. *Waters* v. *Churchill*, 511

U. S. 661, 682 (1994) (SOUTER, J., concurring) (public employer's reasonable belief that employee engaged in unprotected speech excuses liability); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 453–455, and n. 29 (1978) ("'meeting competition'" defense in antitrust based on reasonable belief in the necessity to meet competition); *Pierson* v. *Ray*, 386 U. S. 547, 555–557 (1967) (police officer has defense to constitutional claim, as did officers of the peace at common law in actions for false arrest, when the officer reasonably believed the statute whose violation precipitated the arrest was valid). And the contours of the shield—reasonableness—constrain the discretion of the cable operator as much as they protect it. If, for example, a court had already found substantially similar programming to be beyond the pale of "patently offensive" material, or if a local authority overseeing the local public, governmental, or educational channels had indicated that materials of the type that the cable operator decides to ban were not "patently offensive" in that community, then the cable operator would be hard pressed to claim that the exclusion of the material was "reasonable." We conclude that the statute is not impermissibly vague.

For the reasons discussed, we conclude that § 10(a) is consistent with the First Amendment.

III

The statute's second provision significantly differs from the first, for it does not simply permit, but rather requires, cable system operators to restrict speech—by segregating and blocking "patently offensive" sex-related material appearing on leased channels (but not on other channels). 1992 Act, § 10(b). In particular, as previously mentioned, see *supra*, at 735, this provision and its implementing regulations require cable system operators to place "patently offensive" leased channel programming on a separate channel; to block that channel; to unblock the channel within 30 days of a subscriber's written request for access; and to

reblock the channel within 30 days of a subscriber's request for reblocking. 1992 Act, § 10(b); 47 CFR §§ 76.701(b), (c), (g) (1995). Also, leased channel programmers must notify cable operators of an intended "patently offensive" broadcast up to 30 days before its scheduled broadcast date. §§ 76.701(d), (g).

These requirements have obvious restrictive effects. The several up-to-30-day delays, along with single channel segregation, mean that a subscriber cannot decide to watch a single program without considerable advance planning and without letting the "patently offensive" channel in its entirety invade his household for days, perhaps weeks, at a time. These restrictions will prevent programmers from broadcasting to viewers who select programs day by day (or, through "surfing," minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs on the "patently offensive" channel; and to viewers who simply tend to judge a program's value through channel reputation, *i. e.*, by the company it keeps. Moreover, the "written notice" requirement will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the "patently offensive" channel. Cf. *Lamont* v. *Postmaster General*, 381 U. S. 301, 307 (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it). Further, the added costs and burdens that these requirements impose upon a cable system operator may encourage that operator to ban programming that the operator would otherwise permit to run, even if only late at night.

The Government argues that, despite these adverse consequences, the "segregate and block" requirements are lawful because they are "the least restrictive means of realizing" a "'compelling interest,'" namely, "'protecting the physical and psychological well-being of minors.'" See Brief for Federal Respondents 11 (quoting *Sable*, 492 U. S., at 126).

It adds that, in any event, the First Amendment, as applied in *Pacifica*, "does not require that regulations of indecency on television be subject to the strictest" First Amendment "standard of review." Brief for Federal Respondents 11.

We agree with the Government that protection of children is a "compelling interest." See *supra*, at 743. But we do not agree that the "segregate and block" requirements properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain. Nor need we here determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue, compare 438 U. S., at 745–748 (opinion of STEVENS, J.) (indecent materials enjoy lesser First Amendment protection), with *id.*, at 761–762 (Powell, J., concurring in part and concurring in judgment) (refusing to accept a lesser standard for nonobscene, indecent material). That is because once one examines this governmental restriction, it becomes apparent that, not only is it not a "least restrictive alternative" and is not "narrowly tailored" to meet its legitimate objective, it also seems considerably "more extensive than necessary." That is to say, it fails to satisfy this Court's formulations of the First Amendment's "strictest," as well as its somewhat less "strict," requirements. See, *e. g.*, *Sable*, 492 U. S., at 126 ("compelling interest" and "least restrictive means" requirements applied to indecent telephone communications); *id.*, at 131 (requiring "narrowly tailored" law); *Turner*, 512 U. S., at 641 (using "heightened scrutiny" to address content-neutral structural regulations of cable systems); *id.*, at 662 (quoting "'no greater than . . . essential'" language from *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), as an example of "heightened," less-than-strictest, First Amendment scrutiny); *Central Hudson*, 447 U. S., at 566 (restriction on commercial speech cannot be "more extensive than is necessary"); *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 624 (1995) (restriction must be "narrowly drawn"); *id.*, at 632 (there must be a

"reasonable" "fit" with the objective that legitimates speech restriction). The provision before us does not reveal the caution and care that the standards underlying these various verbal formulas impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions.

Several circumstances lead us to this conclusion. For one thing, the law, as recently amended, uses other means to protect children from similar "patently offensive" material broadcast on *un*leased cable channels, *i. e.*, broadcast over any of a system's numerous ordinary, or public access, channels. The law, as recently amended, requires cable operators to "scramble or . . . block" such programming on any (unleased) channel "*primarily dedicated* to sexually-oriented programming." Telecommunications Act of 1996, § 505, 110 Stat. 136 (emphasis added). In addition, cable operators must honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe. § 504, *ibid.* And manufacturers, in the future, will have to make television sets with a so-called "V-chip"—a device that will be able automatically to identify and block sexually explicit or violent programs. § 551, *id.*, at 139–142.

Although we cannot, and do not, decide whether the new provisions are themselves lawful (a matter not before us), we note that they are significantly less restrictive than the provision here at issue. They do not force the viewer to receive (for days or weeks at a time) all "patently offensive" programming or none; they will not lead the viewer automatically to judge the few by the reputation of the many; and they will not automatically place the occasional viewer's name on a special list. They therefore inevitably lead us to ask why, if they adequately protect children from "patently offensive" material broadcast on ordinary channels, they would not offer adequate protection from similar leased channel broadcasts as well? Alternatively, if these provi-

sions do not adequately protect children from "patently offensive" material broadcast on ordinary channels, how could one justify more severe leased channel restrictions when (given ordinary channel programming) they would yield so little additional protection for children?

The record does not answer these questions. It does not explain why, under the new Act, blocking alone—without written access requests—adequately protects children from exposure to regular sex-dedicated channels, but cannot adequately protect those children from programming on similarly sex-dedicated channels that are leased. It does not explain why a simple subscriber blocking request system, perhaps a phone-call-based system, would adequately protect children from "patently offensive" material broadcast on ordinary non-sex-dedicated channels (*i. e.*, almost all channels) but a far more restrictive segregate/block/written-access system is needed to protect children from similar broadcasts on what (in the absence of the segregation requirement) would be non-sex-dedicated channels that are leased. Nor is there any indication Congress thought the new ordinary channel protections less than adequate.

The answers to the questions are not obvious. We have no empirical reason to believe, for example, that sex-dedicated channels are all (or mostly) leased channels, or that "patently offensive" programming on non-sex-dedicated channels is found only (or mostly) on leased channels. To the contrary, the parties' briefs (and major city television guides) provide examples of what seems likely to be such programming broadcast over both kinds of channels.

We recognize, as the Government properly points out, that Congress need not deal with every problem at once. Cf. *Semler* v. *Oregon Bd. of Dental Examiners*, 294 U. S. 608, 610 (1935) (the legislature need not "strike at all evils at the same time"); and Congress also must have a degree of leeway in tailoring means to ends. *Columbia Broadcasting*, 412 U. S., at 102–103. But in light of the 1996 statute, it seems

fair to say that Congress now has tried to deal with most of the problem. At this point, we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not "essential" (or will not prove very helpful). Cf. *Boos* v. *Barry,* 485 U. S. 312, 329 (1988) (existence of a less restrictive statute suggested that a challenged ordinance, aimed at the same problem, was overly restrictive).

The record's description and discussion of a different alternative—the "lockbox"—leads, through a different route, to a similar conclusion. The Cable Communications Policy Act of 1984 required cable operators to provide

> "upon the request of a subscriber, a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by the subscriber." 47 U. S. C. § 544(d)(2).

This device—the "lockbox"—would help protect children by permitting their parents to "lock out" those programs or channels that they did not want their children to see. See FCC 85–179, ¶ 132, 50 Fed. Reg. 18637, 18655 (1985) ("[T]he provision for lockboxes largely disposes of issues involving the Commission's standard for indecency"). The FCC, in upholding the "segregate and block" provisions, said that lockboxes protected children (including, say, children with inattentive parents) less effectively than those provisions. See First Report and Order ¶¶ 14–15, 8 FCC Rcd, at 1000. But it is important to understand why that is so.

The Government sets forth the reasons as follows:

> "In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out

> whatever indecent programming they do not wish their children to view." Brief for Federal Respondents 37.

We assume the accuracy of this statement. But the reasons do not show need for a provision as restrictive as the one before us. Rather, they suggest a set of provisions very much like those that Congress placed in the 1996 Act.

No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify "'"reduc[ing] the adult population . . . to . . . only what is fit for children."'" *Sable*, 492 U. S., at 128 (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 73 (1983), in turn quoting *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957)); see *Sable, supra*, at 130, and n. 10. But, leaving that problem aside, the Government's list of practical difficulties would seem to call, not for "segregate and block" requirements, but, rather, for informational requirements, for a simple coding system, for readily available blocking equipment (perhaps accessible by telephone), for imposing cost burdens upon system operators (who may spread them through subscription fees); or perhaps even for a system that requires lockbox defaults to be set to block certain channels (say, sex-dedicated channels). These kinds of requirements resemble those that Congress has recently imposed upon all but leased channels. For that reason, the "lockbox" description and the discussion of its frailties reinforces our conclusion that the leased channel provision is overly restrictive when measured against the benefits it is likely to achieve. (We add that the record's discussion of the "lockbox" does not explain why the law now treats leased channels more restrictively than ordinary channels.)

There may, of course, be other explanations. Congress may simply not have bothered to change the leased channel provisions when it introduced a new system for other channels. But responses of this sort, like guesses about the comparative seriousness of the problem, are not legally adequate.

In other cases, where, as here, the record before Congress or before an agency provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech. See, *e. g.*, *Sable*, *supra*, at 130 ("[T]he congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be"); *Simon & Schuster*, 502 U. S., at 120; *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585–586 (1983); *Arkansas Writers' Project*, 481 U. S., at 231–232.

Consequently, we cannot find that the "segregate and block" restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, "sacrific[ing]" important First Amendment interests for too "speculative a gain." *Columbia Broadcasting*, 412 U. S., at 127; see *League of Women Voters*, 468 U. S., at 397. For that reason they are not consistent with the First Amendment.

IV

The statute's third provision, as implemented by FCC regulation, is similar to its first provision, in that it too *permits* a cable operator to prevent transmission of "patently offensive" programming, in this case on public access channels. 1992 Act, § 10(c); 47 CFR § 76.702 (1995). But there are four important differences.

The first is the historical background. As JUSTICE KENNEDY points out, see *post*, at 788–790, cable operators have traditionally agreed to reserve channel capacity for public, governmental, and educational channels as part of the consideration they give municipalities that award them cable franchises. See H. R. Rep. No. 98–934, at 30. In the terms preferred by JUSTICE THOMAS, see *post*, at 827–828, the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedica-

tion of land for streets and parks, as part of a municipality's approval of a subdivision of land. Cf. *post*, at 793–794 (opinion of KENNEDY, J.). Significantly, these are channels over which cable operators have not historically exercised editorial control. H. R. Rep. No. 98–934, *supra*, at 30. Unlike § 10(a) therefore, § 10(c) does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished. See also *post*, at 792–793 (opinion of KENNEDY, J.).

The second difference is the institutional background that has developed as a result of the historical difference. When a "leased channel" is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot. See 47 U. S. C. § 532(c)(2). Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements. See § 531(b) (franchising authorities "may require rules and procedures for the use of the [public access] channel capacity"). Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner. See D. Brenner, M. Price, & M. Myerson, Cable Television and Other Nonbroadcast Video ¶ 6.04[7] (1993); P. Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (1992) (hereinafter Aufderheide), reprinted in App. 61, 63 (surveying 61 communities; the access manager was: a nonprofit organization in 41, a local government official in 12, the cable operator in 5, and an unidentified entity in 3); D. Agosta, C. Rogoff, & A. Norman, The Participate Report: A Case Study of Public Access Cable Television in New York State 28 (1990) (hereinafter Agosta), attached as Exh. K to Joint Comments for the Alliance for Community Media et al., filed with the FCC under MM Docket No. 92–

258 (materials so filed hereinafter FCC Record) ("In 88% [of New York public access systems] access channels were programmed jointly between the cable operator and another institution such as a university, library, or non-profit access organization"); *id.*, at 28–32, FCC Record; Comments of National Cable Television Association Inc., at 14, FCC Record ("Operators often have no involvement in PEG channels that are run by local access organizations"). Access channel activity and management are partly financed with public funds—through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds, see Brenner, Price, & Myerson, *supra*, ¶ 6.04[3][c]; Aufderheide, App. 59–60—and are commonly subject to supervision by a local supervisory board. See, *e. g.*, D. C. Code Ann. § 43–1829 (1990 and Supp. 1996); Lynchburg City Code § 12.1–44(d)(2) (1988).

This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services. And this system can police that policy by, for example, requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by prescreening individual programs. See Second Report and Order ¶ 26, 8 FCC Rcd, at 2642 ("[F]rom the comments received, it appears that a number of access organizations already have in place procedures that require certification statements [of compliance with local standards], or their equivalent, from access programmers"); Comments of Boston Community Access and Programming Foundation, App. 163–164; Aufderheide, *id.*, at 69–71; Comments of Metropolitan Area Communications Commission 2, FCC Record; Reply Comments of Waycross Community Television 4–6, FCC Record; Reply Comments of Columbus Community Cable Access, Inc., App. 329; Reply Comments of City of St. Paul, *id.*, at 318, 325; Reply Comments of Erik

Mollberg, Public Access Coordinator, Ft. Wayne, Ind., 3, FCC Record; Comments of Defiance Community Television 3, FCC Record; Comments of Nutmeg Public Access Television, Inc., 3–4, FCC Record. Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community. See 56 F. 3d, at 127–128; Second Report and Order ¶ 26, 8 FCC Rcd 2642.

Third, the existence of a system aimed at encouraging and securing programming that the community considers valuable strongly suggests that a "cable operator's veto" is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels. Of course, the system of access managers and supervising boards can make mistakes, which the operator might in some cases correct with its veto power. Balanced against this potential benefit, however, is the risk that the veto itself may be mistaken; and its use, or threatened use, could prevent the presentation of programming, that, though borderline, is not "patently offensive" to its targeted audience. See Aufderheide, App. 64–66 (describing the programs that were considered borderline by access managers, including sex education, health education, broadcasts of politically marginal groups, and various artistic experiments). And this latter threat must bulk large within a system that already has publicly accountable systems for maintaining responsible programs.

Finally, our examination of the legislative history and the record before us is consistent with what common sense suggests, namely, that the public/nonprofit programming control systems now in place would normally avoid, minimize, or

eliminate any child-related problems concerning "patently offensive" programming. We have found anecdotal references to what seem isolated instances of potentially indecent programming, some of which may well have occurred on leased, not public access, channels. See 138 Cong. Rec. 984, 990 (1992) (statement of Sen. Wirth) (mentioning "abuses" on Time Warner's New York City channel); but see Comments of Manhattan Neighborhood Network, App. 235, 238 (New York access manager noting that leased, not public access, channels regularly carry sexually explicit programming in New York, and that no commercial programs or advertising are allowed on public access channels); Brief for Time Warner Cable as *Amicus Curiae* 2–3 (indicating that relevant "abuses" likely occurred on leased channels). See also 138 Cong. Rec., at 989 (statement of Sen. Fowler) (describing solicitation of prostitution); *id.*, at 985 (statement of Sen. Helms) (identifying newspaper headline referring to mayor's protest of a "strip act"); 56 F. 3d, at 117–118 (recounting comments submitted to the FCC describing three complaints of offensive programming); Letter from Mayor of Rancho Palos Verdes, FCC Record; Resolution of San Antonio City Council, No. 92–49–40, FCC Record.

But these few examples do not necessarily indicate a significant nationwide pattern. See 56 F. 3d, at 127–128 (public access channels "did not pose dangers on the order of magnitude of those identified on leased access channels," and "local franchising authorities could respond" to such problems "by issuing 'rules and procedures' or other 'requirements' "). The Commission itself did not report *any* examples of "indecent" programs on public access channels. See Second Report and Order, 8 FCC Rcd, at 2638; see also Comments of Boston Community Access and Programming Foundation, App. 162–163 (noting that the FCC's Notice of Proposed Rulemaking, 7 FCC Rcd 7709 (1992), did not identify *any* "inappropriate" programming that actually exists on public

access channels). Moreover, comments submitted to the FCC undermine any suggestion that prior to 1992 there were significant problems of indecent programming on public access channels. See Agosta 10, 28, FCC Record (surveying 76 public access systems in New York over two years, and finding "only two examples of controversial programming, and both had been settled by the producers and the access channel"); Reply Comments of Staten Island Community Television 2, FCC Record ("Our access channels have been on the air since 1986 without a single incident which would be covered by Section 10 of the new law"); Reply Comments of Waycross Community Television, at 2, FCC Record ("[I]ndecent and obscene programs . . . [have] never been cablecast through Waycross Community Television during our entire ten year programming history"); Reply Comments of Cambridge Community Television, App. 314 ("In Cambridge less than one hour out of 15,000 hours of programming CCTV has run in the past five year[s] may have been affected by the Act"); *ibid.* ("CCTV feels that there simply is not a problem which needs to be fixed"); Reply Comments of Columbus Community Cable Access, Inc., *id.*, at 329 ("ACTV is unaware of any actions taken by the cable operators under [a local law authorizing them to prohibit "legally obscene matter"] within the last 10 years"); Reply Comments of Cincinnati Community Video, Inc., *id.*, at 316 ("[I]n 10 years of access operations with over 30,000 access programs cablecast not a single obscenity violation has ever occurred"); Comments of Defiance Community Television, at 2–3, FCC Record (in eight years of operation, "there has never been a serious problem with the content of programming on the channel").

At most, we have found borderline examples as to which people's judgment may differ, perhaps acceptable in some communities but not others, of the type that petitioners fear the law might prohibit. See, *e. g.*, Aufderheide, App. 64–66; Brief for Petitioners in No. 95–124, p. 7 (describing depiction

of a self-help gynecological examination); Comments of Time Warner Entertainment Co., App. 252 (describing an Austin, Tex., program that included "nude scenes from a movie," and an Indianapolis, Ind., "'safe sex'" program). It is difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials. Compare 138 Cong. Rec., at 985 (statement of Sen. Helms) (justifying regulation of leased access channels in terms of programming that depicts "bestiality" and "rape"). In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it. See *Turner*, 512 U. S., at 664–665.

The upshot, in respect to the public access channels, is a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear. At the same time, given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious. Having carefully reviewed the legislative history of the Act, the proceedings before the FCC, the record below, and the submissions of the parties and *amici* here, we conclude that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end. See, *e. g.*, *Columbia Broadcasting*, 412 U. S., at 127; *League of Women Voters*, 468 U. S., at 398–399; *Sable*, 492 U. S., at 126. Consequently, we find that this third provision violates the First Amendment.

V

Finally, we must ask whether § 10(a) is severable from the two other provisions. The question is one of legislative intent: Would Congress still "have passed" § 10(a) "had it known" that the remaining "provision[s were] invalid"? *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 506 (1985). If so, we need not invalidate all three provisions. *New York* v. *Ferber*, 458 U. S., at 769, n. 24 (citing *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971)).

Although the 1992 Act contains no express "severability clause," we can find the Act's "severability" intention in its structure and purpose. It seems fairly obvious Congress would have intended its permissive "leased access" channels provision, § 10(a), to stand irrespective of § 10(c)'s legal fate. That is because the latter provision concerns only public, educational, and governmental channels. Its presence had little, if any, effect upon "leased access" channels; hence its absence in respect to those channels could not make a significant difference.

The "segregate and block" requirement's invalidity does make a difference, however, to the effectiveness of the permissive "leased access" provision, § 10(a). Together they told the cable system operator: "Either ban a 'patently offensive' program or 'segregate and block' it." Without the "segregate and block" provision, cable operators are afforded broad discretion over what to do with a patently offensive program, and because they will no longer bear the costs of segregation and blocking if they refuse to ban such programs, cable operators may choose to ban fewer programs.

Nonetheless, this difference does not make the two provisions unseverable. Without the "segregate and block" provision, the law simply treats leased channels (in respect to patently offensive programming) just as it treats all other channels. And judging by the absence of similar segregate and block provisions in the context of these other channels, Congress would probably have thought that § 10(a), standing

alone, was an effective (though, perhaps, not the most effective) means of pursuing its objective. Moreover, we can find no reason why, in light of Congress' basic objective (the protection of children), Congress would have preferred no provisions at all to the permissive provision standing by itself. That provision, capable of functioning on its own, still helps to achieve that basic objective. Consequently, we believe the valid provision is severable from the others.

VI

For these reasons, the judgment of the Court of Appeals is affirmed insofar as it upheld § 10(a); the judgment of the Court of Appeals is reversed insofar as it upheld § 10(b) and § 10(c).

It is so ordered.

JUSTICE STEVENS, concurring.

The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition. The former restores the freedom of cable operators to reject indecent programs; the latter requires local franchising authorities to reject such programs. While I join the Court's opinion, I add these comments to emphasize the difference between the two provisions and to endorse the analysis in Part III–B of JUSTICE KENNEDY's opinion even though I do not think it necessary to characterize the public access channels as public fora. Like JUSTICE SOUTER, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this. Cf. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 426–427 (1992) (STEVENS, J., concurring in judgment).

I

Federal law requires cable system operators to reserve about 15 percent of their channels for commercial lease to unaffiliated programmers. See 47 U. S. C. § 532(b). On

these channels, federal law generally prohibits the cable operator from exercising any control over program content, see § 532(c)(2), with one exception: Section 10(a) allows the operator to refuse to air "indecent" programs. In my view, that exception is permissible.

The Federal Government established the leased access requirements to ensure that certain programmers would have more channels available to them. Section 10(a) is therefore best understood as a limitation on the amount of speech that the Federal Government has spared from the censorial control of the cable operator, rather than a direct prohibition against the communication of speech that, in the absence of federal intervention, would flow freely.

I do not agree, however, that § 10(a) established a public forum. Unlike sidewalks and parks, the Federal Government created leased access channels in the course of its legitimate regulation of the communications industry. In so doing, it did not establish an entirely open forum, but rather restricted access to certain speakers, namely, unaffiliated programmers able to lease the air time. By facilitating certain speech that cable operators would not otherwise carry, the leased access channels operate like the must-carry rules that we considered in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 643–646 (1994), without reference to our public forum precedents.

When the Federal Government opens cable channels that would otherwise be left entirely in private hands, it deserves more deference than a rigid application of the public forum doctrine would allow. At this early stage in the regulation of this developing industry, Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas.

Just as Congress may legitimately limit access to these channels to unaffiliated programmers, I believe it may also limit, within certain reasonable bounds, the extent of the ac-

cess that it confers upon those programmers.[1] If the Government had a reasonable basis for concluding that there were already enough classical musical programs or cartoons being telecast—or, perhaps, even enough political debate—I would find no First Amendment objection to an open access requirement that was extended on an impartial basis to all but those particular subjects. A contrary conclusion would ill-serve First Amendment values by dissuading the Government from creating access rights altogether.[2]

Of course, the fact that the Federal Government may be entitled to some deference in regulating access for cable programmers does not mean that it may evade First Amendment constraints by selectively choosing which speech should be excepted from private control. If the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806

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[1] Our precedents recognize that reasonable restraints may be placed on access to certain well-regulated fora. There is no reason why cable television should be treated differently. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995); *id.*, at 892–895, 899 (SOUTER, J., dissenting); see also *Widmar* v. *Vincent*, 454 U. S. 263, 278 (1981) (STEVENS, J., concurring in judgment) ("I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first"); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 394 (1969) (approving access requirement limited to "matters of great public concern").

[2] For purposes of these cases, canons of constitutional avoidance require us to assume that the Government has the authority to impose leased access requirements on cable operators. Indeed, no party to this litigation contends to the contrary. Because petitioners' constitutional claim depends for its success on the constitutionality of the underlying access rights, they certainly cannot complain if we decide the cases on that assumption.

(1985). More subtle viewpoint-based limitations on access also may be prohibited by the First Amendment. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 564 (1975) (Douglas, J., dissenting in part and concurring in result in part).

Even though it is often difficult to determine whether a given access restriction impermissibly singles out certain ideas for repression, in these cases I find no basis for concluding that § 10(a) is a species of viewpoint discrimination. By returning control over indecent programming to the cable operator, § 10(a) treats indecent programming on access channels no differently from indecent programming on regular channels. The decision to permit the operator to determine whether to show indecent programming on access channels therefore cannot be said to reflect a governmental bias against the indecent programming that appears on access channels in particular.

Nor can it be argued that indecent programming has no outlet other than leased access channels, and thus that the exclusion of such speech from special protection is designed to prohibit its communication altogether. Petitioners impliedly concede this point when they contend that the indecency restrictions are arbitrarily underinclusive because they do not affect the similarly indecent programming that appears on regular channels.

Moreover, the criteria § 10(a) identifies for limiting access are fully consistent with the Government's contention that the speech restrictions are not designed to suppress "a certain form of expression that the Government dislikes," *post*, at 802 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), but rather to protect children from sexually explicit programming on a pervasive medium. In other cases, we have concluded that such a justification is both viewpoint neutral and legitimate. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989);

FCC v. *Pacifica Foundation*, 438 U. S. 726 (1978). There is no reason to conclude otherwise here.

Finally, § 10(a) cannot be assailed on the somewhat broader ground that it nevertheless reduces the programming available to the adult population to what is suitable for children. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957); *post*, at 807 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). Section 10(a) serves only to ensure that the newly created access right will not require operators to expose children to *more* unsuitable communications than would otherwise be the case. It is thus far different in both purpose and effect from the provision at issue in *Butler*, which criminalized the sale of certain books. 352 U. S., at 381.

In sum, § 10(a) constitutes a reasonable, viewpoint-neutral limitation on a federally created access right for certain cable programmers. Accordingly, I would affirm the judgment of the Court of Appeals as to this provision.

II

As both JUSTICE BREYER and JUSTICE KENNEDY have explained, the public, educational, and governmental access channels that are regulated by § 10(c) are not creations of the Federal Government. They owe their existence to contracts forged between cable operators and local cable franchising authorities. *Ante*, at 734, 760–762 (opinion of BREYER, J.); *post*, at 788–790, 791–794 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part).

As their name reflects, so-called PEG channels are subject to a variety of local governmental controls and regulations that—apart from any federal requirement—may result either in a prohibition or a requirement that certain types of programs be carried. *Ante*, at 761–763 (opinion of BREYER, J.) Presumably, as JUSTICE BREYER explains, the local authorities seldom permit programming of the type described by § 10(c) to air. *Ante*, at 762–763.

What is of critical importance to me, however, is that if left to their own devices, those authorities may choose to carry some programming that the Federal Government has decided to restrict. As I read § 10(c), the federal statute would disable local governments from making that choice. It would inject federally authorized private censors into fora from which they might otherwise be excluded, and it would therefore limit local fora that might otherwise be open to all constitutionally protected speech.[3]

Section 10(c) operates as a direct restriction on speech that, in the absence of federal intervention, might flow freely. The Federal Government is therefore not entitled to the same leeway that I believe it deserves when it enacts provisions, such as § 10(a), that define the limits of federally created access rights. See *supra*, at 769–770. The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels that they own. In this respect, I agree entirely with JUSTICE KENNEDY, save for his designation of these channels as public fora.

That is not to say that the Federal Government may not impose restrictions on the dissemination of indecent materials on cable television. Although indecent speech is protected by the First Amendment, the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). When the Gov-

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[3] Although in 1984 Congress essentially barred cable operators from exercising editorial control over PEG channels, see 47 U. S. C. § 531(e), § 10(c) does not merely restore the status quo *ante*. Section 10(c) authorizes private operators to exercise editorial discretion over "indecent" programming even if the franchising authority objects. Under the pre-1984 practice, local franchising authorities were free to exclude operators from exercising any such control on PEG channels.

ernment acts to suppress directly the dissemination of such speech, however, it may not rely solely on speculation and conjecture. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S., at 129–131.

JUSTICE BREYER persuasively demonstrates that the Government has made no effort to identify the harm caused by permitting local franchising authorities to determine the quantum of so-called "indecent" speech that may be aired in their communities. *Ante*, at 763–766. Nor has the Government attempted to determine whether the intervention of the discretionary censorial authority of a private cable operator constitutes an appropriately limited means of addressing that harm. *Ibid.* Given the direct nature of the restriction on speech that § 10(c) imposes, the Government has failed to carry its burden of justification. Accordingly, I agree that the judgment of the Court of Appeals with respect to § 10(c) should be reversed.

JUSTICE SOUTER, concurring.

JUSTICE KENNEDY's separate opinion stresses the worthy point that First Amendment values generally are well served by categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue. Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.[1] JUSTICE KENNEDY sees no warrant in these cases for anything but a categorical and rule-based approach applying a fixed level of scrutiny, the strictest, to judge the content-based provisions of §§ 10(a), (b), and (c), and he accordingly faults the principal opinion

[1] See, *e. g.*, Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 474 (1985) (arguing that "courts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense").

for declining to decide the precise doctrinal categories that should govern the issue at hand. The value of the categorical approach generally to First Amendment security prompts a word to explain why I join the Court's unwillingness to announce a definitive categorical analysis in these cases.

Neither the speech nor the limitation at issue here may be categorized simply by content. Our prior case most nearly on point dealt not with a flat restriction covering a separate category of indecency at the First Amendment's periphery, but with less than a total ban, directed to instances of indecent speech easily available to children through broadcasts readily received in the household and difficult or impossible to control without immediate supervision. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 747 (1978) (plurality opinion) ("It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances").[2] It is not surprising that so contextually complex a category was not expressly assigned a standard level of scrutiny for reviewing the Government's limitation at issue there.[3]

Nor does the fact that we deal in these cases with cable transmission necessarily suggest that a simple category sub-

[2] Our indecency cases since *Pacifica* have likewise turned as much on the context or medium of the speech as on its content. See, *e. g.*, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 127–128 (1989) (distinguishing *Pacifica* in part on the ground that the telephonic medium at issue was less intrusive than broadcast television); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 47, 54 (1986) (permitting zoning regulation of adult theaters based on their "secondary effects"); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 685–686 (1986) (upholding restriction on indecent speech in a public school).

[3] Our analysis of another important strand of the present cases, the right of owners of the means of communication to refuse to serve as conduits for messages they dislike, has been equally contextual. Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) (upholding a right-of-reply requirement in the broadcasting context), with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974) (rejecting such a requirement for print journalism).

ject to a standard level of scrutiny ought to be recognized at this point; while we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), see *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 638–639 (1994) (finding that *Red Lion*'s spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television, *ante*, at 744–745. It would seem, then, that the appropriate category for cable indecency should be as contextually detailed as the *Pacifica* example, and settling upon a definitive level-of-scrutiny rule of review for so complex a category would require a subtle judgment; but there is even more to be considered, enough more to demand a subtlety tantamount to prescience.

All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. Recent and far-reaching legislation not only affects the technical feasibility of parental control over children's access to undesirable material, see, *e. g.*, Telecommunications Act of 1996, § 551, 110 Stat. 139–142 (provision for "V-chip" to block sexually explicit or violent programs), but portends fundamental changes in the competitive structure of the industry and, therefore, the ability of individual entities to act as bottlenecks to the free flow of information, see Title III, *id.*, at 114–128 (promoting competition in cable services). As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can

hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.[4]

Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong." Lessig, The Path of Cyberlaw, 104 Yale L. J. 1743, 1745 (1995).

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. Rather than definitively settling the issue now, JUSTICE BREYER wisely reasons by direct analogy rather than by rule, concluding that the speech and the restriction at issue in these cases may usefully be measured against the ones at issue in *Pacifica*.[5] If

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[4] See, *e. g.*, Lynch, Speedier Access: Cable and Phone Companies Compete, at http://www.usatoday.com/life/cyber/bonus/cb006.htm (June 17, 1996) (describing cable modem technology); Gateway 2000 ships first Destination big screen TV-PC's, at http://www.gw2k.com/corpinfo/press/1996/destin.htm (Apr. 29, 1996) (describing computer with both cable TV and Internet reception capability).

[5] See, *e. g.*, Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 786 (1993) (observing that analogical reasoning permits "greater flexibility . . . over time"); Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L. Rev. 293, 295, n. 6 (1992) (noting that

that means it will take some time before reaching a final method of review for cases like these, there may be consolation in recalling that 16 years passed, from *Roth* v. *United States*, 354 U. S. 476 (1957), to *Miller* v. *California*, 413 U. S. 15 (1973), before the modern obscenity rule jelled; that it took over 40 years, from *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939), to *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), for the public forum category to settle out; and that a round half-century passed before the clear and present danger of *Schenck* v. *United States*, 249 U. S. 47 (1919), evolved into the modern incitement rule of *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*.

I cannot guess how much time will go by until the technologies of communication before us today have matured and their relationships become known. But until a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be just what JUSTICE BREYER does today: recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject. These are familiar judicial responsibilities in times when we know too little to risk the finality of precision, and attention to them will probably take us through the communications revolution. Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: "First, do no harm."

"once the categories are established . . . the categorical mode leads to briefs and arguments that concentrate much more on threshold characterization than on comparative analysis").

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I agree that § 10(a) is constitutional and that § 10(b) is unconstitutional, and I join Parts I, II, III, and V, and the judgment in part. I am not persuaded, however, that the asserted "important differences" between §§ 10(a) and 10(c), *ante*, at 760, are sufficient to justify striking down § 10(c). I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences. For that reason, I would find that § 10(c) also withstands constitutional scrutiny.

Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989); *Ginsberg* v. *New York*, 390 U. S. 629, 639–640 (1968). Cable television, like broadcast television, is a medium that is uniquely accessible to children, see *ante*, at 744–745, and, of course, children have equally easy access to public access channels as to leased access channels. By permitting a cable operator to prevent transmission of patently offensive sex-related programming, §§ 10(a) and 10(c) further the interest of protecting children.

Furthermore, both provisions are permissive. Neither presents an outright ban on a category of speech, such as we struck down in *Sable Communications of Cal., Inc.* v. *FCC*, *supra*. Sections 10(a) and 10(c) leave to the cable operator the decision whether to broadcast indecent programming, and, therefore, are less restrictive than an absolute governmental ban. Certainly § 10(c) is not *more* restrictive than § 10(a) in this regard.

It is also significant that neither § 10(a) nor § 10(c) is more restrictive than the governmental speech restriction we upheld in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). I agree with JUSTICE BREYER that we should not yet under-

take fully to adapt our First Amendment doctrine to the new context we confront here. Because we refrain from doing so, the precedent established by *Pacifica* offers an important guide. Section 10(c), no less than § 10(a), is within the range of acceptability set by *Pacifica.* See *ante,* at 744–747.

The distinctions upon which the Court relies in deciding that § 10(c) must fall while § 10(a) survives are not, in my view, constitutionally significant. Much emphasis is placed on the differences in the origins of leased access and public access channels. To be sure, the leased access channels covered by § 10(a) were a product of the Federal Government, while the public access channels at issue in § 10(c) arose as part of the cable franchises awarded by municipalities, see *ante,* at 761–762, but I am not persuaded that the difference in the origin of the access channels is sufficient to justify upholding § 10(a) and striking down § 10(c). The interest in protecting children remains the same, whether on a leased access channel or a public access channel, and allowing the cable operator the option of prohibiting the transmission of indecent speech seems a constitutionally permissible means of addressing that interest. Nor is the fact that public access programming may be subject to supervisory systems in addition to the cable operator, see *ante,* at 761–763, sufficient in my mind to render § 10(c) so ill tailored to its goal as to be unconstitutional.

Given the compelling interest served by § 10(c), its permissive nature, and its fit within our precedent, I would hold § 10(c), like § 10(a), constitutional.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG joins, concurring in part, concurring in the judgment in part, and dissenting in part.

The plurality opinion, insofar as it upholds § 10(a) of the 1992 Cable Act, is adrift. The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal signifi-

cance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. This is the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings. Rather than undertake this task, however, the plurality just declares that, all things considered, § 10(a) seems fine. I think the implications of our past cases for these cases are clearer than the plurality suggests, and they require us to hold § 10(a) invalid. Though I join Part III of the opinion (there for the Court) striking down § 10(b) of the Act, and concur in the judgment that § 10(c) is unconstitutional, with respect I dissent from the remainder.

I

Two provisions of the 1992 Act, §§ 10(a) and (c), authorize the operator of a cable system to exclude certain programming from two different kinds of channels. Section 10(a) concerns leased access channels. These are channels the cable operator is required by federal law to make available to unaffiliated programmers without exercising any control over program content. The statute allows a cable operator to enforce a written and published policy of prohibiting on these channels any programming it "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards," speech we can refer to as "indecent programming."

Section 10(c) involves public, educational, and governmental access channels (or PEG access channels, as they are known). These are channels set aside for use by members of the public, governmental authorities, and local school systems. As interpreted by the Federal Communications Commission (FCC), § 10(c) requires the agency to make regu-

lations enabling cable operators to prohibit indecent programming on PEG access channels. See *ante*, at 734–736 (quoting statutory provisions in full and discussing interpretive regulations).*

Though the two provisions differ in significant respects, they have common flaws. In both instances, Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. The plurality at least recognizes this as state action, *ante*, at 737, avoiding the mistake made by the Court of Appeals, *Alliance for Community Media* v. *FCC*, 56 F. 3d 105, 112–121 (CADC 1995). State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State. Cf. *Hunter* v. *Erickson*, 393 U. S. 385, 389–390 (1969) (state action under the Fourteenth Amendment).

The plurality balks at taking the next step, however, which is to advise us what standard it applies to determine whether the state action conforms to the First Amendment. Sections 10(a) and (c) disadvantage nonobscene, indecent programming, a protected category of expression, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989), on the basis of its content. The Constitution in general does not tolerate content-based restriction of, or discrimination against, speech. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"); *Carey* v. *Brown*, 447 U. S. 455, 461–463 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). In the

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*The Telecommunications Act of 1996, §§ 506(a), (b), 110 Stat. 136, 137, permits a cable operator to refuse to transmit any leased or public access program or portion thereof which contains "obscenity, indecency, or nudity." The constitutionality of the 1996 amendments, to the extent they differ from the provisions here, is not before us.

realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen* v. *California,* 403 U. S. 15, 24 (1971). "[E]ach person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 641 (1994). We therefore have given "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.,* at 642.

Sections 10(a) and (c) are unusual. They do not require direct action against speech, but do authorize a cable operator to deny the use of its property to certain forms of speech. As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment, *Hudgens* v. *NLRB,* 424 U. S. 507 (1976), and if §§ 10(a) and (c) were no more than affirmations of this principle they might be unremarkable. Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies. These laws cannot survive this exacting review. However compelling Congress' interest in shielding children from indecent programming, the provisions in these cases are not drawn with enough care to withstand scrutiny under our precedents.

II

Before engaging the complexities of cable access channels and explaining my reasons for thinking all of § 10 unconstitutional, I start with the most disturbing aspect of the plurality opinion: its evasion of any clear legal standard in deciding these cases. See *ante*, at 741 (disavowing need to "declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here").

The plurality begins its flight from standards with a number of assertions nobody disputes. I agree, of course, that it would be unwise "to declare a rigid single standard, good for now and for all future media and purposes," *ante*, at 742. I do think it necessary, however, to decide what standard applies to discrimination against indecent programming on cable access channels in the present state of the industry. We owe at least that much to public and leased access programmers whose speech is put at risk nationwide by these laws.

In a similar vein, we are admonished, these cases are complicated, not simple; the importance of contextual review, we are told, cannot be evaded by recourse to simple analogies. *Ante*, at 739–743, 748. All this is true, but use of a standard does not foreclose consideration of context. Indeed, if strict scrutiny is an instance of "judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems," *ante*, at 741, this is a grave indictment of our First Amendment jurisprudence, which relies on strict scrutiny in a number of settings where context is important. I have expressed misgivings about judicial balancing under the First Amendment, see *Burson* v. *Freeman*, 504 U. S. 191, 211–212 (1992) (concurring opinion); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 124–125 (1991) (opinion concurring in judgment), but strict scrutiny at least confines the balancing process in a manner protective of speech; it does not disable government from addressing serious problems,

but does ensure that the solutions do not sacrifice speech to a greater extent than necessary.

The plurality claims its resistance to standards is in keeping with our case law, where we have shown a willingness to be flexible in confronting novel First Amendment problems. The cases it cites, *ante*, at 740–741, however, demonstrate the opposite of what the plurality supposes: In each, we developed specialized or more or less stringent standards when certain contexts demanded them; we did not avoid the use of standards altogether. Indeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech. Yet formulations like strict scrutiny, used in a number of constitutional settings to ensure that the inequities of the moment are subordinated to commitments made for the long run, see *Simon & Schuster*, *supra*, at 115–116; *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983), mean little if they can be watered down whenever they seem too strong. They mean still less if they can be ignored altogether when considering a case not on all fours with what we have seen before.

The plurality seems distracted by the many changes in technology and competition in the cable industry. See *ante*, at 741–742; *ante*, at 776–777 (SOUTER, J., concurring). The laws challenged here, however, do not retool the structure of the cable industry or (with the exception of § 10(b)) involve intricate technologies. The straightforward issue here is whether the Government can deprive certain speakers, on the basis of the content of their speech, of protections af-

forded all others. There is no reason to discard our existing First Amendment jurisprudence in answering this question.

While it protests against standards, the plurality does seem to favor one formulation of the question in these cases: namely, whether the Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Ante*, at 743. (Though the plurality frowns on any effort to settle on a form of words, it likes this formulation well enough to repeat it; see *ante*, at 741.) This description of the question accomplishes little, save to clutter our First Amendment case law by adding an untested rule with an uncertain relationship to the others we use to evaluate laws restricting speech. The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide these cases without uttering some sort of standard; so it has settled for synonyms. "[C]lose judicial scrutiny," *ibid.*, is substituted for strict scrutiny, and "extremely important problem," *ante*, at 743, or "extraordinary proble[m]," *ante*, at 741, is substituted for "compelling interest." The admonition that the restriction not be unnecessarily great in light of the interest it serves, *ante*, at 743, is substituted for the usual narrow tailoring requirements. All we know about the substitutes is that they are inferior to their antecedents. We are told the Act must be "appropriately tailored," *ante*, at 741, "sufficiently tailored," *ante*, at 743, or "carefully and appropriately addressed," *ante*, at 748, to the problems at hand—anything, evidently, except narrowly tailored.

These restatements have unfortunate consequences. The first is to make principles intended to protect speech easy to manipulate. The words end up being a legalistic cover for an ad hoc balancing of interests; in this respect the plurality succeeds after all in avoiding the use of a standard. Second, the plurality's exercise in pushing around synonyms for the words of our usual standards will sow confusion in the courts bound by our precedents. Those courts, and lawyers in the

communications field, now will have to discern what difference there is between the formulation the plurality applies today and our usual strict scrutiny. I can offer little guidance, except to note the unprotective outcome the plurality reaches here. This is why comparisons and analogies to other areas of our First Amendment case law become a responsibility, rather than the luxury the plurality considers them to be. The comparisons provide discipline to the Court and guidance for others, and give clear content to our standards—all the things I find missing in the plurality's opinion. The novelty and complexity of these cases is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy.

Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech where emerging technologies are concerned, because we are unsure what standard should be used to assess them. JUSTICE SOUTER recommends to the Court the precept, "'First, do no harm,'" *ante*, at 778. The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it. We have before us an urgent claim for relief against content-based discrimination, not a dry run.

I turn now to the issues presented, and explain why strict scrutiny is warranted.

III

A

Cable operators deliver programming from four sources: retransmission of broadcast stations; programming purchased from professional vendors (including national services like ESPN and Nickelodeon) and delivered by satellite; pro-

grams created by the cable operator itself; and access channels (PEG and leased), the two kinds of programming at issue here. See Mueller, Note, Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response, 38 DePaul L. Rev. 1051, 1056–1057 (1989) (hereinafter Mueller). See also *Turner Broadcasting*, 512 U. S., at 628–629.

PEG access channels grew out of local initiatives in the late 1960's and early 1970's, before the Federal Government began regulating cable television. Mueller 1061. Local franchising was the first form of cable regulation, arising from the need of localities to control access to public rights-of-way and easements and to minimize disruption to traffic and other public activity from the laying of cable lines. See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video § 3.01[3] (1996) (hereinafter Brenner); *Turner Broadcasting*, *supra*, at 628 ("[T]he cable medium may depend for its very existence upon express permission from local governing authorities"). A local government would set up a franchise authority to oversee the cable system and to negotiate a franchise agreement specifying the cable operator's rights and obligations. See Brenner § 3.01; § 3.01[4] (discussing States where local franchising has now been displaced by state regulation). Cf. 47 U. S. C. § 522(10) (defining franchise authority). A franchise, now mandatory under federal law except for systems operating without them prior to 1984, § 541(b), is an authorization, akin to a license, by a franchise authority permitting the construction or operation of a cable system. § 522(8). From the early 1970's onward, franchise authorities began requiring operators to set aside access channels as a condition of the franchise. See Mueller 1061–1062; D. Agosta, C. Rogoff, & A. Norman, The Participate Report: A Case Study of Public Access Cable Television in New York State 24 (1990) (hereinafter Agosta), attached as Exhibit K to Joint Comments for the Alliance for

Community Media et al., filed with the FCC under MM Docket No. 92–258 (hereinafter FCC Record).

The FCC entered the arena in 1972, requiring the cable companies servicing the country's largest television markets to set aside four access channels (one each for public, educational, governmental, and leased programming) by a date certain, and to add channel capacity if necessary to meet the requirement. *Cable Television Report and Order*, 36 F. C. C. 2d 141, 189–198 (1972). See also *In re Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251*, 59 F. C. C. 2d 294, 303, 321 (1976) (modifying the 1972 rules). We struck down the access rules as beyond the FCC's authority under the Communications Act of 1934. *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 708–709 (1979).

When Congress turned its attention to PEG access channels in 1984, it recognized that "reasonable third-party access to cable systems will mean a wide diversity of information sources for the public—the fundamental goal of the First Amendment—without the need to regulate the content of programming provided over cable." H. R. Rep. No. 98–934, p. 30 (1984). It declined, however, to set new federal mandates or authorize the FCC to do so. Since "[a]lmost all recent franchise agreements provide for access by local governments, schools, and non-profit and community groups" over some channels, the 1984 Act instead "continue[d] the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to such use." *Ibid.*

Section 611 of the Communications Act of 1934, added by the Cable Communications Policy Act of 1984 (1984 Act), authorized local franchise authorities to require cable operators to set aside channel capacity for PEG access when seeking new franchises or renewal of old ones. 47 U. S. C. § 531(b).

Franchise authorities may enforce franchise agreements, § 531(c), but they lack the power to impose requirements beyond those authorized by federal law, § 531(a). But cf. § 557(a) (grandfathering as valid all pre-1984 franchise agreements for the remainder of their term). Federal law also allows a franchise authority to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." § 541(a)(4)(B). Prior to the passage of § 10(c) of the 1992 Act, the cable operator, save for implementing provisions of its franchise agreement limiting obscene or otherwise constitutionally unprotected cable programming, § 544(d), was forbidden any editorial control over PEG access channels. 47 U. S. C. § 531(e) (1988 ed.).

Congress has not, in the 1984 Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.

My principal concern is with public access channels (the P of PEG). These are the channels open to programming by members of the public. Petitioners here include public access programmers and viewers who watch their shows. By contrast, educational and governmental access channels (the E and G of PEG) serve other speakers. Under many franchises, educational channels are controlled by local school systems, which use them to provide school information and educational programs. Governmental access channels are committed by the cable franchise to the local municipal government, which uses them to distribute information to constituents on public affairs. Mueller 1065–1066. No local governmental entity or school system has petitioned for relief in these cases, and none of the petitioners who are viewers has asserted an interest in viewing educational or governmental programming or briefed the relevant issues.

B

The public access channels established by franchise agreements tend to have certain traits. They are available at low or no cost to members of the public, often on a first-come, first-served basis. Brenner § 6.04[3][a]–[b], at 6–38. The programmer on one of these channels most often has complete control over, as well as liability for, the content of its show. *Ibid.;* Mueller 1064. The entity managing the technical aspects of public access, such as scheduling and transmission, is not always the cable operator; it may be the local government or a third party that runs the access centers, which are facilities made available for the public to produce programs and transmit them on the access channels. Brenner § 6.04[7], at 6–48.

Public access channels meet the definition of a public forum. We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. *Perry*, 460 U. S., at 45; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). "The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992).

Public access channels fall in the second category. Required by the franchise authority as a condition of the franchise and open to all comers, they are a designated public forum of unlimited character. The House Report for the 1984 Act is consistent with this view. It characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic mar-

ketplace of ideas." H. R. Rep. No. 98–934, *supra*, at 30. Public fora do not have to be physical gathering places, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830 (1995), nor are they limited to property owned by the government, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. 10A E. McQuillin, Law of Municipal Corporations § 30.32 (3d ed. 1990); *Hague*, *supra*, at 515 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.

It is important to understand that public access channels are public fora created by local or state governments in the cable franchise. Section § 10(c) does not, as the Court of Appeals thought, just return rightful First Amendment discretion to the cable operator, see *Alliance for Community Media*, 56 F. 3d, at 114. Cable operators have First Amendment rights, of course; restrictions on entry into the cable business may be challenged under the First Amendment, *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986), and a cable operator's activities in originating programs or exercising editorial discretion over programs others provide on its system also are protected, *Turner Broadcasting*, 512 U. S., at 636. But cf. *id.*, at 656 (distinguishing discretion of cable operators from that of newspaper editors). Yet the editorial discretion of a cable operator is a function of the cable franchise it receives from local government. The operator's right to exercise any editorial discretion over cable service disappears if its franchise is terminated. See 47 U. S. C. § 541(b) (cable service may not

be offered without a franchise); § 546 (prescribing procedures and standards for renewal). Cf. Brenner § 3.07[9][a] (franchise terms of 15 years are the norm); § 3.07[15] (typical franchise agreements recognize the absolute right of the franchiser to refuse renewal at expiration of term). If the franchise is transferred to another, so is the right of editorial discretion. The cable operator may own the cables transmitting the signal, but it is the franchise—the agreement between the cable operator and the local government—that allocates some channels to the full discretion of the cable operator while reserving others for public access.

In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87 (1980). Section 10(c) thus restores no power of editorial discretion over public access channels that the cable operator once had; the discretion never existed. It vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. By enacting a law in 1992 excluding indecent programming from protection but retaining the prohibition on cable operators' editorial control over all other protected speech, the Federal Government at the same time ratified the public-forum character of public access channels but discriminated against certain speech based on its content.

The plurality refuses to analyze public access channels as public fora because it is reluctant to decide "the extent to which private property can be designated a public forum," *ante*, at 742. We need not decide here any broad issue whether private property can be declared a public forum by simple governmental decree. That is not what happens in the creation of public access channels. Rather, in return for granting cable operators easements to use public rights-of-

way for their cable lines, local governments have bargained for a right to use cable lines for public access channels. JUSTICE THOMAS resists public-forum analysis because he sees no evidence of a "formal easement." *Post*, at 828. Under general principles of property law, no particular formalities are necessary to create an easement. Easements may be created by contract. 2 G. Thompson, Commentaries on the Modern Law of Real Property §§ 331–332 (1980); 3 H. Tiffany, The Law of Real Property § 776 (3d ed. 1939). A franchise agreement is a contract, and in those agreements the cable operator surrenders his power to exclude certain programmers from use of his property for specific purposes. A state court confronted with the issue would likely hold the franchise agreement to create a right of access equivalent to an easement in land. So one can even view these cases as a local government's dedication of its own property interest to speech by members of the public. In any event, it seems to me clear that when a local government contracts to use private property for public expressive activity, it creates a public forum.

Treating access channels as public fora does not just place a label on them, as the plurality suggests, see *ante*, at 750. It defines the First Amendment rights of speakers seeking to use the channels. When property has been dedicated to public expressive activities, by tradition or government designation, access is protected by the First Amendment. Regulations of speech content in a designated public forum, whether of limited or unlimited character, are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *Lee*, 505 U. S., at 678. Unless there are reasons for applying a lesser standard, § 10(c) must satisfy this stringent review.

C

Leased access channels, as distinct from public access channels, are those the cable operator must set aside for un-

affiliated programmers who pay to transmit shows of their own without the cable operator's creative assistance or editorial approval. In my view, strict scrutiny also applies to § 10(a)'s authorization to cable operators to exclude indecent programming from these channels.

Congress created leased access channels in the 1984 Act. Section 612 of the Act, as amended, requires a cable system with more than 36 channels to set aside a certain percentage of its channels (up to 15%, depending on the size of the system) "for commercial use by persons unaffiliated with the operator." 47 U. S. C. § 532(b)(1). Commercial use means "provision of video programming, whether or not for profit." § 532(b)(5). When an unaffiliated programmer seeks access, the cable operator shall set "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system," § 532(c)(1). Cf. 47 CFR § 76.971 (1995) (rules governing terms and conditions of leased access). The price may not exceed the maximum charged any unaffiliated programmer in the same program category for the use of nonaccess channels. § 76.970. Aggrieved programmers have recourse to federal district court and the FCC (if there are repeated violations) to compel access on appropriate terms. 47 U. S. C. §§ 532(d), (e).

Before 1992, cable operators were forbidden editorial control over any video programming on leased access channels, and could not consider the content of the programming except to set the price of access, 47 U. S. C. § 532(c)(2) (1988 ed.). But cf. 47 U. S. C. § 532(h) (prohibiting programs that are obscene or otherwise unprotected under the Constitution on leased access channels). Section 10(a) of the 1992 Act modifies the no-discretion rule by allowing cable operators to reject, pursuant to a written and published policy, programs they reasonably believe to be indecent. § 532(h). Under § 10(b) of the Act, any indecent programming must be

segregated onto one channel and blocked unless the subscriber requests that the channel be provided to him. § 532(j); 47 CFR § 76.701 (1995).

Two distinctions between public and leased access channels are important. First, whereas public access channels are required by state and local franchise authorities (subject to certain federal limitations), leased access channels are created by federal law. Second, whereas cable operators never have had editorial discretion over public access channels under their franchise agreements, the leased access provisions of the 1984 Act take away channels the operator once controlled. Cf. *Midwest Video*, 440 U. S., at 708, n. 17 (federal mandates "compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers"). In this sense, § 10(a) now gives back to the operator some of the discretion it had before Congress imposed leased access requirements in the first place.

The constitutionality under *Turner Broadcasting*, 512 U. S., at 665–668, of requiring a cable operator to set aside leased access channels is not before us. For purposes of these cases, we should treat the cable operator's rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording protection to certain programmers. I cannot agree with JUSTICE THOMAS, *post*, at 821–822, that the cable operator's rights inform this analysis.

Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others. The plurality resists any classification of leased access channels (as created in the 1984 Act) as a common-carrier provision, *ante*, at 739–740, although we described in just those

terms the access (including leased access) rules promulgated by the FCC in 1976:

> "The access rules plainly impose common-carrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. Operators are prohibited from determining or influencing the content of access programming. And the rules delimit what operators may charge for access and use of equipment." *Midwest Video*, 440 U. S., at 701–702 (citations and footnotes omitted).

Indeed, we struck down the FCC's rules as beyond the agency's statutory authority at the time precisely because they made cable operators common carriers. *Id.*, at 702–709. The FCC characterizes § 612 as a form of common-carrier requirement, App. to Pet. for Cert. 139a–140a, as does the Government, Brief for Federal Respondents 23.

Section 10(a) authorizes cable operators to ban indecent programming on leased access channels. We have held that a law precluding a common carrier from transmitting protected speech is subject to strict scrutiny, *Sable Communications*, 492 U. S., at 131 (striking down ban on indecent telephonic communications), but we have not had occasion to consider the standard for reviewing a law, such as § 10(a), permitting a carrier in its discretion to exclude specified speech.

Laws removing common-carriage protection from a single form of speech based on its content should be reviewed under the same standard as content-based restrictions on speech in a public forum. Making a cable operator a common carrier does not create a public forum in the sense of taking property from private control and dedicating it to public use; rather, regulations of a common carrier dictate the manner in which private control is exercised. A common-carriage

mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication. This purpose is evident in the statute itself and in the committee findings supporting it. Congress described the leased access requirements as intended "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U. S. C. § 532(a). The House Committee reporting the 1984 cable bill acknowledged that, in general, market demand would prompt cable operators to provide diverse programming. It recognized, though, the incentives cable operators might have to exclude "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or . . . competes with a program service already being provided by that cable system." H. R. Rep. No. 98–934, at 48. In its view, the leased access provisions were narrowly drawn structural regulations of private industry, cf. *Associated Press* v. *United States*, 326 U. S. 1 (1945), to enhance the free flow and diversity of information available to the public without governmental intrusion into decisions about program content. H. R. Rep. No. 98–934, *supra*, at 32–35. The functional equivalence of designating a public forum and mandating common carriage suggests the same scrutiny should be applied to attempts in either setting to impose content discrimination by law. Under our precedents, the scrutiny is strict.

> "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (university meeting facilities); *City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting); *Southeast-*

> *ern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975) (municipal theater). Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry,* 460 U. S., at 45–46 (footnote omitted).

In *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972), we made clear that selective exclusions from a public forum were unconstitutional. Invoking the First and Fourteenth Amendments to strike down a city ordinance allowing only labor picketing on any public way near schools, we held the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.,* at 96.

> "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Ibid.*

Since the same standard applies to exclusions from limited or unlimited designated public fora as from traditional forums, *Lee,* 505 U. S., at 678, there is no reason the kind of selective exclusion we condemned in *Mosley* should be tolerated here.

The plurality acknowledges content-based exclusions from the right to use a common carrier could violate the First Amendment. It tells us, however, that it is wary of analogies to doctrines developed elsewhere, and so does not address this issue. *Ante,* at 749. This newfound aversion to analogical reasoning strikes at a process basic to legal analy-

sis. See E. Levi, An Introduction to Legal Reasoning 1–2 (1949). I am not suggesting the plurality should look far afield to other areas of law; these are settled First Amendment doctrines dealing with state action depriving certain speakers of protections afforded to all others.

In all events, the plurality's unwillingness to consider our public-forum precedents does not relieve it of the burden of explaining why strict scrutiny should not apply. Except in instances involving well-settled categories of proscribable speech, see *R. A. V.*, 505 U. S., at 382–390, strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech. The purpose of forum analysis is to determine whether, because of the property or medium where speech takes place, there should be any dispensation from this rule. See *Consolidated Edison Co. of N. Y.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 538–539 (1980). In the context of government property, we have recognized an exception "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," and in those circumstances, we have said, regulations of speech need only be reasonable and viewpoint neutral. *Lee*, *supra*, at 678–679. Here, of course, the Government has not dedicated the cable operator's property for leased access to serve some proprietary function of its own; it has done so to provide a forum for a vital class of programmers who otherwise would be excluded from cable television.

The question remains whether a dispensation from strict scrutiny might be appropriate because § 10(a) restores in part an editorial discretion once exercised by the cable operator over speech occurring on its property. This is where public-forum doctrine gives guidance. Common-carrier requirements of leased access are little different in function from designated public fora, and no different standard of review should apply. It is not that the functional equivalence of leased access channels to designated public fora

compels strict scrutiny; rather, it simply militates against recognizing an exception to the normal rule.

Perhaps, as the plurality suggests, *ante*, at 749–750, § 10(a) should be treated as a limitation on a forum rather than an exclusion from it. This would not change the analysis, however. If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation. See Post, Between Governance and Management: the History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1753 (1987). We have allowed content-based limitations of public fora, but only when necessary to serve specific institutional ends. See *Perry*, 460 U. S., at 48 (school mailboxes, if considered designated public fora, could be limited to mailings from "organizations that engage in activities of interest and educational relevance to students"); *Widmar* v. *Vincent*, 454 U. S. 263, 267–268, n. 5 (1981) (recognizing a public university could limit the use of its facilities by reasonable regulations compatible with its mission of education); *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175, n. 8 (1976) (in assessing a teacher's right to speak at a school board meeting, considering it obvious that "public bodies may confine their meetings to specified subject matter"). The power to limit or redefine fora for a specific legitimate purpose, see *Rosenberger*, 515 U. S., at 829–830, does not allow the government to exclude certain speech or speakers from them for any reason at all.

Madison Joint School Dist., *supra*, illustrates the point. The Wisconsin Employment Relations Commission had ordered a school board to prohibit school employees other than union representatives from speaking at its meetings on matters subject to collective bargaining between the board and the union. *Id.*, at 173. While recognizing the power of a State to limit school board meetings to certain subject mat-

ter, we held it could not confine the forum "to one category of interested individuals." *Id.*, at 175. The exclusion would skew the debate and deprive decisionmakers of the benefit of other voices. *Id.*, at 175–176.

It is no answer to say Congress does not have to create access channels at all, so it may limit access as it pleases. Whether or not a government has any obligation to make railroads common carriers, under the Equal Protection Clause it could not define common carriage in ways that discriminate against suspect classes. See *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962) *(per curiam)* (States may not require railroads to segregate the races). For the same reason, even if Congress has no obligation to impose common-carriage rules on cable operators or retain them forever, it is not at liberty to exclude certain forms of speech from their protection on the suspect basis of content. See *Perry*, *supra*, at 45–46.

I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny. This possibility seems to trouble the plurality, which wonders if a local government must "show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)." *Ante*, at 750. This is not the correct analogy. These cases are more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music. The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here.

Giving government free rein to exclude speech it dislikes by delimiting public fora (or common-carriage provisions) would have pernicious effects in the modern age. Minds are

not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. Cf. *United States* v. *Kokinda*, 497 U. S. 720, 737 (1990) (KENNEDY, J., concurring in judgment). The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more accustomed. It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

D

The Government advances a different argument for not applying strict scrutiny in these cases. The nature of access channels to one side, it argues the nature of the speech in question—indecent broadcast (or cablecast)—is subject to the lower standard of review it contends was applied in *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748 (1978) (upholding an FCC order declaring the radio broadcast of indecent speech during daytime hours to be sanctionable).

Pacifica did not purport, however, to apply a special standard for indecent broadcasting. Emphasizing the narrowness of its holding, the Court in *Pacifica* conducted a context-specific analysis of the FCC's restriction on indecent programming during daytime hours. See *id.*, at 750. See also *Sable Communications*, 492 U. S., at 127–128 (underscoring the narrowness of *Pacifica*). It relied on the general rule that "broadcasting . . . has received the most limited First Amendment protection." 438 U. S., at 748. We already have rejected the application of this lower broadcast standard of review to infringements on the liberties of cable operators, even though they control an important communica-

tions medium. *Turner Broadcasting,* 512 U. S., at 637–641. There is even less cause for a lower standard here.

Pacifica did identify two important considerations relevant to the broadcast of objectionable material. First, indecent broadcasting "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U. S., at 748. Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.,* at 749. *Pacifica* teaches that access channels, even if analogous to ordinary public fora from the standpoint of the programmer, must also be considered from the standpoint of the viewer. An access channel is not a forum confined to a discrete public space; it can bring indecent expression into the home of every cable subscriber, where children spend astounding amounts of time watching television, cf. *ante,* at 744–745 (citing studies). Though in *Cohen* we explained that people in public areas may have to avert their eyes from messages that offend them, 403 U. S., at 21, we further acknowledged that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue," *ibid.* See *Hess* v. *Indiana,* 414 U. S. 105, 108 (1973) *(per curiam); Rowan* v. *Post Office Dept.,* 397 U. S. 728, 736–738 (1970). This is more true when the interests of children are at stake. See *id.,* at 738 ("[T]he householder [should not] have to risk that offensive material come into the hands of his children before it can be stopped").

These concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech. Other than the few categories of expression that can be proscribed, see *R. A. V.,* 505 U. S., at 382–390, we have been reluctant to mark off new categories of speech for diminished constitutional protection. Our hesitancy reflects

skepticism about the possibility of courts drawing principled distinctions to use in judging governmental restrictions on speech and ideas, *Cohen*, 403 U. S., at 25, a concern heightened here by the inextricability of indecency from expression. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.*, at 26. The same is true of forbidding programs indecent in some respect. In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying "otherwise inexpressible emotions." *Ibid.* In scientific programs, the more graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. Under our traditional First Amendment jurisprudence, factors perhaps justifying some restriction on indecent cable programming may all be taken into account without derogating this category of protected speech as marginal.

IV

At a minimum, the proper standard for reviewing §§ 10(a) and (c) is strict scrutiny. The plurality gives no reason why it should be otherwise. I would hold these enactments unconstitutional because they are not narrowly tailored to serve a compelling interest.

The Government has no compelling interest in restoring a cable operator's First Amendment right of editorial discretion. As to § 10(c), Congress has no interest at all, since under most franchises operators had no rights of editorial discretion over PEG access channels in the first place. As to § 10(a), any governmental interest in restoring operator discretion over indecent programming on leased access channels is too minimal to justify the law. First, the transmission of indecent programming over leased access channels

is not forced speech of the operator. *Turner Broadcasting, supra,* at 655–656; *PruneYard,* 447 U. S., at 87. Second, the discretion conferred by the law is slight. The operator is not authorized to place programs of its own liking on the leased access channels, nor to remove other speech (racist or violent, for example) that might be offensive to it or to viewers. The operator is just given a veto over the one kind of lawful speech Congress disdains.

Congress does have, however, a compelling interest in protecting children from indecent speech. *Sable Communications,* 492 U. S., at 126; *Ginsberg* v. *New York,* 390 U. S. 629, 639–640 (1968). See also *Pacifica,* 438 U. S., at 749–750 (same). So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors. This interest is substantial enough to justify some regulation of indecent speech even under, I will assume, the indecency standard used here.

Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels. First, to the extent some operators may allow indecent programming, children in localities those operators serve will be left unprotected. Partial service of a compelling interest is not narrow tailoring. *FCC* v. *League of Women Voters of Cal.,* 468 U. S. 364, 396 (1984) (asserted interest in keeping noncommercial stations free from controversial or partisan opinions not served by ban on station editorials, if such opinions could be aired through other programming); *Florida Star* v. *B. J. F.,* 491 U. S. 524, 540–541 (1989) (selective ban on publication of rape victim's name in some media but not others not narrowly tailored). Cf. *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 73 (1983) (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster under commercial-speech standards). Put another way, the

interest in protecting children from indecency only at the caprice of the cable operator is not compelling. Perhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channels, but the First Amendment does not permit this sort of ill fit between a law restricting speech and the interest it is said to serve.

Second, to the extent cable operators prohibit indecent programming on access channels, not only children but adults will be deprived of it. The Government may not "reduce the adult population . . . to [viewing] only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). It matters not that indecent programming might be available on the operator's other channels. The Government has no legitimate interest in making access channels pristine. A block-and-segregate requirement similar to § 10(b), but without its constitutional infirmity of requiring persons to place themselves on a list to receive programming, see *ante*, at 756–757, protects children with far less intrusion on the liberties of programmers and adult viewers than allowing cable operators to ban indecent programming from access channels altogether. When applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means. *Sable Communications*, *supra*, at 128–130. Cf. *Turner Broadcasting*, 512 U. S., at 664–668. There is none here.

Sections 10(a) and (c) present a classic case of discrimination against speech based on its content. There are legitimate reasons why the Government might wish to regulate or even restrict the speech at issue here, but §§ 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.

V

Not only does the plurality fail to apply strict scrutiny, but its reasoning is unpersuasive on its own terms.

The plurality declares § 10(c) unconstitutional because it interferes with local supervisory systems that "can set programming policy and approve or disapprove particular programming services." *Ante*, at 762. Replacing these local schemes with a cable operator veto would, in the plurality's view, "greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear," *ante*, at 766. Although the plurality terms these local schemes "public/nonprofit programming control systems," *ante*, at 763, it does not contend (nor does the record suggest) that any local board or access center has the authority to exclude indecent programming, or to do anything that would cast doubt on the status of public access channels as public fora. Cf. Agosta 88 (New York state law forbids editorial control over public access programs by either the cable operator or the municipality); Comments of Hillsborough County Board of County Commissioners 2, FCC Record (explaining county's inability to exclude indecent programming). Indeed, "[m]ost access centers surveyed do not prescreen at all, except, as in [two named localities], a high speed run-through for technical quality." P. Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (1992), reprinted in App. 61, 68. As the plurality acknowledges, the record indicates no response to indecent programming by local access centers (whether they prescreen or not) other than "requiring indemnification by programmers, certification of compliance with local standards, time segregation, [and] adult content advisories," *ante*, at 762. Those are measures that, if challenged, would likely survive strict scrutiny as narrowly tailored to safeguard children. If those measures, in the words of the plurality, "normally avoid, minimize, or eliminate any child-related

problems concerning 'patently offensive' programming" on public access channels, *ante*, at 763–764, one is left to wonder why the cable operator veto over leased access programming authorized in § 10(a) is constitutional even under the plurality's First Amendment analysis. Although I concur in its judgment that § 10(c) is invalid, I cannot agree with the plurality's reasoning.

In regard to § 10(a), the plurality's analysis there undermines its claims of faithfulness to our First Amendment jurisprudence and close attention to context.

First, the plurality places some weight on there being "nothing to stop 'adults who feel the need' from finding [indecent] programming elsewhere, say, on tape or in theaters," or on competitive services like direct broadcast television, *ante*, at 745. The availability of alternative channels of communication may be relevant when we are assessing content-neutral time, place, and manner restrictions, *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791, 802 (1989), but the fact that speech can occur elsewhere cannot justify a content-based restriction, *Southeastern Promotions*, 420 U. S., at 556; *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939).

Second, the plurality suggests the permissive nature of § 10(a) at least does not create the same risk of exclusion as a total ban on indecency. *Ante*, at 745–746. This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech. See, *e. g.*, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 130–137 (1992) (broad discretion of county administrator to award parade permits and to adjust permit fee according to content of speech violates First Amendment); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963) (informal threats to recommend criminal prosecutions and other pressure tactics by state moral-

ity commission against book publishers violate the First Amendment).

Third, based on its own factual speculations, the plurality discounts the risks created by the law that operators will not run indecent programming on access channels. The plurality takes "a glance at the programming that cable operators allow on their own (nonaccess) channels," and, espying some indecent programming there, supposes some cable operators may be willing to allow similar programs on leased access channels. *Ante*, at 746. This sort of surmise, giving the Government the benefit of the doubt when it restricts speech, is an unusual approach to the First Amendment, to put it mildly. Worse, it ignores evidence of industry structure that should cast doubt on the plurality's sanguine view of the probable fate of programming considered "indecent" under § 10(a). The plurality fails to note that, aside from the indecency provisions of § 10 tacked on in a Senate floor amendment, the 1992 Act strengthened the regulation of leased access channels because it was feared cable operators would exercise their substantial market power to exclude disfavored programmers. The congressional findings in the statute and the conclusions of the Senate Committee on Commerce, Science, and Transportation after more than two years of hearings on the cable market, see S. Rep. No. 102–92, pp. 3–4 (1991), are instructive. Leased access channels had been underused since their inception in 1984, the Senate Committee determined. *Id.*, at 30. Though it recognized the adverse economics of leased access for programmers may have been one reason for the underutilization, the Committee found the obstinacy of cable operators and their control over prices, terms, and conditions also were to blame. *Id.*, at 31.

> "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry

> the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." *Ibid.*

Perhaps some operators will choose to show the indecent programming they now may banish if they can command a better price than other access programmers are willing to pay. In the main, however, leased access programs are the ones the cable operator, for competitive reasons or otherwise, has no interest in showing. And because the cable operator may put to his own commercial use any leased access capacity not taken by unaffiliated programmers, 47 U. S. C. § 532(b)(4), operators have little incentive to allow indecent programming if they have excess capacity on leased access channels.

There is even less reason to think cable operators will choose to show indecent programs on public access channels. The operator is not paid, or paid much, for transmitting programs on these channels; public access programs may compete with the operator's own programs; the operator will wish to avoid unwanted controversy; and here, as with leased access channels, the operator may reclaim unused PEG capacity for its own paid use, 47 U. S. C. § 531(d)(1).

In the 1992 Act, Congress recognized cable operators might want to exclude unaffiliated or otherwise disfavored programmers from their channels, but it granted operators discretion to do so in regard to but a single category of speech. The obvious consequence invited by the discretion is exclusion. I am not sure why the plurality would suppose otherwise, or contend the practical consequences of § 10(a) would be no worse for programmers than those flowing from the sort of time-segregation requirement approved in *Pacifica*. See *ante*, at 746–747. Despite its claim of making

"a more contextual assessment" of these cases, *ante*, at 748, the plurality ignores a key difference of these cases from *Pacifica*. There, the broadcaster wanted to air the speech in question; here, the cable operator does not. So the safe harbor of late-night programming permitted by the FCC in *Pacifica* would likely promote speech, whereas suppression will follow from § 10(a).

VI

In agreement with the plurality's analysis of § 10(b) of the Act, insofar as it applies strict scrutiny, I join Part III of its opinion. Its position there, however, cannot be reconciled with upholding § 10(a). In the plurality's view, § 10(b), which standing alone would guarantee an indecent programmer some access to a cable audience, violates the First Amendment, but § 10(a), which authorizes exclusion of indecent programming from access channels altogether, does not. There is little to commend this logic or result. I dissent from the judgment of the Court insofar as it upholds the constitutionality of § 10(a).

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.

I agree with the principal opinion's conclusion that § 10(a) is constitutionally permissible, but I disagree with its conclusion that §§ 10(b) and (c) violate the First Amendment. For many years, we have failed to articulate how, and to what extent, the First Amendment protects cable operators, programmers, and viewers from state and federal regulation. I think it is time we did so, and I cannot go along with JUSTICE BREYER's assiduous attempts to avoid addressing that issue openly.

I

The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367

(1969), we held that, in light of the scarcity of broadcasting frequencies, the Government may require a broadcast licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.*, at 389. We thus endowed the public with a right of access "to social, political, esthetic, moral, and other ideas and experiences." *Id.*, at 390. That public right left broadcasters with substantial, but not complete, First Amendment protection of their editorial discretion. See, *e. g.*, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 117–118 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper").

In contrast, we have not permitted that level of government interference in the context of the print media. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), for instance, we invalidated a Florida statute that required newspapers to allow, free of charge, a right of reply to political candidates whose personal or professional character the paper assailed. We rejected the claim that the statute was constitutional because it fostered speech rather than restricted it, as well as a related claim that the newspaper could permissibly be made to serve as a public forum. *Id.*, at 256–258. We also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion. *Id.*, at 256.

Our First Amendment distinctions between media, dubious from their infancy,[1] placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was

[1] See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 638, and n. 5 (1994).

subject to the more onerous obligations shouldered by the broadcast media. See *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 496 (1986) (Blackmun, J., concurring) ("In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis"). Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.

Our first ventures into the world of cable regulation involved no claims arising under the First Amendment, and we addressed only the regulatory authority of the Federal Communications Commission (FCC) over cable operators.[2] Only in later cases did we begin to address the level of First Amendment protection applicable to cable operators. In *Preferred Communications*, for instance, when a cable operator challenged the city of Los Angeles' auction process for a single cable franchise, we held that the cable operator had stated a First Amendment claim upon which relief could be granted. *Id.*, at 493. We noted that cable operators communicate various topics "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." *Id.*, at 494. Cf. *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 707 (1979) *(Midwest Video II)* ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include"). But we then lik-

[2] See *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U. S. 649 (1972) *(Midwest Video I)*. Our decisions in *Southwestern Cable* and *Midwest Video I* were purely regulatory and gave no indication whether, or to what extent, cable operators were protected by the First Amendment.

ened the operators' First Amendment interests to those of broadcasters subject to *Red Lion*'s right of access requirement. 476 U. S., at 494–495.

Five years later, in *Leathers* v. *Medlock*, 499 U. S. 439 (1991), we dropped any reference to the relaxed scrutiny permitted by *Red Lion.* Arkansas had subjected cable operators to the State's general sales tax, while continuing to exempt newspapers, magazines, and scrambled satellite broadcast television. Cable operators, among others, challenged the tax on First Amendment grounds, arguing that the State could not discriminatorily apply the tax to some, but not all, members of the press. Though we ultimately upheld the tax scheme because it was not content based, we agreed with the operators that they enjoyed the protection of the First Amendment. We found that cable operators engage in speech by providing news, information, and entertainment to their subscribers and that they are "part of the 'press.'" 499 U. S., at 444.

Two Terms ago, in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994), we stated expressly what we had implied in *Leathers:* The *Red Lion* standard does not apply to cable television. 512 U. S., at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation"); *id.*, at 639 ("[A]pplication of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation"). While Members of the Court disagreed about whether the must-carry rules imposed by Congress were content based, and therefore subject to strict scrutiny, there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media. But see *id.*, at 670 (STEVENS, J., concurring in part and concurring in judgment) ("Cable operators' control of essential facilities provides a

basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media").

In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U. S., at 390. After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent. If *Tornillo* and *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986), are applicable, and I think they are, see *Turner*, *supra*, at 681–682 (O'CONNOR, J., concurring in part and dissenting in part), then, when there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion. Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

The Court in *Turner* found that the FCC's must-carry rules implicated the First Amendment rights of both cable operators and cable programmers. The rules interfered with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry, and they interfered with the programmers' ability to compete for space on the operators' channels. 512 U. S., at 636–637; *id.*, at 675–676 (O'CONNOR, J., concurring in part and dissenting in part). We implicitly recognized in *Turner* that the programmer's right to compete for channel space

is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S., at 256–258. Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers. Cf. *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756–757 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both"). Viewers have a general right to see what a willing operator transmits, but, under *Tornillo* and *Pacific Gas*, they certainly have no right to force an unwilling operator to speak.

By recognizing the general primacy of the cable operator's editorial rights over the rights of programmers and viewers, *Turner* raises serious questions about the merits of petitioners' claims. None of the petitioners in these cases are cable operators; they are all cable viewers or access programmers or their representative organizations. See Brief for Petitioners in No. 95–124, pp. 5–6; Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95–227, p. 3; Brief for Petitioners Alliance for Community Media et al. in No. 95–227, p. 3. It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality have adequately explained the source or justification of those asserted rights.

JUSTICE BREYER's detailed explanation of why he believes it is "unwise and unnecessary," *ante*, at 742, to choose a standard against which to measure petitioners' First Amendment claims largely disregards our recent attempt in *Turner*

to define that standard.[3] His attempt to distinguish *Turner* on the ground that it did not involve "the effects of television viewing on children," *ante*, at 748, is meaningless because that factual distinction has no bearing on the existence and ordering of the free speech rights asserted in these cases.

In the process of deciding not to decide on a governing standard, JUSTICE BREYER purports to discover in our cases an expansive, general principle permitting government to "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech." *Ante*, at 741. This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted. It is true that the standard I endorse lacks the "flexibility" inherent in the plurality's balancing approach, *ante*, at 740, but that relative rigidity is required by our precedents and is not of my own making.

In any event, even if the plurality's balancing test were an appropriate standard, it could only be applied to protect speech interests that, under the circumstances, are themselves protected by the First Amendment. But, by shifting the focus to the balancing of "complex" interests, *ante*, at 743, JUSTICE BREYER never explains whether (and if so, how) a programmer's ordinarily unprotected interest in affirmative transmission of its programming acquires constitutional significance on leased and public access channels. See

[3] Curiously, the plurality relies on "changes taking place in the law, the technology, and the industrial structure related to telecommunications," *ante*, at 742, to justify its avoidance of traditional First Amendment standards. If anything, as the plurality recognizes, *ante*, at 745, those recent developments—which include the growth of satellite broadcast programming and the coming influx of video dialtone services—suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems, thus effectively negating the primary justifications for treating cable operators differently from other First Amendment speakers.

ibid. ("interests of programmers in maintaining access channels"); *ibid.* ("interests served by the access requirements"). It is that question, left unanswered by the plurality, to which I now turn.

II

A

In 1984, Congress enacted 47 U. S. C. § 532(b), which generally requires cable operators to reserve approximately 10 to 15 percent of their available channels for commercial lease to "unaffiliated persons." Operators were prohibited from "exercis[ing] any editorial control" over these leased access channels. § 532(c)(2). In 1992, Congress withdrew part of its prohibition on the exercise of the cable operators' editorial control and essentially permitted operators to censor privately programming that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner." § 532(h).

Since 1984, federal law has also permitted local franchise authorities to require cable operators to set aside certain channels for "public, educational, or governmental use" (PEG channels),[4] § 531(a), but unlike the leased access provisions, has not directly required operators to do so. As with leased access, Congress generally prohibited cable operators from exercising "any editorial control" over public access channels, but provided that operators could prohibit the transmission of obscene programming. § 531(e); see § 544(d). Section 10(c) of the 1992 Act broadened the operators' editorial control and instructed the FCC to promulgate regulations enabling a cable operator to ban from its public access channels "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Note following 47 U. S. C. § 531. The

[4] Because indecent programming on PEG channels appears primarily on public access channels, I will generally refer to PEG access as public access.

FCC subsequently promulgated regulations in its Second Report and Order, *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels*, 8 FCC Rcd 2638 (1993) (Second Report and Order). The FCC interpreted Congress' reference to "sexually explicit conduct" to mean that the programming must be indecent, and its regulations therefore permit cable operators to ban indecent programming from their public access channels. *Id.*, at 2640.

As I read these provisions, they provide leased and public access programmers with an expansive and federally enforced statutory right to transmit virtually any programming over access channels, limited only by the bounds of decency. It is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions. Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 127 (1989) (striking down total ban on indecent dial-a-porn messages). At the same time, however, the Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity.[5] We have not found a First Amendment violation in statutory schemes that substantially expand the speech opportunities of the person or entity challenging the scheme.

There is no getting around the fact that leased and public access are a type of forced speech. Though the constitutionality of leased and public access channels is not directly at

[5] Even in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87–88 (1980), for instance, we permitted California's compelled access rule only because it did not burden or conflict with the mall owner's own speech.

issue in these cases,[6] the position adopted by the Court in *Turner* ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny. See *Turner*, 512 U. S., at 661–662 (citing *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989); *United States* v. *O'Brien*, 391 U. S. 367 (1968)). Under that view, content-neutral governmental impositions on an operator's editorial discretion may be sustained only if they further an important governmental interest unrelated to the suppression of free speech and are no greater than is essential to further the asserted interest. See *id.*, at 377. Of course, the analysis I joined in *Turner* would have required strict scrutiny. 512 U. S., at 680–682 (O'CONNOR, J., concurring in part and dissenting in part).

Petitioners must concede that cable access is not a constitutionally required entitlement and that the right they claim to leased and public access has, by definition, been governmentally created at the expense of cable operators' editorial

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[6] Following *Turner*, some commentators have questioned the constitutionality of leased and public access. See, *e. g.*, J. Goodale, All About Cable § 6.04[5], pp. 6–38.6 to 6–38.7 (1996) ("In the wake of the Supreme Court's decision in the *Turner Broadcasting* case, the constitutionality of both PEG access and leased access requirements would seem open to searching reexamination. . . . To the extent that an access requirement . . . is considered to be a content-based restriction on the speech of a cable system operator, it seems clear, after *Turner Broadcasting*, that such a requirement would be found to violate the operator's First Amendment rights" (footnotes omitted)); Ugland, Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F. C. C., 60 Mo. L. Rev. 799, 837 (1995) ("PEG requirements are content-based on their face because they force cable system operators to carry certain *types* of programming" (emphasis in original)); Perritt, Access to the National Information Infrastructure, 30 Wake Forest L. Rev. 51, 66 (1995) (leased access and public access requirements "were called into question in *Turner*"). Moreover, as JUSTICE O'CONNOR noted in *Turner*, Congress' imposition of common-carrier-like obligations on cable operators may raise Takings Clause questions. 512 U. S., at 684 (opinion concurring in part and dissenting in part). Such questions are not at issue here.

discretion. Just because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers.

We have said that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995), but this principle hardly supports petitioners' claims, for, if they do anything, the leased and public access requirements favor access programmers over cable operators. I do not see §§ 10(a) and (c) as independent restrictions on programmers, but as intricate parts of the leased and public access restrictions imposed by Congress (and state and local governments) on cable operators. The question petitioners pose is whether §§ 10(a) and (c) are improper restrictions on their free speech rights, but *Turner* strongly suggests that the proper question is whether the leased and public access requirements (with §§ 10(a) and (c)) are improper restrictions on the *operators'* free speech rights. In my view, the constitutional presumption properly runs in favor of the operators' editorial discretion, and that discretion may not be burdened without a compelling reason for doing so. Petitioners' view that the constitutional presumption favors their asserted right to speak on access channels is directly contrary to *Turner* and our established precedents.

It is one thing to compel an operator to carry leased and public access speech, in apparent violation of *Tornillo*, but it is another thing altogether to say that the First Amendment forbids Congress to give back part of the operators' editorial discretion, which all recognize as fundamentally protected, in favor of a broader access right. It is no answer to say that leased and public access are content neutral and that

§§ 10(a) and (c) are not, for that does not change the fundamental fact, which petitioners never address, that it is the operators' journalistic freedom that is infringed, whether the challenged restrictions be content neutral or content based.

Because the access provisions are part of a scheme that restricts the free speech rights of cable operators and expands the speaking opportunities of access programmers, who have no underlying constitutional right to speak through the cable medium, I do not believe that access programmers can challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech." Outside the public forum doctrine, discussed *infra*, at 826–831, Government intervention that grants access programmers an opportunity to speak that they would not otherwise enjoy—and which does not directly limit programmers' underlying speech rights—cannot be an abridgment of the same programmers' First Amendment rights, even if the new speaking opportunity is content based.

The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right, recognized in *Turner*, *supra*, at 645, to compete for space on an operator's system. The Court would undoubtedly strictly scrutinize such a law. See *Sable*, 492 U. S., at 126. But §§ 10(a) and (c) do not burden a programmer's right to seek access for its indecent programming on an operator's system. Rather, they merely restore part of the editorial discretion an operator would have absent Government regulation without burdening the programmer's underlying speech rights.[7]

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[7] The plurality, in asserting that § 10(c) "does not restore to cable operators editorial rights that they once had," *ante*, at 761, mistakes inability to exercise a right for absence of the right altogether. That cable operators "have not historically exercised editorial control" over public access

The First Amendment challenge, if one is to be made, must come from the party whose constitutionally protected freedom of speech has been burdened. Viewing the federal access requirements as a whole, it is the cable operator, not the access programmer,[8] whose speech rights have been infringed. Consequently, it is the operator, and not the programmer, whose speech has arguably been infringed by these provisions. If Congress passed a law forcing bookstores to sell all books published on the subject of congressional politics, we would undoubtedly entertain a claim by bookstores that this law violated the First Amendment principles established in *Tornillo* and *Pacific Gas.* But I doubt that we would similarly find merit in a claim by publishers of gardening books that the law violated their First Amendment rights. If that is so, then petitioners in these cases cannot reasonably assert that the Court should strictly scrutinize the provisions at issue in a way that maximizes their ability to speak over leased and public access channels and, by necessity, minimizes the operators' discretion.

B

It makes no difference that the leased access restrictions may take the form of common carrier obligations. See *Midwest Video II*, 440 U. S., at 701; see also Brief for Federal Respondents 23. But see 47 U. S. C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service"). That the leased access provisions may be described in common carrier terms does not demonstrate that access programmers

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channels, *ibid.*, does not diminish the underlying right to do so, even if the operator's forbearance is viewed as a contractual *quid pro quo* for the local franchise.

[8] *Turner* recognized that the must-carry rules burden programmers who must compete for space on fewer channels. 512 U. S., at 636–637. Leased access requirements may also similarly burden programmers who compete for space on nonaccess channels.

have obtained a First Amendment right to transmit programming over leased access channels. Labeling leased access a common carrier scheme has no real First Amendment consequences. It simply does not follow from common carrier status that cable operators may not, with Congress' blessing, decline to carry indecent speech on their leased access channels. Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition. Concurring in *Sable*, JUSTICE SCALIA explained: "I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." 492 U. S., at 133. See also *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F. 2d 866, 877 (CA9 1991) ("[A] carrier is free under the Constitution to terminate service to dial-a-porn operators altogether"); *Carlin Communications, Inc.* v. *Mountain States Telephone & Telegraph Co.*, 827 F. 2d 1291, 1297 (CA9 1987) (same), cert. denied, 485 U. S. 1029 (1988); *Carlin Communication, Inc.* v. *Southern Bell Telephone & Telegraph Co.*, 802 F. 2d 1352, 1357 (CA11 1986) (same).

Nothing about common carrier status *per se* constitutionalizes the asserted interests of petitioners in these cases, and JUSTICE KENNEDY provides no authority for his assertion that common carrier regulations "should be reviewed under the same standard as content-based restrictions on speech in a public forum." *Ante*, at 797. Whether viewed as the creation of a common carrier scheme or simply as a regulatory restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers. Consequently, the fact that the leased access provisions impose a form of common carrier obligation on cable operators does not alter my view that Congress' leased access scheme burdens the constitutionally protected speech rights of cable operators in order

to expand the speaking opportunities of access programmers, but does not independently burden the First Amendment rights of programmers or viewers.

C

Petitioners argue that public access channels are public forums in which they have First Amendment rights to speak and that § 10(c) is invalid because it imposes content-based burdens on those rights. Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95–227, pp. 8–23; Brief for Petitioners Alliance for Community Media et al. in No. 95–227, pp. 32–35. Though I agree that content-based prohibitions in a public forum "must be narrowly drawn to effectuate a compelling state interest," *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983), I do not agree with petitioners' antecedent assertion that public access channels are public forums.

We have said that government may designate public property for use by the public as a place for expressive activity and that, so designated, that property becomes a public forum. *Id.*, at 45. Petitioners argue that "[a] local government does exactly that by requiring as a condition of franchise approval that the cable operator set aside a public access channel for the free use of the general public on a first-come, first-served, nondiscriminatory basis."[9]

[9] In *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995), we found the university's student activity fund, a nontangible channel of communication, to be a limited public forum, but generally we have been quite reluctant to find even limited public forums in such channels of communication. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 804 (1985) (Combined Federal Campaign not a limited public forum); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 47–48 (1983) (school mail facilities not a limited public forum). In any event, we certainly have never held that public access channels are a fully designated public forum that entitles programmers to freedom from content-based distinctions.

Brief for Petitioners Alliance for Community Media et al. in No. 95–227, p. 33. I disagree.

Cable systems are not public property.[10] Cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum. The public forum doctrine is a rule governing claims of "a right of access to public property," *Perry Ed. Assn.*, *supra*, at 44, and has never been thought to extend beyond property generally understood to belong to the government. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 681 (1992) (evidence of expressive activity at rail stations, bus stations, wharves, and Ellis Island was "irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership" (emphasis in original)). See also *id.*, at 678 (public forum is "government" or "public" property); *Perry Ed. Assn.*, *supra*, at 45 (designated public forum "consists of public property").

Petitioners point to dictum in *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U. S. 788, 801 (1985), that a public forum may consist of "private property dedicated to public use," but that statement has no applicability here. That statement properly refers to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments. See 1A C. Antieau & J. Antieau, Antieau's Local Government Law § 9.05 (1991); 11A E. McQuillin, Law of Municipal Corporations § 33.03 (3d ed. 1991). Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land. 1A Antieau, *supra*, § 9.15; 11A McQuillin, *supra*,

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[10] See G. Shapiro, P. Kurland, & J. Mercurio, "CableSpeech": The Case for First Amendment Protection 119 (1983) ("Because cable systems are operated by private rather than governmental entities, cable television cannot be characterized as a public forum and, therefore, rights derived from the public forum doctrine cannot be asserted by those who wish to express themselves on cable systems").

§ 33.68. To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum.

It may be true, as petitioners argue, that title is not dispositive of the public forum analysis, but the nature of the regulatory restrictions placed on cable operators by local franchising authorities is not consistent with the kinds of governmental property interests we have said may be formally dedicated as public forums. Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum. See, *e. g.*, *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (streets and parks); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) (sidewalks adjoining public school); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975) (theater under long-term lease to city); *Carey* v. *Brown*, 447 U. S. 455, 460–462 (1980) (sidewalks in front of private residence); *Widmar* v. *Vincent*, 454 U. S. 263, 267–268 (1981) (university facilities that had been opened for student activities). That is simply not true in these cases. Pursuant to federal and state law, franchising authorities require cable operators to create public access channels, but nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as a public forum.[11]

[11] Petitioners' argument that a property right called "the right to exclude" has been transferred to the government is not persuasive. Though it is generally true that, excepting § 10(c), cable operators are forbidden to exercise editorial discretion over public access channels, that prohibition is not absolute. Section 531(e) provides that the prohibition on the exercise of editorial discretion is subject to § 544(d)(1), which permits operators and franchising authorities to ban obscene or other constitutionally unprotected speech. Some States, however, have not permitted exercise of that authority. See, *e. g.*, Minn. Stat. § 238.11 (1994) (prohibiting any censor-

Similarly, assertion of government control over private property cannot justify designation of that property as a public forum. We have expressly stated that neither government ownership nor government control will guarantee public access to property. See *Cornelius*, *supra*, at 803; *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981). Government control over its own property or private property in which it has taken a cognizable property interest, like the theater in *Southeastern Promotions*, is consistent with designation of a public forum. But we have never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could justify creation of a public forum. Properly construed, our cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated.

Nor am I convinced that a formal transfer of a property interest in public access channels would suffice to permit a local franchising authority to designate those channels as a public forum. In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf. Cable operators regularly retain some level of managerial and operational control over their public access channels, subject only to the requirements of federal, state, and local law and the franchise agreement. In more traditional public forums, the government shoulders the burden of administering and enforcing the openness of the expressive forum, but it is frequently a private citizen, the operator, who shoulders that burden for public access channels. For instance,

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ship of leased or public access programming); N. Y. Pub. Serv. Law § 229 (McKinney Supp. 1996) (same). At any rate, the Court has never recognized a public forum based on a property interest "taken" by regulatory restriction.

it is often the operator who must accept and schedule an access programmer's request for time on a channel.[12] And, in many places, the operator is actually obligated to provide production facilities and production assistance to persons seeking to produce access programming.[13] Moreover, unlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or "speak," the access programmer's message. That the speech may be considered the operator's is driven home by 47 U. S. C. § 559, which authorizes a fine of up to $10,000 and two years' imprisonment for any person who "transmits over any cable system any matter which is obscene." See also

[12] See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video § 6.04[7] (1996) (hereinafter Brenner). Some States and local governments have formed nonprofit organizations to perform some of these functions. See D. C. Code Ann. § 43–1829(a) (1990 and Supp. 1996) (establishing Public Access Corporation "for the purpose of facilitating and governing nondiscriminatory use" of public access channels).

[13] See, *e. g.*, 47 U. S. C. § 541(a)(4)(B) (authorizing franchise authorities to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support"); Conn. Gen. Stat. § 16–331c (1995) (requiring cable operators to contribute money or resources to cable advisory councils that monitor compliance with public access standards); § 16–333(c) (requiring the department of public utility control to adopt regulations "establishing minimum standards for the equipment supplied . . . for the community access programming"); D. C. Code Ann. § 43–1829.1(c) (1990) ("For public access channel users, the franchisee shall provide use of the production facilities and production assistance at an amount set forth in the request for proposal"); Minn. Stat. § 238.084.3(b) (1994) (requiring cable operators to "make readily available for public use at least the minimal equipment necessary for the production of programming and playback of prerecorded programs"). That these activities are "partly financed with public funds," *ante*, at 762, does not diminish the fact that these activities are also "partly financed" with the operator's money. See Brenner § 6.04[7], at 6–48 ("Frequently, access centers receive money and equipment from the cable operator"); *id.*, § 6.04[3][c], at 6–41 (discussing cable operator financing of public access channels and questioning its constitutionality as "forced subsidization of speech").

§ 558 (making operators immune for all public access programming, except that which is obscene).[14]

Thus, even were I inclined to view public access channels as public property, which I am not, the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum. As I have already indicated, public access requirements, in my view, are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum. Public access channels are not public forums, and, therefore, petitioners' attempt to redistribute cable speech rights in their favor must fail. For this reason, and the other reasons articulated earlier, I would sustain both § 10(a) and § 10(c).

III

Most sexually oriented programming appears on premium or pay-per-view channels that are naturally blocked from nonpaying customers by market forces, see *In re Implementation of Section 10 of the Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order*, 8 FCC Rcd 998, 1001, n. 20 (1993) (First Report and Order), and it is only governmental intervention in the first instance that requires access channels, on which indecent programming may appear, to be made part of the basic cable package. Section 10(b) does nothing more than adjust the nature of Government-imposed leased access requirements

[14] Petitioners argue that § 10(d) of the 1992 Act, 47 U. S. C. § 558, which lifts cable operators' immunity for obscene speech, forces or encourages operators to ban indecent speech. Because Congress could directly impose an outright ban on obscene programming, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 124 (1989), petitioners' encouragement argument is meritless.

in order to emulate the market forces that keep indecent programming primarily on premium channels (without permitting the operator to charge subscribers for that programming).

Unlike §§ 10(a) and (c), § 10(b) clearly implicates petitioners' free speech rights. Though § 10(b) by no means bans indecent speech, it clearly places content-based restrictions on the transmission of private speech by requiring cable operators to block and segregate indecent programming that the operator has agreed to carry. Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available. See *Sable*, 492 U. S., at 126. The parties agree that Congress has a "compelling interest in protecting the physical and psychological well-being of minors" and that its interest "extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards." *Ibid.* See *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968) (persons "who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility"). Because § 10(b) is narrowly tailored to achieve that well-established compelling interest, I would uphold it. I therefore dissent from the Court's decision to the contrary.

Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position. For example, in *Ginsberg*, in which we upheld a State's ability to prohibit the sale of indecent literature to minors, we pointed out that the State had simply imposed its own default choice by noting that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Ibid.* Likewise, in *Sable* we set aside a complete ban on indecent dial-a-porn messages in part because the FCC had previously imposed certain default rules intended to prevent access by minors,

and there was no evidence that those rules were ineffective. 492 U. S., at 128–130.[15]

The Court strikes down § 10(b) by pointing to alternatives, such as reverse blocking and lockboxes, that it says are less restrictive than segregation and blocking. Though these methods attempt to place in parents' hands the ability to permit their children to watch as little, or as much, indecent programming as the parents think proper, they do not effectively support parents' authority to direct the moral upbringing of their children. See First Report and Order, 8 FCC Rcd, at 1000–1001.[16] The FCC recognized that leased access programming comes "from a wide variety of independent sources, with no single editor controlling [its] selection and presentation." *Id.*, at 1000. Thus, indecent programming on leased access channels is "especially likely to be shown randomly or intermittently between non-indecent programs." *Ibid.* Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased access programming and constantly reprogram the lockbox

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[15] After *Sable*, Congress quickly amended the statute and the FCC again promulgated those "safe harbor" rules. Those rules were later upheld against a First Amendment challenge. See *Dial Information Servs. Corp. of N. Y.* v. *Thornburgh*, 938 F. 2d 1535 (CA2 1991), cert. denied, 502 U. S. 1072 (1992); *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F. 2d 866 (CA9 1991). In promulgating regulations pursuant to § 10(b), the FCC was well aware that the default rules established for dial-a-porn had been upheld and asserted that similar rules were necessary for leased access channels. See First Report and Order, 8 FCC Rcd 998, 1000 (1993) ("The blocking scheme upheld in these cases is, in all relevant respects, identical to that required by section 10(b)"); *ibid.* ("[J]ust as it did in section 223 relating to 'dial-a-porn' telephone services—Congress has now determined that mandatory, not voluntary, blocking is essential").

[16] In the context of dial-a-porn, courts upholding the FCC's mandatory blocking scheme have expressly found that voluntary blocking schemes are not effective. See *Dial Information Servs.*, *supra*, at 1542; *Information Providers' Coalition*, *supra*, at 873–874.

to keep out undesired programming. Thus, even assuming that cable subscribers generally have the technical proficiency to properly operate a lockbox, by no means a given, this distinguishing characteristic of leased access channels makes lockboxes and reverse blocking largely ineffective.

Petitioners argue that § 10(b)'s segregation and blocking scheme is not sufficiently narrowly tailored because it requires the viewer's "written consent," 47 CFR § 76.701(b) (1995); it permits the cable operator 30 days to respond to the written request for access, § 76.701(c); and it is impermissibly underinclusive because it reaches only leased access programming.

Relying on *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), petitioners argue that forcing customers to submit a written request for access will chill dissemination of speech. In *Lamont,* we struck down a statute barring the mail delivery of "'communist political propaganda'" to persons who had not requested the Post Office in writing to deliver such propaganda. *Id.,* at 307. The law required the Post Office to keep an official list of persons desiring to receive communist political propaganda, *id.,* at 303, which, of course, was intended to chill demand for such materials. Here, however, petitioners' allegations of an official list "of those who wish to watch the 'patently offensive' channel," as the majority puts it, *ante,* at 754, are pure hyperbole. The FCC regulation implementing § 10(b)'s written request requirement, 47 CFR § 76.701(b) (1995), says nothing about the creation of a list, much less an official Government list. It requires only that the cable operator receive written consent. Other statutory provisions make clear that the cable operator may not share that, or any other, information with any other person, including the Government. Section 551 mandates that all personally identifiable information regarding a subscriber be kept strictly confidential and further requires cable operators to destroy any information that is no longer necessary for the purpose for which it was collected. 47 U. S. C. § 551.

None of the circumstances that figured prominently in *Lamont* exists here.

Though petitioners cannot reasonably fear the specter of an officially published list of leased access indecency viewers, it is true that the fact that a subscriber is unblocked is ascertainable, if only by the cable operator. I find no legally significant stigma in that fact. If a segregation and blocking scheme is generally permissible, then a subscriber's access request must take some form, whether written or oral, and I see nothing nefarious in Congress' choice of a written, rather than an oral, consent.[17] Any request for access to blocked programming—by whatever method—ultimately will make the subscriber's identity knowable.[18] But this is hardly the kind of chilling effect that implicates the First Amendment.

Though making an oral request for access, perhaps by telephone, is slightly less bothersome than making a written request, it is also true that a written request is less subject to fraud "by a determined child." *Ante*, at 759. Consequently, despite the fact that an oral request is slightly less restrictive in absolute terms, it is also less effective in supporting parents' interest in denying enterprising, but parentally unauthorized, minors access to blocked programming.

The segregation and blocking requirement was not intended to be a replacement for lockboxes, V-chips, reverse blocking, or other subscriber-initiated measures. Rather, Congress enacted in § 10(b) a default setting under which a subscriber receives no blocked programming without a writ-

[17] Because, under the circumstances of these cases, I see no constitutionally significant difference between a written and an oral request to see blocked programming, I also see no relevant distinction between § 10(b) and the blocking requirement enacted in the 1996 Act, on which the majority places so much reliance. See *ante*, at 756–758.

[18] Indeed, persons who request access to blocked programming pursuant to 47 CFR § 76.701(c) (1995) are no more identifiable than persons who subscribe to sexually oriented premium channels, because those persons must specially request that premium service.

ten request. Thus, subscribers who do not want the blocked programming are protected, and subscribers who do want it may request access. Once a subscriber requests access to blocked programming, however, the subscriber remains free to use other methods, such as lockboxes, to regulate the kind of programming shown on those channels in that home.[19] Thus, petitioners are wrong to portray § 10(b) as a highly ineffective method of screening individual programs, see Brief for Petitioners in No. 95–124, at 43, and the majority is similarly wrong to suggest that a person cannot "watch a single program . . . without letting the 'patently offensive' channel in its entirety invade his household for days, perhaps weeks, at a time," *ante*, at 754; see *ante*, at 756. Given the limited scope of § 10(b) as a default setting, I see nothing constitutionally infirm about Congress' decision to permit the cable operator 30 days to unblock or reblock the segregated channel.

Petitioners also claim that § 10(b) and its implementing regulations are impermissibly underinclusive because they apply only to leased access programming. In *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), we rejected the view that a content-based restriction is subject to a separate and independent "underinclusiveness" evaluation. *Id.*, at 387 ("In our view, the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech"). See also *ante*, at 757 ("Congress need not deal with every problem at once"). Also, petitioners' claim is in tension with the constitutional principle that Congress may not impose a remedy that is more restrictive than necessary to satisfy its asserted compelling interest and with their own arguments pressing that very principle. Cf. *R. A. V.*, *supra*, at 402 (White, J., concurring in judgment) (though the "overbreadth doctrine

[19] The lockbox provision, originally passed in 1984, was unaffected by the 1992 Act and remains fully available to every subscriber. 47 U. S. C. § 544(d)(2).

has the redeeming virtue of attempting to avoid the chilling of protected expression," an underbreadth challenge "serves no desirable function").

In arguing that Congress could not impose a blocking requirement without also imposing that requirement on public access and nonaccess channels, petitioners fail to allege, much less argue, that doing so would further Congress' compelling interest. While it is true that indecent programming appears on nonaccess channels, that programming appears almost exclusively on "per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 FCC Rcd, at 1001, n. 20.[20] In contrast to these premium services, leased access channels are part of the basic cable package, and the segregation and blocking scheme Congress imposed does nothing more than convert sexually oriented leased access programming into a free "premium service."[21] Similarly, Congress' failure to impose segregation and blocking requirements on public access channels may have been based on its judgment that those channels presented a less severe problem of unintended indecency—it appears that most of the anecdotal evidence before Congress involved leased access channels. Congress may also have simply de-

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[20] In examining the restrictions imposed by the 1996 Act, the majority is probably correct to doubt that "sex-dedicated channels are all (or mostly) leased channels," *ante,* at 757, but surely the majority does not doubt that most nonleased sex-dedicated channels are premium channels that must be expressly requested. I thus disagree that the provisions of the 1996 Act address a "highly similar problem." *Ante,* at 758.

[21] Unlike Congress' blocking scheme, and the market norm of requiring viewers to pay a premium for indecent programming, lockboxes place a financial burden on those seeking to avoid indecent programming on leased access channels. See 47 U. S. C. § 544(d)(2) ("[A] cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber").

cided to permit the States and local franchising authorities to address the issue of indecency on public access channels at a local level, in accordance with the local rule policies evinced in 47 U. S. C. § 531. In any event, if the segregation and blocking scheme established by Congress is narrowly tailored to achieve a compelling governmental interest, it does not become constitutionally suspect merely because Congress did not extend the same restriction to other channels on which there was less of a perceived problem (and perhaps no compelling interest).

The United States has carried its burden of demonstrating that § 10(b) and its implementing regulations are narrowly tailored to satisfy a compelling governmental interest. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety. I therefore concur in the judgment upholding § 10(a) and respectfully dissent from that portion of the judgment striking down §§ 10(b) and (c).

Syllabus

UNITED STATES *v.* WINSTAR CORP. ET AL.

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

No. 95–865. Argued April 24, 1996—Decided July 1, 1996

Realizing that the Federal Savings and Loan Insurance Corporation (FSLIC) lacked the funds to liquidate all of the failing thrifts during the savings and loan crisis of the 1980's, the Federal Home Loan Bank Board (Bank Board) encouraged healthy thrifts and outside investors to take over ailing thrifts in a series of "supervisory mergers." As inducement, the Bank Board agreed to permit acquiring entities to designate the excess of the purchase price over the fair value of identifiable assets as an intangible asset referred to as supervisory goodwill, and to count such goodwill and certain capital credits toward the capital reserve requirements imposed by federal regulations. Congress's subsequent passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) forbade thrifts to count goodwill and capital credits in computing the required reserves. Respondents are three thrifts created by way of supervisory mergers. Two of them were seized and liquidated by federal regulators for failure to meet FIRREA's capital requirements, and the third avoided seizure through a private recapitalization. Believing that the Bank Board and FSLIC had promised that they could count supervisory goodwill toward regulatory capital requirements, respondents each filed suit against the United States in the Court of Federal Claims, seeking damages for, *inter alia*, breach of contract. In granting each respondent summary judgment, the court held that the Government had breached its contractual obligations and rejected the Government's "unmistakability defense"—that surrenders of sovereign authority, such as the promise to refrain from regulatory changes, must appear in unmistakable terms in a contract in order to be enforceable, see *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41, 52—and its "sovereign act" defense—that a "public and general" sovereign act, such as FIRREA's alteration of capital reserve requirements, could not trigger contractual liability, see *Horowitz* v. *United States*, 267 U. S. 458, 461. The cases were consolidated, and the en banc Federal Circuit ultimately affirmed.

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

64 F. 3d 1531, affirmed and remanded.

JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE BREYER, concluded in Parts II, III, IV, and IV–C that

the United States is liable to respondents for breach of contract. Pp. 860–896; 904–910.

(a) There is no reason to question the Federal Circuit's conclusion that the Government had express contractual obligations to permit respondents to use goodwill and capital credits in computing their regulatory capital reserves. When the law as to capital requirements changed, the Government was unable to perform its promises and became liable for breach under ordinary contract principles. Pp. 860–871.

(b) The unmistakability doctrine is not implicated here because enforcement of the contractual obligation alleged would not block the Government's exercise of a sovereign power. The courts below did not construe these contracts as binding the Government's exercise of authority to modify its regulation of thrifts, and there has been no demonstration that awarding damages for breach would be tantamount to such a limitation. They read the contracts as solely risk-shifting agreements, and respondents seek nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change. Applying the unmistakability doctrine to such contracts not only would represent a conceptual expansion of the doctrine beyond its historical and practical warrant, but also would compromise the Government's practical capacity to make contracts, which is "of the essence of sovereignty" itself, *United States* v. *Bekins*, 304 U. S. 27, 51–52. Pp. 871–887.

(c) The answer to the Government's unmistakability argument also meets its two related ultra vires contentions: that, under the reserved powers doctrine, Congress's power to change the law in the future was an essential attribute of its sovereignty that the Bank Board and FSLIC had no authority to bargain away; and that in any event no such authority can be conferred without an express delegation to that effect. A contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty, and the contracts did not surrender the Government's sovereign power to regulate. And there is no serious question that FSLIC (and the Bank Board acting through it) lacked authority to guarantee respondents against losses arising from subsequent regulatory changes. Pp. 888–891.

(d) The facts of this case do not warrant application of the sovereign act doctrine. That doctrine balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on whether that act would otherwise release the Government from liability under ordinary contract principles. Pp. 891–896.

Syllabus

(e) Even if FIRREA were to qualify as a "public and general" act, the sovereign act doctrine cannot excuse the Government's breach here. Since the object of the doctrine is to place the Government as contractor on par with a private contractor in the same circumstances, *Horowitz* v. *United States, supra,* at 461, the Government, like any other defending party in a contract action, must show that passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and, ultimately, that the language or circumstances do not indicate that the Government should be liable in any case. The Government has not satisfied these conditions. There is no doubt that some changes in the regulatory structure governing thrift capital reserves were both foreseeable and likely when the parties contracted with the Government. In addition, any governmental contract that not only deals with regulatory change but allocates the risk of its occurring will, by definition, fail the further condition of a successful impossibility defense, for it will indeed indicate that the parties' agreement was not meant to be rendered nugatory by a change in the regulatory law. That the Bank Board and FSLIC could not themselves preclude Congress from changing the regulatory rules does not stand in the way of concluding that those agencies assumed the risk of such change, for determining the consequences of legal change was the point of the agreements. Pp. 904–910.

JUSTICE SOUTER, joined by JUSTICE STEVENS and JUSTICE BREYER, concluded in Parts IV–A and IV–B that, since the Government should not be excused by legislation when the substantial effect of regulation was to help itself out of improvident agreements, it is impossible to attribute the exculpatory "public and general" character to FIRREA. Not only did that statute have the purpose of eliminating the very accounting "gimmicks" that acquiring thrifts had been promised, but also the congressional debates indicate Congress's expectation, which there is no reason to question, that FIRREA would have a substantial effect on the Government's contractual obligations. The evidence of Congress's intense concern with contracts like those at issue is not neutralized by the fact that FIRREA did not formally target particular transactions or by FIRREA's broad purpose to advance the general welfare. Pp. 896–903.

JUSTICE SCALIA, joined by JUSTICE KENNEDY and JUSTICE THOMAS, agreed that the Government was contractually obligated to afford respondents favorable accounting treatment, and violated its obligations when it discontinued that treatment under FIRREA. The Government's sovereign defenses cannot be avoided by characterizing its obligations as not entailing a limitation on the exercise of sovereign power;

Syllabus

that approach, although adopted by the plurality, is novel and fails to acknowledge that virtually *every* contract regarding future conduct operates as an assumption of liability in the event of nonperformance. Accordingly, it is necessary to address the Government's various sovereign defenses, particularly its invocation of the "unmistakability" doctrine. That doctrine simply embodies the commonsense presumption that governments do not ordinarily agree to curtail their sovereign or legislative powers. Respondents have overcome that presumption here in establishing that the Government promised, in unmistakable terms, to regulate them in a particular fashion, into the future. The Government's remaining arguments are readily rejected. The "reserved powers" doctrine cannot defeat a claim to recover damages for breach of contract where subsequent legislation has sought to minimize monetary risks assumed by the Government. The "express delegation" doctrine is satisfied here by the statutes authorizing the relevant federal bank regulatory agencies to enter into the agreements at issue. Finally, the "sovereign acts" doctrine adds little, if anything, to the "unmistakability" doctrine, and cannot be relied upon where the Government has attempted to abrogate the essential bargain of the contract. Pp. 919–924.

SOUTER, J., announced the judgment of the Court and delivered an opinion, in which STEVENS and BREYER, JJ., joined, and in which O'CONNOR, J., joined except as to Parts IV–A and IV–B. BREYER, J., filed a concurring opinion, *post*, p. 910. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 919. REHNQUIST, C. J., filed a dissenting opinion, in which GINSBURG, J., joined as to Parts I, III, and IV, *post*, p. 924.

Deputy Solicitor General Bender argued the cause for the United States. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Hunger*, *James A. Feldman*, *Douglas Letter*, and *Jacob M. Lewis*.

Joe G. Hollingsworth argued the cause for respondent Glendale Federal Bank, FSB. With him on the brief were *Jerry Stouck*, *Donald W. Fowler*, *Catherine R. Baumer*, *Carter G. Phillips*, *Richard D. Bernstein*, *Theodore R. Posner*, and *Jesse H. Choper*. *Charles J. Cooper* argued the cause for respondents Winstar Corp. et al. With him on the brief

were *Michael A. Carvin*, *Robert J. Cynkar*, and *Vincent J. Colatriano.**

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS and JUSTICE BREYER join, and in which JUSTICE O'CONNOR joins except as to Parts IV–A and IV–B.

The issue in this case is the enforceability of contracts between the Government and participants in a regulated industry, to accord them particular regulatory treatment in exchange for their assumption of liabilities that threatened to produce claims against the Government as insurer. Although Congress subsequently changed the relevant law, and thereby barred the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach.

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Herbert L. Fenster*, *Tami Lyn Azorsky*, and *Robin S. Conrad;* for the Aerospace Industries Association of America, Inc., et al. by *Clarence T. Kipps, Jr.*, *Alan I. Horowitz*, and *Mac S. Dunaway;* for AmBase Corp. et al. by *Laurence H. Tribe*, *Brian Stuart Koukoutchos*, *Harvey Silverglate*, and *John C. Millian;* for the American Association of State Colleges and Universities et al. by *Joseph N. Onek*, *Kent R. Morrison*, *Robert P. Charrow*, *Sheldon Elliot Steinbach*, and *J. Mark Waxman;* for Coast Federal Bank, FSB, by *Daniel J. Goldberg* and *Matthew G. Ash;* for Dollar Bank, FSB, by *Paul Blankenstein*, *John K. Bush*, and *Robert T. Messner;* for the Franklin Financial Group, Inc., et al. by *Thomas M. Buchanan*, *Paul M. Fish*, *Ronald R. Glancz*, *John F. Cooney*, *Don S. Willner*, and *Jerrold J. Ganzfried;* for Keystone Holdings, Inc., et al. by *Melvin C. Garbow* and *Edward H. Sisson;* for Long Island Savings Bank, FSB, by *Russell E. Brooks* and *Fred W. Reinke;* for Trinity Ventures, Ltd., et al. by *John C. Millian*, *John K. Bush*, and *Wesley G. Howell, Jr.;* for the Watts Health Foundation, Inc., et al. by *Peter J. Gregora* and *Kenneth R. Heitz;* and for the Western Federal Savings and Loan Association et al. by *Dennis A. Winston.*

I

We said in *Fahey* v. *Mallonee*, 332 U. S. 245, 250 (1947), that "[b]anking is one of the longest regulated and most closely supervised of public callings." That is particularly true of the savings and loan, or "thrift," industry, which has been described as "a federally-conceived and assisted system to provide citizens with affordable housing funds." H. R. Rep. No. 101–54, pt. 1, p. 292 (1989) (House Report). Because the contracts at issue in today's case arise out of the National Government's efforts over the last decade and a half to preserve that system from collapse, we begin with an overview of the history of federal savings and loan regulation.

A

The modern savings and loan industry traces its origins to the Great Depression, which brought default on 40 percent of the Nation's $20 billion in home mortgages and the failure of some 1,700 of the Nation's approximately 12,000 savings institutions. *Id.*, at 292–293. In the course of the debacle, Congress passed three statutes meant to stabilize the thrift industry. The Federal Home Loan Bank Act created the Federal Home Loan Bank Board (Bank Board), which was authorized to channel funds to thrifts for loans on houses and for preventing foreclosures on them. Ch. 522, 47 Stat. 725 (1932) (codified, as amended, at 12 U. S. C. §§ 1421–1449 (1988 ed.)); see also House Report, at 292. Next, the Home Owners' Loan Act of 1933 authorized the Bank Board to charter and regulate federal savings and loan associations. Ch. 64, 48 Stat. 128 (1933) (codified, as amended, at 12 U. S. C. §§ 1461–1468 (1988 ed.)). Finally, the National Housing Act created the Federal Savings and Loan Insurance Corporation (FSLIC), under the Bank Board's authority, with responsibility to insure thrift deposits and regulate all federally insured thrifts. Ch. 847, 48 Stat. 1246 (1934) (codified, as amended, at 12 U. S. C. §§ 1701–1750g (1988 ed.)).

The resulting regulatory regime worked reasonably well until the combination of high interest rates and inflation in the late 1970's and early 1980's brought about a second crisis in the thrift industry. Many thrifts found themselves holding long-term, fixed-rate mortgages created when interest rates were low; when market rates rose, those institutions had to raise the rates they paid to depositors in order to attract funds. See House Report, at 294–295. When the costs of short-term deposits overtook the revenues from long-term mortgages, some 435 thrifts failed between 1981 and 1983. *Id.*, at 296; see also General Accounting Office, Thrift Industry: Forbearance for Troubled Institutions 1982–1986, p. 9 (May 1987) (GAO, Forbearance for Troubled Institutions) (describing the origins of the crisis).

The first federal response to the rising tide of thrift failures was "extensive deregulation," including "a rapid expansion in the scope of permissible thrift investment powers and a similar expansion in a thrift's ability to compete for funds with other financial services providers." House Report, at 291; see also *id.*, at 295–297; Breeden, Thumbs on the Scale: The Role that Accounting Practices Played in the Savings and Loan Crisis, 59 Ford. L. Rev. S71, S72–S74 (1991) (describing legislation permitting nonresidential real estate lending by thrifts and deregulating interest rates paid to thrift depositors).[1] Along with this deregulation came moves to weaken the requirement that thrifts maintain adequate capital reserves as a cushion against losses, see 12 CFR § 563.13 (1981), a requirement that one commentator described as "the most powerful source of discipline for financial institutions." Breeden, *supra*, at S75. The result was a drop in capital reserves required by the Bank Board from five to

[1] The easing of federal regulatory requirements was accompanied by similar initiatives on the state level, especially in California, Florida, and Texas. The impact of these changes was substantial, since as of 1980 over 50 percent of federally insured thrifts were chartered by the States. See House Report, at 297.

four percent of assets in November 1980, see 45 Fed. Reg. 76111, and to three percent in January 1982, see 47 Fed. Reg. 3543; at the same time, the Board developed new "regulatory accounting principles" (RAP) that in many instances replaced generally accepted accounting principles (GAAP) for purposes of determining compliance with its capital requirements.[2] According to the House Banking Committee, "[t]he use of various accounting gimmicks and reduced capital standards masked the worsening financial condition of the industry, and the FSLIC, and enabled many weak institutions to continue operating with an increasingly inadequate cushion to absorb future losses." House Report, at 298. The reductions in required capital reserves, moreover, allowed thrifts to grow explosively without increasing their capital base, at the same time deregulation let them expand into new (and often riskier) fields of investment. See Note, Causes of the Savings and Loan Debacle, 59 Ford. L. Rev. S301, S311 (1991); Breeden, *supra*, at S74–S75.

While the regulators tried to mitigate the squeeze on the thrift industry generally through deregulation, the multitude of already-failed savings and loans confronted FSLIC with deposit insurance liabilities that threatened to exhaust its insurance fund. See *Olympic Federal Savings and Loan Assn.* v. *Director, Office of Thrift Supervision*, 732 F. Supp.

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[2] "Regulatory and statutory accounting gimmicks included permitting thrifts to defer losses from the sale of assets with below market yields; permitting the use of income capital certificates, authorized by Congress, in place of real capital; letting qualifying mutual capital certificates be included as RAP capital; allowing FSLIC members to exclude from liabilities in computing net worth, certain contra-asset accounts, including loans in process, unearned discounts, and deferred fees and credits; and permitting the inclusion of net worth certificates, qualifying subordinated debentures and appraised equity capital as RAP net worth." House Report, at 298. The result of these practices was that "[b]y 1984, the difference between RAP and GAAP net worth at S&L's stood at $9 billion," which meant "that the industry's capital position, or . . . its cushion to absorb losses was overstated by $9 billion." *Ibid.*

1183, 1185 (DC 1990). According to the General Accounting Office, FSLIC's total reserves declined from $6.46 billion in 1980 to $4.55 billion in 1985, GAO, Forbearance for Troubled Institutions 12, when the Bank Board estimated that it would take $15.8 billion to close all institutions deemed insolvent under GAAP. General Accounting Office, Troubled Financial Institutions: Solutions to the Thrift Industry Problem 108 (Feb. 1989) (GAO, Solutions to the Thrift Industry Problem). By 1988, the year of the last transaction involved in this case, FSLIC was itself insolvent by over $50 billion. House Report, at 304. And by early 1989, the GAO estimated that $85 billion would be needed to cover FSLIC's responsibilities and put it back on the road to fiscal health. GAO, Solutions to the Thrift Industry Problem 43. In the end, we now know, the cost was much more even than that. See, *e. g.*, Horowitz, The Continuing Thrift Bailout, Investor's Business Daily, Feb. 1, 1996, p. A1 (reporting an estimated $140 billion total public cost of the savings and loan crisis through 1995).

Realizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the Bank Board chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of "supervisory mergers." See GAO, Solutions to the Thrift Industry Problem 52; L. White, The S&L Debacle: Public Policy Lessons for Bank and Thrift Regulation 157 (1991) (White).[3]

[3] See also White 157 (noting that "[t]he FSLIC developed lists of prospective acquirers, made presentations, held seminars, and generally tried to promote the acquisitions of these insolvents"); Grant, The FSLIC: Protection through Professionalism, 14 Federal Home Loan Bank Board Journal 9–10 (Feb. 1981) (describing the pros and cons of various default-prevention techniques from FSLIC's perspective). Over 300 such mergers occurred between 1980 and 1986, as opposed to only 48 liquidations. GAO, Forbearance for Troubled Institutions 13. There is disagreement as to whether the Government actually saved money by pursuing this course rather than simply liquidating the insolvent thrifts. Compare, *e. g.*, Brief for Franklin Financial Group, Inc., et al. as *Amici Curiae* 7,

Such transactions, in which the acquiring parties assumed the obligations of thrifts with liabilities that far outstripped their assets, were not intrinsically attractive to healthy institutions; nor did FSLIC have sufficient cash to promote such acquisitions through direct subsidies alone, although cash contributions from FSLIC were often part of a transaction. See M. Lowy, High Rollers: Inside the Savings and Loan Debacle 37 (1991) (Lowy). Instead, the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations. See Investigation of Lincoln Savings & Loan Assn.: Hearing Before the House Committee on Banking, Finance, and Urban Affairs, 101st Cong., 1st Sess., pt. 5, p. 447 (1989) (testimony of M. Danny Wall, Director, Office of Thrift Supervision) (noting that acquirers of failing thrifts were allowed to use certain accounting methods "in lieu of [direct] federal financial assistance").

B

Under GAAP there are circumstances in which a business combination may be dealt with by the "purchase method" of accounting. See generally R. Kay & D. Searfoss, Handbook of Accounting and Auditing 23–21 to 23–40 (2d ed. 1989) (describing the purchase method); Accounting Principles Board Opinion No. 16 (1970) (establishing rules as to what method must be applied to particular transactions). The critical aspect of that method for our purposes is that it permits the acquiring entity to designate the excess of the purchase price

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quoting remarks by H. Brent Beasley, Director of FSLIC, before the California Savings and Loan League Management Conference (Sept. 9, 1982) (concluding that FSLIC-assisted mergers have "'[h]istorically . . . cost about 70% of [the] cost of liquidation'"), with GAO, Solutions to the Thrift Industry Problem 52 ("FSLIC's cost analyses may . . . understat[e] the cost of mergers to the government").

over the fair value of all identifiable assets acquired as an intangible asset called "goodwill." *Id.*, ¶ 11, p. 284; Kay & Searfoss, *supra*, at 23–38.[4] In the ordinary case, the recognition of goodwill as an asset makes sense: a rational purchaser in a free market, after all, would not pay a price for a business in excess of the value of that business's assets unless there actually were some intangible "going concern" value that made up the difference. See Lowy 39.[5] For that reason, the purchase method is frequently used to account for acquisitions, see A. Phillips, J. Butler, G. Thompson, & R. Whitman, Basic Accounting for Lawyers 121 (4th ed. 1988), and GAAP expressly contemplated its application to at least some transactions involving savings and loans. See Financial Accounting Standards Board Interpretation No. 9 (Feb. 1976). Goodwill recognized under the purchase method as the result of an FSLIC-sponsored supervisory merger was generally referred to as "supervisory goodwill."

Recognition of goodwill under the purchase method was essential to supervisory merger transactions of the type at issue in this case. Because FSLIC had insufficient funds to

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[4] See also Accounting Principles Board Opinion No. 17, ¶ 26, p. 339 (1970) (providing that "[i]ntangible assets acquired . . . as part of an acquired company should . . . be recorded at cost," which for unidentifiable intangible assets like goodwill is "measured by the difference between the cost of the . . . enterprise acquired and the sum of the assigned costs of individual tangible and identifiable intangible assets acquired less liabilities assumed").

[5] See *Newark Morning Ledger Co.* v. *United States*, 507 U. S. 546, 556 (1993) (describing "goodwill" as "the total of all the imponderable qualities that attract customers to the business"). Justice Story defined "goodwill" somewhat more elaborately as "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities, or prejudices." J. Story, Law of Partnership § 99, p. 139 (1841).

make up the difference between a failed thrift's liabilities and assets, the Bank Board had to offer a "cash substitute" to induce a healthy thrift to assume a failed thrift's obligations. Former Bank Board Chairman Richard Pratt put it this way in testifying before Congress:

> "The Bank Board . . . did not have sufficient resources to close all insolvent institutions, [but] at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task." Savings and Loan Policies in the Late 1970's and 1980's: Hearings before the House Committee on Banking, Finance, and Urban Affairs, 101st Cong., 2d Sess., Ser. No. 101–176, p. 227 (1990).[6]

Supervisory goodwill was attractive to healthy thrifts for at least two reasons. First, thrift regulators let the acquiring institutions count supervisory goodwill toward their reserve requirements under 12 CFR § 563.13 (1981). This treatment was, of course, critical to make the transaction possible in the first place, because in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards if goodwill had not counted toward regulatory net worth. From the acquiring

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[6] See also 135 Cong. Rec. 12061 (1989) (statement of Rep. Hyde) (observing that FSLIC used goodwill as "an inducement to the healthy savings and loans to merge with the sick ones"); Brief for Franklin Financial Group, Inc., et al. as *Amici Curiae* 9, quoting Deposition of Thurman Connell, former official at the Atlanta Federal Home Loan Bank, Joint App. in *Charter Federal Savings Bank* v. *Office of Thrift Supervision*, Nos. 91–2647, 91–2708 (CA4), p. 224 (recognizing that treating supervisory goodwill as regulatory capital was "'a very important aspect of [the acquiring thrifts'] willingness to enter into these agreements,'" and concluding that the regulators "'looked at [supervisory goodwill] as kind of the engine that made this transaction go. Because without it, there wouldn't have been any train pulling out of the station, so to speak'").

thrift's perspective, however, the treatment of supervisory goodwill as regulatory capital was attractive because it inflated the institution's reserves, thereby allowing the thrift to leverage more loans (and, it hoped, make more profits). See White 84; cf. Breeden, 59 Ford. L. Rev., at S75–S76 (explaining how loosening reserve requirements permits asset expansion).

A second and more complicated incentive arose from the decision by regulators to let acquiring institutions amortize the goodwill asset over long periods, up to the 40-year maximum permitted by GAAP, see Accounting Principles Board Opinion No. 17, ¶ 29, p. 340 (1970). Amortization recognizes that intangible assets such as goodwill are useful for just so long; accordingly, a business must "write down" the value of the asset each year to reflect its waning worth. See Kay & Searfoss, Handbook of Accounting and Auditing, at 15–36 to 15–37; Accounting Principles Board Opinion No. 17, *supra*, ¶ 27, at 339–340.[7] The amount of the write down is reflected on the business's income statement each year as an operating expense. See generally E. Faris, Accounting and Law in a Nutshell § 12.2(q) (1984) (describing amortization of goodwill). At the same time that it amortizes its goodwill asset,

[7] In this context, "amortization" of an intangible asset is equivalent to depreciation of tangible assets. See *Newark Morning Ledger Co.* v. *United States*, *supra*, at 571, n. 1 (SOUTER, J., dissenting); Gregorcich, Amortization of Intangibles: A Reassessment of the Tax Treatment of Purchased Goodwill, 28 Tax Lawyer 251, 253 (1975). Both the majority opinion and dissent in *Newark Morning Ledger* agreed that "goodwill" was not subject to depreciation (or amortization) for federal tax purposes, see 507 U. S., at 565, n. 13; *id.*, at 573 (SOUTER, J., dissenting), although we disagreed as to whether one could accurately estimate the useful life of certain elements of goodwill and, if so, permit depreciation of those elements under Internal Revenue Service regulations. *Id.*, at 566–567; *id.*, at 576–577 (SOUTER, J., dissenting). Neither of the *Newark Morning Ledger* opinions, however, denied the power of another federal agency, such as the Bank Board or FSLIC, to decide that goodwill is of transitory value and impose a particular amortization period to be used for its own regulatory purposes.

however, an acquiring thrift must also account for changes in the value of its loans, which are its principal assets. The loans acquired as assets of the failed thrift in a supervisory merger were generally worth less than their face value, typically because they were issued at interest rates below the market rate at the time of the acquisition. See Black, Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill, 2 Stan. L. & Policy Rev. 102, 104–105 (1990). This differential or "discount," J. Rosenberg, Dictionary of Banking and Financial Services 233 (2d ed. 1985), appears on the balance sheet as a "contra-asset" account, or a deduction from the loan's face value to reflect market valuation of the asset, R. Estes, Dictionary of Accounting 29 (1981). Because loans are ultimately repaid at face value, the magnitude of the discount declines over time as redemption approaches; this process, technically called "accretion of discount," is reflected on a thrift's income statement as a series of capital gains. See Rosenberg, *supra*, at 9; Estes, *supra*, at 39–40.

The advantage in all this to an acquiring thrift depends upon the fact that accretion of discount is the mirror image of amortization of goodwill. In the typical case, a failed thrift's primary assets were long-term mortgage loans that earned low rates of interest and therefore had declined in value to the point that the thrift's assets no longer exceeded its liabilities to depositors. In such a case, the disparity between assets and liabilities from which the accounting goodwill was derived was virtually equal to the value of the discount from face value of the thrift's outstanding loans. See Black, 2 Stan. L. & Policy Rev., at 104–105. Thrift regulators, however, typically agreed to supervisory merger terms that allowed acquiring thrifts to accrete the discount over the average life of the loans (approximately seven years), see *id.*, at 105, while permitting amortization of the goodwill asset over a much longer period. Given that goodwill and discount were substantially equal in overall values, the more rapid

accrual of capital gain from accretion resulted in a net paper profit over the initial years following the acquisition. See *ibid.;* Lowy 39–40.[8] The difference between amortization and accretion schedules thus allowed acquiring thrifts to seem more profitable than they in fact were.

Some transactions included yet a further inducement, described as a "capital credit." Such credits arose when FSLIC itself contributed cash to further a supervisory merger and permitted the acquiring institution to count the FSLIC contribution as a permanent credit to regulatory capital. By failing to require the thrift to subtract this FSLIC contribution from the amount of supervisory goodwill generated by the merger, regulators effectively permitted double counting of the cash as both a tangible and an intangible asset. See, *e. g.*, *Transohio Savings Bank* v. *Director, Office of Thrift Supervision*, 967 F. 2d 598, 604 (CADC 1992). Capital credits thus inflated the acquiring thrift's regulatory capital and permitted leveraging of more and more loans.

As we describe in more detail below, the accounting treatment to be accorded supervisory goodwill and capital credits was the subject of express arrangements between the regulators and the acquiring institutions. While the extent to which these arrangements constituted a departure from prior norms is less clear, an acquiring institution would rea-

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[8] See also National Commission on Financial Institution Reform, Recovery and Enforcement, Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States 38–39 (July 1993) (explaining the advantages of different amortization and accretion schedules to an acquiring thrift). The downside of a faster accretion schedule, of course, was that it exhausted the discount long before the goodwill asset had been fully amortized. As a result, this treatment resulted in a net drag on earnings over the medium and long terms. See Lowy 40–41; Black, Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill, 2 Stan. L. & Policy Rev. 102, 104–105 (1990). Many thrift managers were apparently willing to take the short-term gain, see Lowy 40–41, and others sought to stave off the inevitable losses by pursuing further acquisitions, see Black, *supra*, at 105.

sonably have wanted to bargain for such treatment. Although GAAP demonstrably permitted the use of the purchase method in acquiring a thrift suffering no distress, the relevant thrift regulations did not explicitly state that intangible goodwill assets created by that method could be counted toward regulatory capital. See 12 CFR § 563.13 (a)(3) (1981) (permitting thrifts to count as reserves any "items listed in the definition of net worth"); § 561.13(a) (defining "net worth" as "the sum of all reserve accounts . . . , retained earnings, permanent stock, mutual capital certificates . . . , and any other non-withdrawable accounts of an insured institution").[9] Indeed, the rationale for recognizing goodwill stands on its head in a supervisory merger: ordinarily, goodwill is recognized as valuable because a rational purchaser would not pay more than assets are worth; here, however, the purchase is rational only because of the accounting treatment for the shortfall. See Black, *supra,* at 104 ("GAAP's treatment of goodwill . . . assumes that buyers do not overpay when they purchase an S&L"). In the end, of course, such reasoning circumvented the whole purpose of the reserve requirements, which was to protect depositors and the deposit insurance fund. As some in Congress later recognized, "[g]oodwill is not cash. It is a concept, and a shadowy one at that. When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall." 135 Cong. Rec. 11795 (1989) (remarks of Rep. Barnard); see also White 84 (acknowledging

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[9] The 1981 regulations quoted above were in effect at the time of the Glendale transaction. The 1984 regulations relevant to the Winstar transaction were identical in all material respects, and although substantial changes had been introduced into § 563.13 by the time of the Statesman merger in 1988, they do not appear to resolve the basic ambiguity as to whether goodwill could qualify as regulatory capital. See 12 CFR § 563.13 (1988). Section 563.13 has since been superseded by the Financial Institutions Reform, Recovery, and Enforcement Act.

that in some instances supervisory goodwill "involved the creation of an asset that did not have real value as protection for the FSLIC"). To those with the basic foresight to appreciate all this, then, it was not obvious that regulators would accept purchase accounting in determining compliance with regulatory criteria, and it was clearly prudent to get agreement on the matter.

The advantageous treatment of amortization schedules and capital credits in supervisory mergers amounted to more clear-cut departures from GAAP and, hence, subjects worthy of agreement by those banking on such treatment. In 1983, the Financial Accounting Standards Board (the font of GAAP) promulgated Statement of Financial Accounting Standards No. 72 (SFAS 72), which applied specifically to the acquisition of a savings and loan association. SFAS 72 provided that "[i]f, and to the extent that, the fair value of liabilities assumed exceeds the fair value of identifiable assets acquired in the acquisition of a banking or thrift institution, the unidentifiable intangible asset recognized generally shall be amortized to expense by the interest method over a period no longer than the discount on the long-term interest-bearing assets acquired is to be recognized as interest income." Accounting Standards, Original Pronouncements (July 1973–June 1, 1989), p. 725. In other words, SFAS 72 eliminated any doubt that the differential amortization periods on which acquiring thrifts relied to produce paper profits in supervisory mergers were inconsistent with GAAP. SFAS 72 also barred double counting of capital credits by requiring that financial assistance from regulatory authorities must be deducted from the cost of the acquisition before the amount of goodwill is determined. SFAS 72, ¶ 9.[10] Thrift acquirers relying on such credits, then, had

[10] Although the Glendale transaction in this case occurred before the promulgation of SFAS 72 in 1983, the proper amortization period for goodwill under GAAP was uncertain prior to that time. According to one observer, "when the accounting profession designed the purchase account-

every reason for concern as to the continued availability of the RAP in effect at the time of these transactions.

C

Although the results of the forbearance policy, including the departures from GAAP, appear to have been mixed, see GAO, Forbearance for Troubled Institutions 4, it is relatively clear that the overall regulatory response of the early and mid-1980's was unsuccessful in resolving the crisis in the thrift industry. See, *e. g.*, *Transohio Savings Bank*, 967 F. 2d, at 602 (concluding that regulatory measures "actually aggravat[ed] the decline"). As a result, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101–73, 103 Stat. 183, with the objects of preventing the collapse of the industry, attacking the root causes of the crisis, and restoring public confidence.

FIRREA made enormous changes in the structure of federal thrift regulation by (1) abolishing FSLIC and transferring its functions to other agencies; (2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation; (3) replacing the Bank Board with the Office of Thrift Supervision (OTS), a Treasury Department office with responsibility for the regulation of all federally insured savings associations; and (4) establishing the Resolution Trust Corporation to liquidate or otherwise dispose of certain closed thrifts and their assets. See note following 12 U. S. C. § 1437, §§ 1441a, 1821. More importantly for the present case, FIRREA also obligated OTS to "prescribe and maintain uniformly applicable capital standards for savings associations" in accord with strict statutory re-

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ing rules in the early 1970s, they didn't anticipate the case of insolvent thrift institutions . . . . The rules for that situation were simply unclear until September 1982," when the SFAS 72 rules were first aired. Lowy 39–40.

quirements. § 1464(t)(1)(A).[11] In particular, the statute required thrifts to "maintain core capital in an amount not less than 3 percent of the savings association's total assets," § 1464(t)(2)(A), and defined "core capital" to exclude "unidentifiable intangible assets," § 1464(t)(9)(A), such as goodwill. Although the reform provided a "transition rule" permitting thrifts to count "qualifying supervisory goodwill" toward half the core capital requirement, this allowance was phased out by 1995. § 1464(t)(3)(A). According to the House Report, these tougher capital requirements reflected a congressional judgment that "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." House Report, at 310.

The impact of FIRREA's new capital requirements upon institutions that had acquired failed thrifts in exchange for supervisory goodwill was swift and severe. OTS promptly issued regulations implementing the new capital standards along with a bulletin noting that FIRREA "eliminates [capital and accounting] forbearances" previously granted to certain thrifts. Office of Thrift Supervision, Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments held by a Deposit Insurance Fund, Thrift Bulletin No. 38–2, Jan. 9, 1990. OTS accordingly directed that "[a]ll savings associations presently operating with these forbearances . . . should eliminate them in determining whether or not they comply with the new minimum regulatory capital standards." *Ibid.* Despite the statute's limited exception intended to moderate transitional

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[11] See 135 Cong. Rec. 18863 (1989) (remarks of Sen. Riegle) (emphasizing that these capital requirements were at the "heart" of the legislative reform); *id.*, at 18860 (remarks of Sen. Chafee) (describing capital standards as FIRREA's "strongest and most critical requirement" and "the backbone of the legislation"); *id.*, at 18853 (remarks of Sen. Dole) (describing the "[t]ough new capital standards [as] perhaps the most important provisions in this bill").

pains, many institutions immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators. See Black, 2 Stan. L. & Policy Rev., at 107 ("FIRREA's new capital mandates have caused over 500 S&Ls . . . to report that they have failed one or more of the three capital requirements").

D

This case is about the impact of FIRREA's tightened capital requirements on three thrift institutions created by way of supervisory mergers. Respondents Glendale Federal Bank, FSB, Winstar Corporation, and The Statesman Group, Inc., acquired failed thrifts in 1981, 1984, and 1988, respectively. After the passage of FIRREA, federal regulators seized and liquidated the Winstar and Statesman thrifts for failure to meet the new capital requirements. Although the Glendale thrift also fell out of regulatory capital compliance as a result of the new rules, it managed to avoid seizure through a massive private recapitalization. Believing that the Bank Board and FSLIC had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital requirements, respondents each filed suit against the United States in the Court of Federal Claims, seeking monetary damages on both contractual and constitutional theories. That court granted respondents' motions for partial summary judgment on contract liability, finding in each case that the Government had breached contractual obligations to permit respondents to count supervisory goodwill and capital credits toward their regulatory capital requirements. See *Winstar Corp.* v. *United States*, 21 Cl. Ct. 112 (1990) *(Winstar I)* (finding an implied-in-fact contract but requesting further briefing on contract issues); 25 Cl. Ct. 541 (1992) *(Winstar II)* (finding contract breached and entering summary judgment on liability); *Statesman Savings Holding Corp.* v. *United States*, 26 Cl. Ct. 904 (1992) (granting summary judgment on liability

to Statesman and Glendale). In so holding, the Court of Federal Claims rejected two central defenses asserted by the Government: that the Government could not be held to a promise to refrain from exercising its regulatory authority in the future unless that promise was unmistakably clear in the contract, *Winstar I*, *supra*, at 116; *Winstar II*, *supra*, at 544–549; *Statesman*, *supra*, at 919–920, and that the Government's alteration of the capital reserve requirements in FIRREA was a sovereign act that could not trigger contractual liability, *Winstar II*, *supra*, at 550–553; *Statesman*, *supra*, at 915–916. The Court of Federal Claims consolidated the three cases and certified its decisions for interlocutory appeal.

A divided panel of the Federal Circuit reversed, holding that the parties did not allocate to the Government, in an unmistakably clear manner, the risk of a subsequent change in the regulatory capital requirements. *Winstar Corp.* v. *United States*, 994 F. 2d 797, 811–813 (1993). The full court, however, vacated this decision and agreed to rehear the case en banc. After rebriefing and reargument, the en banc court reversed the panel decision and affirmed the Court of Federal Claims' rulings on liability. *Winstar Corp.* v. *United States*, 64 F. 3d 1531 (1995). The Federal Circuit found that FSLIC had made express contracts with respondents, including a promise that supervisory goodwill and capital credits could be counted toward satisfaction of the regulatory capital requirements. *Id.*, at 1540, 1542–1543. The court rejected the Government's unmistakability argument, agreeing with the Court of Federal Claims that that doctrine had no application in a suit for money damages. *Id.*, at 1545–1548. Finally, the en banc majority found that FIRREA's new capital requirements "single[d] out supervisory goodwill for special treatment" and therefore could not be said to be a "public" and "general act" within the meaning of the sovereign acts doctrine. *Id.*, at 1548–1551. Judge Nies dissented, essentially repeating the arguments in her

prior opinion for the panel majority, *id.*, at 1551–1552, and Judge Lourie also dissented on the ground that FIRREA was a public and general act, *id.*, at 1552–1553. We granted certiorari, 516 U. S. 1087 (1996), and now affirm.

II

We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here. We decide whether the Government may assert four special defenses to respondents' claims for breach: the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms, *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41, 52 (1986); the rule that an agent's authority to make such surrenders must be delegated in express terms, *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265 (1908); the doctrine that a government may not, in any event, contract to surrender certain reserved powers, *Stone* v. *Mississippi*, 101 U. S. 814 (1880); and, finally, the principle that a Government's sovereign acts do not give rise to a claim for breach of contract, *Horowitz* v. *United States*, 267 U. S. 458, 460 (1925).

The anterior question whether there were contracts at all between the Government and respondents dealing with regulatory treatment of supervisory goodwill and capital credits, although briefed and argued by the parties in this Court, is not strictly before us. See *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (noting that "we ordinarily do not consider questions outside those presented in the petition for certiorari"); this Court's Rule 14.1(a). And although we may review the Court of Federal Claims' grant of summary judgment *de novo*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 465, n. 10 (1992), we are in no better position than the Federal Circuit and the Court of Federal Claims to evaluate the documentary records of

the transactions at issue. Our resolution of the legal issues raised by the petition for certiorari, however, does require some consideration of the nature of the underlying transactions.

A

The Federal Circuit found that "[t]he three plaintiff thrifts negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time." 64 F. 3d, at 1545. Although each of these transactions was fundamentally similar, the relevant circumstances and documents vary somewhat from case to case.

1

In September 1981, Glendale was approached about a possible merger by the First Federal Savings and Loan Association of Broward County, which then had liabilities exceeding the fair value of its assets by over $734 million. At the time, Glendale's accountants estimated that FSLIC would have needed approximately $1.8 billion to liquidate Broward, only about $1 billion of which could be recouped through the sale of Broward's assets. Glendale, on the other hand, was both profitable and well capitalized, with a net worth of $277 million.[12] After some preliminary negotiations with the regulators, Glendale submitted a merger proposal to the Bank Board, which had to approve all mergers involving savings and loan associations, see 12 U. S. C. §§ 1467a(e)(1)(A) and (B); § 1817(j)(1); that proposal assumed the use of the purchase method of accounting to record supervisory goodwill arising from the transaction, with an amortization period of 40 years. The Bank Board ratified the merger, or "Supervisory Action Agreement" (SAA), on November 19, 1981.

[12] Glendale's premerger net worth amounted to 5.45 percent of its total assets, which comfortably exceeded the 4 percent capital/asset ratio, or net worth requirement, then in effect. See 12 CFR § 563.13(a)(2) (1981).

The SAA itself said nothing about supervisory goodwill, but did contain the following integration clause:

> "This Agreement . . . constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith." App. 598–599.

The SAA thereby incorporated Bank Board Resolution No. 81–710, by which the Board had ratified the SAA. That resolution referred to two additional documents: a letter to be furnished by Glendale's independent accountant identifying and supporting the use of any goodwill to be recorded on Glendale's books, as well as the resulting amortization periods; and "a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with [Bank Board] Memorandum R–31b." *Id.*, at 607. Memorandum R–31b, finally, permitted Glendale to use the purchase method of accounting and to recognize goodwill as an asset subject to amortization. See *id.*, at 571–574.

The Government does not seriously contest this evidence that the parties understood that goodwill arising from these transactions would be treated as satisfying regulatory requirements; it insists, however, that these documents simply reflect statements of then-current federal regulatory policy rather than contractual undertakings. Neither the Court of Federal Claims nor the Federal Circuit so read the record, however, and we agree with those courts that the Government's interpretation of the relevant documents is fundamentally implausible. The integration clause in Glendale's SAA with FSLIC, which is similar in all relevant respects to the analogous provisions in the Winstar and Statesman contracts, provides that the SAA supersedes "all prior agreements and understandings . . . excepting only . . . any resolutions or letters issued contemporaneously" by the Board, *id.*,

at 598–599; in other words, the SAA characterizes the Board's resolutions and letters not as statements of background rules, but as part of the "agreements and understandings" between the parties.

To the extent that the integration clause leaves any ambiguity, the other courts that construed the documents found that the realities of the transaction favored reading those documents as contractual commitments, not mere statements of policy, see Restatement (Second) of Contracts § 202(1) (1981) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"), and we see no reason to disagree. As the Federal Circuit noted, "[i]t is not disputed that if supervisory goodwill had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation." 64 F. 3d, at 1542. Indeed, the assumption of Broward's liabilities would have rendered Glendale immediately insolvent by approximately $460 million, but for Glendale's right to count goodwill as regulatory capital. Although one can imagine cases in which the potential gain might induce a party to assume a substantial risk that the gain might be wiped out by a change in the law, it would have been irrational in this case for Glendale to stake its very existence upon continuation of current policies without seeking to embody those policies in some sort of contractual commitment. This conclusion is obvious from both the dollar amounts at stake and the regulators' proven propensity to make changes in the relevant requirements. See Brief for United States 26 ("[I]n light of the frequency with which federal capital requirements had changed in the past . . . , it would have been unreasonable for Glendale, FSLIC, or the Bank Board to expect or rely upon the fact that those requirements would remain unchanged"); see also *infra*, at 909–910. Under the circumstances, we have no doubt that

the parties intended to settle regulatory treatment of these transactions as a condition of their agreement. See, *e. g.*, *The Binghamton Bridge*, 3 Wall. 51, 78 (1866) (refusing to construe charter in such a way that it would have been "madness" for private party to enter into it).[13] We accordingly have no reason to question the Court of Appeals's conclusion that "the government had an express contractual obligation to permit Glendale to count the supervisory goodwill generated as a result of its merger with Broward as a capital asset for regulatory capital purposes." 64 F. 3d, at 1540.

2

In 1983, FSLIC solicited bids for the acquisition of Windom Federal Savings and Loan Association, a Minnesota-based thrift in danger of failing. At that time, the estimated cost to the Government of liquidating Windom was approximately $12 million. A group of private investors formed Winstar Corporation for the purpose of acquiring Windom and submitted a merger plan to FSLIC; it called for capital contributions of $2.8 million from Winstar and $5.6 million from FSLIC, as well as for recognition of supervisory goodwill to be amortized over a period of 35 years.

The Bank Board accepted the Winstar proposal and made an Assistance Agreement that incorporated, by an integration clause much like Glendale's, both the Board's resolution approving the merger and a forbearance letter issued on the date of the agreement. See App. 112. The forbearance letter provided that "[f]or purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35

[13] See also *Appleby* v. *Delaney*, 271 U. S. 403, 413 (1926) ("It is not reasonable to suppose that the grantees would pay $12,000 . . . and leave to the city authorities the absolute right completely to nullify the chief consideration for seeking this property, . . . or that the parties then took that view of the transaction").

years by the straight-line method." *Id.*, at 123. Moreover, the Assistance Agreement itself contained an "Accounting Principles" section with the following provisions:

> "Except as otherwise provided, any computations made for the purposes of this Agreement shall be governed by generally accepted accounting principles as applied on a going concern basis in the savings and loan industry, except that where such principles conflict with the terms of this Agreement, applicable regulations of the Bank Board or the [FSLIC], or any resolution or action of the Bank Board approving or adopted concurrently with this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. . . . If there is a conflict between such regulations and the Bank Board's resolution or action, the Bank Board's resolution or action shall govern. For purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board ("FASB"), respectively, or any successor organization to either." *Id.*, at 108–109.

The Government emphasizes the last sentence of this clause, which provides that the relevant accounting principles may be "subsequently clarified . . . or amended," as barring any inference that the Government assumed the risk of regulatory change. Its argument, however, ignores the preceding sentence providing that the Bank Board's resolutions and actions in connection with the merger must prevail over contrary regulations. If anything, then, the accounting principles clause tilts in favor of interpreting the contract to lock in the then-current regulatory treatment of supervisory goodwill.

In any event, we do not doubt the soundness of the Federal Circuit's finding that the overall "documentation in the Win-

star transaction establishes an express agreement allowing Winstar to proceed with the merger plan approved by the Bank Board, including the recording of supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over 35 years." 64 F. 3d, at 1544. As in the Glendale transaction, the circumstances of the merger powerfully support this conclusion: The tangible net worth of the acquired institution was a negative $6.7 million, and the new Winstar thrift would have been out of compliance with regulatory capital standards from its very inception, without including goodwill in the relevant calculations. We thus accept the Court of Appeals's conclusion that "it was the intention of the parties to be bound by the accounting treatment for goodwill arising in the merger." *Ibid.*

3

Statesman, another nonthrift entity, approached FSLIC in 1987 about acquiring a subsidiary of First Federated Savings Bank, an insolvent Florida thrift. FSLIC responded that if Statesman wanted Government assistance in the acquisition it would have to acquire all of First Federated as well as three shaky thrifts in Iowa. Statesman and FSLIC ultimately agreed on a complex plan for acquiring the four thrifts; the agreement involved application of the purchase method of accounting, a $21 million cash contribution from Statesman to be accompanied by $60 million from FSLIC, and (unlike the Glendale and Winstar plans) treatment of $26 million of FSLIC's contribution as a permanent capital credit to Statesman's regulatory capital.

The Assistance Agreement between Statesman and FSLIC included an "accounting principles" clause virtually identical to Winstar's, see App. 402–403, as well as a specific provision for the capital credit:

> "For the purposes of reports to the Bank Board . . . , $26 million of the contribution [made by FSLIC] shall be credited to [Statesman's] regulatory capital account

> and shall constitute regulatory capital (as defined in § 561.13 of the Insurance Regulations)." *Id.*, at 362a.

As with Glendale and Winstar, the agreement had an integration clause incorporating contemporaneous resolutions and letters issued by the Board. *Id.*, at 407–408. The Board's resolution explicitly acknowledged both the capital credits and the creation of supervisory goodwill to be amortized over 25 years, *id.*, at 458–459, and the Forbearance Letter likewise recognized the capital credit provided for in the agreement. *Id.*, at 476. Finally, the parties executed a separate Regulatory Capital Maintenance Agreement stating that, "[i]n consideration of the mutual promises contained [t]herein," *id.*, at 418, Statesman would be obligated to maintain the regulatory capital of the acquired thrifts "at the level . . . required by § 563.13(b) of the Insurance Regulations . . . or any successor regulation . . . ." The agreement further provided, however, that "[f]or purposes of this Agreement, any determination of [Statesman's] Required Regulatory Capital . . . shall include . . . amounts permitted by the FSLIC in the Assistance Agreement and in the forbearances issued in connection with the transactions discussed herein." *Id.*, at 418–419. Absent those forbearances, Statesman's thrift would have remained insolvent by almost $9 million despite the cash infusions provided by the parties to the transaction.

For the same reasons set out above with respect to the Glendale and Winstar transactions, we accept the Federal Circuit's conclusion that "the government was contractually obligated to recognize the capital credits and the supervisory goodwill generated by the merger as part of the Statesman's regulatory capital requirement and to permit such goodwill to be amortized on a straight line basis over 25 years." 64 F. 3d, at 1543. Indeed, the Government's position is even weaker in Statesman's case because the capital credits portion of the agreement contains an express commitment to include those credits in the calculation of regulatory capital.

The Government asserts that the reference to § 563.13 of FSLIC regulations, which at the time defined regulatory capital for thrift institutions, indicates that the Government's obligations could change along with the relevant regulations. But, just as in Winstar's case, the Government would have us overlook the specific incorporation of the then-current regulations as part of the agreement.[14] The Government also cites a provision requiring Statesman to "comply in all material respects with all applicable statutes, regulations, orders of, and restrictions imposed by the United States or . . . by any agency of [the United States]," App. 407, but this simply meant that Statesman was required to observe FIRREA's new capital requirements once they were promulgated. The clause was hardly necessary to oblige Statesman to obey the law, and nothing in it barred Statesman from asserting that passage of that law required the Government to take action itself or be in breach of its contract.

B

It is important to be clear about what these contracts did and did not require of the Government. Nothing in the documentation or the circumstances of these transactions purported to bar the Government from changing the way in which it regulated the thrift industry. Rather, what the Federal Circuit said of the Glendale transaction is true of the Winstar and Statesman deals as well: "the Bank Board and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected" in the agreements between the parties. 64 F. 3d, at 1541–1542. We read this promise as the law of contracts has always treated promises to provide something beyond the promi-

[14] As part of the contract, the Government's promise to count supervisory goodwill and capital credits toward regulatory capital was alterable only by written agreement of the parties. See App. 408. This was also true of the Glendale and Winstar transactions. See *id.*, at 112, 600.

sor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence.[15] Holmes's example is famous: "[i]n the case of a binding promise that it shall rain to-morrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee." Holmes, The Common Law (1881), in 3 The Collected Works of Justice Holmes 268 (S. Novick ed. 1995).[16] Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows. The drafters of the Restatement attested to this when they explained that, "[w]ith the trend toward greater governmental regulation . . . parties are increasingly aware of such risks, and a party may undertake a duty that is not discharged by such supervening governmental actions . . . ." Restatement (Second) of Contracts § 264, Comment *a*. "Such an agreement," according to the Restatement, "is usually interpreted as one to pay

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[15] To be sure, each side could have eliminated any serious contest about the correctness of their interpretive positions by using clearer language. See, *e. g., Guaranty Financial Services, Inc.* v. *Ryan*, 928 F. 2d 994, 999–1000 (CA11 1991) (finding, based on very different contract language, that the Government had expressly reserved the right to change the capital requirements without any responsibility to the acquiring thrift). The failure to be even more explicit is perhaps more surprising here, given the size and complexity of these transactions. But few contract cases would be in court if contract language had articulated the parties' postbreach positions as clearly as might have been done, and the failure to specify remedies in the contract is no reason to find that the parties intended no remedy at all. The Court of Claims and Federal Circuit were thus left with the familiar task of determining which party's interpretation was more nearly supported by the evidence.

[16] See also *Day* v. *United States*, 245 U. S. 159, 161 (1917) (Holmes, J.) ("One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking").

damages if performance is prevented rather than one to render a performance in violation of law." *Ibid.*[17]

When the law as to capital requirements changed in the present instance, the Government was unable to perform its promise and, therefore, became liable for breach. We accept the Federal Circuit's conclusion that the Government breached these contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA, 12 U. S. C. § 1464(t), the federal regulatory agencies limited the use of supervisory goodwill and capital credits in calculating respondents' net worth. 64 F. 3d, at 1545. In the case of Winstar and Statesman, the Government exacerbated its breach when it seized and liquidated respondents' thrifts for regulatory noncompliance. *Ibid.*

In evaluating the relevant documents and circumstances, we have, of course, followed the Federal Circuit in applying

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[17] See, *e. g., Hughes Communications Galaxy, Inc.* v. *United States,* 998 F. 2d 953, 957–959 (CA Fed. 1993) (interpreting contractual incorporation of then-current Government policy on space shuttle launches not as a promise not to change that policy, but as a promise "to bear the cost of changes in launch priority and scheduling resulting from the revised policy"); *Hills Materials Co.* v. *Rice,* 982 F. 2d 514, 516–517 (CA Fed. 1992) (interpreting contract to incorporate safety regulations extant when contract was signed and to shift responsibility for costs incurred as a result of new safety regulations to the Government); see generally 18 W. Jaeger, Williston on Contracts § 1934, pp. 19–21 (3d ed. 1978) ("Although a warranty in effect is a promise to pay damages if the facts are not as warranted, in terms it is an undertaking that the facts exist. And in spite of occasional statements that an agreement impossible in law is void there seems no greater difficulty in warranting the legal possibility of a performance than its possibility in fact . . . . [T]here seems no reason of policy forbidding a contract to perform a certain act legal at the time of the contract if it remains legal at the time of performance, and if not legal, to indemnify the promisee for non-performance" (footnotes omitted)); 5A A. Corbin, Corbin on Contracts § 1170, p. 254 (1964) (noting that in some cases where subsequent legal change renders contract performance illegal, "damages are still available as a remedy, either because the promisor assumed the risk or for other reasons," but specific performance will not be required).

ordinary principles of contract construction and breach that would be applicable to any contract action between private parties. The Government's case, however, is that the Federal Circuit's decision to apply ordinary principles was error for a variety of reasons, each of which we consider, and reject, in the sections ahead.

III

The Government argues for reversal, first, on the principle that "contracts that limit the government's future exercises of regulatory authority are strongly disfavored; such contracts will be recognized only rarely, and then only when the limitation on future regulatory authority is expressed in unmistakable terms." Brief for United States 16. Hence, the Government says, the agreements between the Bank Board, FSLIC, and respondents should not be construed to waive Congress's authority to enact a subsequent bar to using supervisory goodwill and capital credits to meet regulatory capital requirements.

The argument mistakes the scope of the unmistakability doctrine. The thrifts do not claim that the Bank Board and FSLIC purported to bind Congress to ossify the law in conformity to the contracts; they seek no injunction against application of FIRREA's new capital requirements to them and no exemption from FIRREA's terms. They simply claim that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury. The question, then, is not whether Congress could be constrained but whether the doctrine of unmistakability is applicable to any contract claim against the Government for breach occasioned by a subsequent Act of Congress. The answer to this question is no.

A

The unmistakability doctrine invoked by the Government was stated in *Bowen* v. *Public Agencies Opposed to Social*

Security Entrapment: "'[S]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" 477 U. S., at 52 (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982)). This doctrine marks the point of intersection between two fundamental constitutional concepts, the one traceable to the theory of parliamentary sovereignty made familiar by Blackstone, the other to the theory that legislative power may be limited, which became familiar to Americans through their experience under the colonial charters, see G. Wood, Creation of the American Republic 1776–1787, pp. 268–271 (1969).

In his Commentaries, Blackstone stated the centuries-old concept that one legislature may not bind the legislative authority of its successors:

> "Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's *[sic]* ordinances could bind the present parliament." 1 W. Blackstone, Commentaries on the Laws of England 90 (1765).[18]

In England, of course, Parliament was historically supreme in the sense that no "higher law" limited the scope of legislative action or provided mechanisms for placing legally enforceable limits upon it in specific instances; the power of American legislative bodies, by contrast, is subject to the overriding dictates of the Constitution and the obligations that it authorizes. See Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am.

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[18] See also H. Hart, The Concept of Law 145 (1961) (recognizing that Parliament is "sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation").

Bar Found. Research J. 379, 392–393 (observing that the English rationale for precluding a legislature from binding its successors does not apply in America). Hence, although we have recognized that "a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature," *Manigault* v. *Springs*, 199 U. S. 473, 487 (1905),[19] on this side of the Atlantic the principle has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation.

The development of this latter, American doctrine in federal litigation began in cases applying limits on state sovereignty imposed by the National Constitution. Thus Chief Justice Marshall's exposition in *Fletcher* v. *Peck*, 6 Cranch 87 (1810), where the Court held that the Contract Clause, U. S. Const., Art. I, § 10, cl. 1, barred the State of Georgia's effort to rescind land grants made by a prior state legislature. Marshall acknowledged "that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." 6 Cranch, at 135. "The correctness of this principle, so far as respects general legislation," he said, "can never be controverted." *Ibid.* Marshall went on to qualify the principle, however, noting that "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." *Ibid.* For Marshall, this was true for the two distinct reasons that the intrusion on vested rights by the Georgia Legislature's Act of repeal might well have gone beyond the limits of "the

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[19] See also *Reichelderfer* v. *Quinn*, 287 U. S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); Black, Amending the Constitution: A Letter to a Congressman, 82 Yale L. J. 189, 191 (1972) (characterizing this "most familiar and fundamental princip[e]" as "so obvious as rarely to be stated").

legislative power," and that Georgia's legislative sovereignty was limited by the Federal Constitution's bar against laws impairing the obligation of contracts. *Id.*, at 135–136.

The impetus for the modern unmistakability doctrine was thus Chief Justice Marshall's application of the Contract Clause to public contracts. Although that Clause made it possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments. Later decisions were accordingly less willing to recognize contractual restraints upon legislative freedom of action, and two distinct limitations developed to protect state regulatory powers. One came to be known as the "reserved powers" doctrine, which held that certain substantive powers of sovereignty could not be contracted away. See *West River Bridge Co.* v. *Dix*, 6 How. 507 (1848) (holding that a State's contracts do not surrender its eminent domain power).[20] The other, which surfaced somewhat earlier in *Providence Bank* v. *Billings*, 4 Pet. 514 (1830), and *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 11 Pet. 420 (1837), was a canon of construction disfavoring implied governmental obligations in public contracts. Under this rule that "[a]ll public grants are strictly construed," *The Delaware Railroad Tax*, 18 Wall. 206, 225 (1874), we have insisted that "[n]othing can be taken against the State by presumption or inference," *ibid.*, and that "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless

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[20] See also *Stone* v. *Mississippi*, 101 U. S. 814 (1880) (State may not contract away its police power); *Butchers' Union Slaughter-House & Live-Stock Landing Co.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U. S. 746 (1884) (same); see generally Griffith, Local Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277, 290–299 (1990) (recounting the early development of the reserved powers doctrine). We discuss the application of the reserved powers doctrine to this case *infra*, at 888–889.

such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 446 (1862).

The posture of the government in these early unmistakability cases is important. In each, a state or local government entity had made a contract granting a private party some concession (such as a tax exemption or a monopoly), and a subsequent governmental action had abrogated the contractual commitment. In each case, the private party was suing to invalidate the abrogating legislation under the Contract Clause. A requirement that the government's obligation unmistakably appear thus served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power. Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring) (same).

The same function of constitutional avoidance has marked the expansion of the unmistakability doctrine from its Contract Clause origins dealing with state grants and contracts to those of other governmental sovereigns, including the United States. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S., at 148 (deriving the unmistakability principle from *St. Louis* v. *United Railways Co.*, 210 U. S. 266 (1908), a Contract Clause suit against a state government).[21] Although

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[21] *United Railways* is in the line of cases stretching back to *Providence Bank* v. *Billings*, 4 Pet. 514 (1830), and *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 11 Pet. 420 (1837). Justice Day's opinion in *United Railways* relied heavily upon *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192 (1892), which in turn relied upon

the Contract Clause has no application to acts of the United States, *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 732, n. 9 (1984), it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights, see, *e. g.*, *Perry* v. *United States*, 294 U. S. 330 (1935); *Lynch* v. *United States*, 292 U. S. 571 (1934). The extent of that capacity, to be sure, remains somewhat obscure. Compare, *e. g.*, *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 26 (1977) (heightened Contract Clause scrutiny when States abrogate their own contractual obligations), with *Pension Benefit Guaranty Corporation*, *supra*, at 733 (contrasting less exacting due process standards governing federal economic legislation affecting private contracts). But the want of more developed law on limitations independent of the Contract Clause is in part the result of applying the unmistakability canon of construction to avoid this doctrinal thicket, as we have done in several cases involving alleged surrenders of sovereign prerogatives by the National Government and Indian tribes.

First, we applied the doctrine to protect a tribal sovereign in *Merrion* v. *Jicarilla Apache Tribe*, *supra*, which held that long-term oil and gas leases to private parties from an Indian Tribe, providing for specific royalties to be paid to the Tribe, did not limit the Tribe's sovereign prerogative to tax the proceeds from the lessees' drilling activities. *Id.*, at 148.

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classic Contract Clause unmistakability cases like *Vicksburg S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 (1886), *Memphis Gas Light Co.* v. *Taxing Dist. of Shelby Cty.*, 109 U. S. 398 (1883), and *Piqua Branch of State Bank of Ohio* v. *Knoop*, 16 How. 369 (1854). And *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), upon which *Merrion* also relied, cites *Charles River Bridge* directly. See 290 U. S., at 435; see also Note, Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty, 92 Colum. L. Rev. 426, 453 (1992) (linking the unmistakability principle applied in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41 (1986), to the *Charles River Bridge*/*Providence Bank* line of cases).

Because the lease made no reference to the Tribe's taxing power, we held simply that a waiver of that power could not be "inferred . . . from silence," *ibid.*, since the taxing power of any government remains "unless it is has been specifically surrendered in terms which admit of no other reasonable interpretation." *Ibid.* (internal quotation marks and citation omitted).

In *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41 (1986), this Court confronted a state claim that § 103 of the Social Security Amendments Act of 1983, 97 Stat. 71, 42 U. S. C. § 418(g) (1982 ed., Supp. II), was unenforceable to the extent it was inconsistent with the terms of a prior agreement with the National Government. Under the law before 1983, a State could agree with the Secretary of Health and Human Services to cover the State's employees under the Social Security scheme subject to a right to withdraw them from coverage later. When the 1983 Act eliminated the right of withdrawal, the State of California and related plaintiffs sought to enjoin application of the new law to them, or to obtain just compensation for loss of the withdrawal right (a remedy which the District Court interpreted as tantamount to the injunction, since it would mandate return of all otherwise required contributions, see 477 U. S., at 51). Although we were able to resolve the case by reading the terms of a state-federal coverage agreement to reserve the Government's right to modify its terms by subsequent legislation, in the alternative we rested the decision on the more general principle that, absent an "unmistakable" provision to the contrary, "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." *Id.*, at 52 (quoting *Merrion*, *supra*, at 147). We thus rejected the proposal "to find that a 'sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in' the contract," *Bowen*, *supra*, at 52 (quoting *Merrion*, *supra*, at 148), and

held instead that unmistakability was needed for waiver, not reservation.

Most recently, in *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700 (1987), we refused to infer a waiver of federal sovereign power from silence. There, an Indian Tribe with property rights in a riverbed derived from a Government treaty sued for just compensation for damage to its interests caused by the Government's navigational improvements to the Arkansas River. The claim for compensation presupposed, and was understood to presuppose, that the Government had conveyed to the Tribe its easement to control navigation; absent that conveyance, the Tribe's property included no right to be free from the Government's riverbed improvements. *Id.*, at 704. We found, however, that the treaty said nothing about conveying the Government's navigational easement, see *id.*, at 706, which we saw as an aspect of sovereignty. This, we said, could be "'surrendered [only] in unmistakable terms,'" *id.*, at 707 (quoting *Bowen*, *supra*, at 52), if indeed it could be waived at all.

Merrion, *Bowen*, and *Cherokee Nation* thus announce no new rule distinct from the canon of construction adopted in *Providence Bank* and *Charles River Bridge;* their collective holding is that a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power. The cases extending back into the 19th century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered a sovereign power[22] (*e. g.*, to tax or

[22] "Sovereign power" as used here must be understood as a power that could otherwise affect the Government's obligation under the contract. The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, Government contracts of a class including that one, or simply all Government con-

control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power (*e. g.*, the equivalent of exemption from Social Security obligations). The application of the doctrine thus turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government.

Since the criterion looks to the effect of a contract's enforcement, the particular remedy sought is not dispositive and the doctrine is not rendered inapplicable by a request for damages, as distinct from specific performance. The respondents in *Cherokee Nation* sought nothing beyond damages, but the case still turned on the unmistakability doctrine because there could be no claim to harm unless the right to be free of the sovereign power to control navigation had been conveyed away by the Government.[23] So, too, in *Bowen:* the sole relief sought was dollars and cents, but the award of damages as requested would have been the

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tracts. No such legislation would provide the Government with a defense under the sovereign acts doctrine, see *infra,* at 891–899.

[23] The Government's right to take the Tribe's property upon payment of compensation, of course, did not depend upon the navigational servitude; where it applies, however, the navigational easement generally obviates the obligation to pay compensation at all. See, *e. g.*, *United States* v. *Kansas City Life Ins. Co.,* 339 U. S. 799, 808 (1950) ("When the Government exercises [the navigational] servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone"); *Scranton* v. *Wheeler,* 179 U. S. 141, 163 (1900) ("Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title . . . to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation"). Because an order to pay compensation would have placed the Government in the same position as if the navigational easement had been surrendered altogether, the holding of *Cherokee Nation* is on all fours with the approach we describe today.

equivalent of exemption from the terms of the subsequent statute.

The application of the doctrine will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them. At one end of the wide spectrum are claims for enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority, such as a claim for rebate under an agreement for a tax exemption. Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power, cf. *Bowen*, 477 U. S., at 51, and the unmistakability doctrine would have to be satisfied.[24] At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the Government's promise to purchase and a claim for damages implies no such limitation. That is why no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine. Between these extremes lies an enormous variety of contracts including those under which performance will require exercise (or not) of a power peculiar to the Government. So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it.

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[24] The dissent is mistaken in suggesting there is question begging in speaking of what a Government contract provides without first applying the unmistakability doctrine, see *post*, at 929. A contract may reasonably be read under normal rules of construction to contain a provision that does not satisfy the more demanding standard of unmistakable clarity. If an alleged term could not be discovered under normal standards, there would be no need for an unmistakability doctrine. It would, of course, make good sense to apply the unmistakability rule if it was clear from the start that a contract plaintiff could not obtain the relief sought without effectively barring exercise of a sovereign power, as in the example of the promisee of the tax exemption who claims a rebate.

The Government argues that enforcement of the contracts in this case would implicate the unmistakability principle, with the consequence that *Merrion*, *Bowen*, and *Cherokee Nation* are good authorities for rejecting respondents' claims. The Government's position is mistaken, however, for the complementary reasons that the contracts have not been construed as binding the Government's exercise of authority to modify banking regulation or of any other sovereign power, and there has been no demonstration that awarding damages for breach would be tantamount to any such limitation.

As construed by each of the courts that considered these contracts before they reached us, the agreements do not purport to bind the Congress from enacting regulatory measures, and respondents do not ask the courts to infer from silence any such limit on sovereign power as would violate the holdings of *Merrion* and *Cherokee Nation.* The contracts have been read as solely risk-shifting agreements and respondents seek nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change. They seek no injunction against application of the law to them, as the plaintiffs did in *Bowen* and *Merrion*, cf. *Reichelderfer* v. *Quinn*, 287 U. S. 315 (1932), and they acknowledge that the Bank Board and FSLIC could not bind Congress (and possibly could not even bind their future selves) not to change regulatory policy.

Nor do the damages respondents seek amount to exemption from the new law, in the manner of the compensation sought in *Bowen*, see 477 U. S., at 51. Once general jurisdiction to make an award against the Government is conceded, a requirement to pay money supposes no surrender of sovereign power by a sovereign with the power to contract. See, *e. g.*, *Amino Bros. Co.* v. *United States*, 178 Ct. Cl. 515, 525, 372 F. 2d 485, 491 ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other

contracting party the amount by which its costs are increased by the Government's sovereign act"), cert. denied, 389 U. S. 846 (1967).[25] Even if respondents were asking that the Government be required to make up any capital deficiency arising from the exclusion of goodwill and capital credits from the relevant calculations, such relief would hardly amount to an exemption from the capital requirements of FIRREA; after all, Glendale (the only respondent thrift still in operation) would still be required to maintain adequate tangible capital reserves under FIRREA, and the purpose of the statute, the protection of the insurance fund, would be served. Nor would such a damages award deprive the Government of money it would otherwise be entitled to receive (as a tax rebate would), since the capital require-

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[25] See also *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F. 2d, at 958 (finding the unmistakability doctrine inapplicable to "the question of how liability for certain contingencies was allocated by the contract"); *Sunswick Corp.* v. *United States*, 109 Ct. Cl. 772, 798, 75 F. Supp. 221, 228 ("We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign. As shown in *United States* v. *Bostwick*, 94 U. S. 53, 69 [(1877)], the liability of the Government in such circumstances rests upon the contract and not upon the act of the Government in its sovereign capacity"), cert. denied, 334 U. S. 827 (1948); see generally Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am. Bar Found. Research J. 379, 424 (observing that limiting the Government's obligation to "compensating for the financial losses its repudiations engender . . . affords the current legislature the freedom to respond to constituents' needs, while at the same time protecting those whose contractual interests are impaired"); Note, A Procedural Approach to the Contract Clause, 93 Yale L. J. 918, 928–929 (1984) ("A damage remedy is superior to an injunction because damages provide the states with the flexibility to impair contracts retroactively when the benefits exceed the costs. So long as the victims of contract impairments are made whole through compensation, there is little reason to grant those victims an injunctive remedy").

ments of FIRREA govern only the allocation of resources to a thrift and require no payments to the Government at all.[26]

We recognize, of course, that while agreements to insure private parties against the costs of subsequent regulatory change do not directly impede the exercise of sovereign power, they may indirectly deter needed governmental regulation by raising its costs. But all regulations have their costs, and Congress itself expressed a willingness to bear the costs at issue here when it authorized FSLIC to "guarantee [acquiring thrifts] against loss" that might occur as a result of a supervisory merger. 12 U. S. C. § 1729(f)(2) (1988 ed.) (repealed 1989). Just as we have long recognized that the Constitution "'bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,'" *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994) (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)), so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change.

The Government's position would not only thus represent a conceptual expansion of the unmistakability doctrine beyond its historical and practical warrant, but would place the doctrine at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies. Consider the procurement con-

[26] This point underscores the likelihood that damages awards will have the same effect as an injunction only in cases, like *Bowen*, where a private party seeks the return of payments to the Government. The classic examples, of course, are tax cases like *St. Louis* v. *United Railways Co.*, 210 U. S. 266 (1908). Because a request for rebate damages in that case would effectively have exempted the plaintiffs from the law by forcing the reimbursement of their tax payments, the dissent is quite wrong to suggest, see *post*, at 928–929, that the plaintiffs could have altered the outcome by pleading their case differently.

tracts that can be affected by congressional or executive scale backs in federal regulatory or welfare activity; or contracts to substitute private service providers for the Government, which could be affected by a change in the official philosophy on privatization; or all the contracts to dispose of federal property, surplus or otherwise. If these contracts are made in reliance on the law of contract and without specific provision for default mechanisms,[27] should all the private contractors be denied a remedy in damages unless they satisfy the unmistakability doctrine? The answer is obviously no because neither constitutional avoidance nor any apparent need to protect the Government from the consequences of standard operations could conceivably justify applying the doctrine. Injecting the opportunity for unmistakability litigation into every common contract action would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be "of the essence of sovereignty" itself. *United States* v. *Bekins*, 304 U. S. 27, 51–52 (1938).[28] From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements. As Justice Brandeis

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[27] See Posner & Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Studies 83, 88–89 (1977) (noting that parties generally rely on contract law "to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them").

[28] See also *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S., at 52 ("[T]he Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights . . ."); *Perry* v. *United States*, 294 U. S. 330, 353 (1935) ("[T]he right to make binding obligations is a competence attaching to sovereignty"); cf. Hart, The Concept of Law, at 145–146 (noting that the ability to limit a body's future authority is itself one aspect of sovereignty).

recognized, "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch* v. *United States*, 292 U. S., at 580.[29]

The dissent's only answer to our concern is to recognize that "Congress may not simply abrogate a statutory provision obligating performance without breaching the contract and rendering itself liable for damages." *Post*, at 929 (citing *Lynch*, *supra*, at 580). Yet the only grounds that statement suggests for distinguishing *Lynch* from the present case is that there the contractual obligation was embodied in a statute. Putting aside the question why this distinction should make any difference, we note that the dissent seemingly does not deny that its view would apply the unmistakability doctrine to the vast majority of governmental contracts, which would be subject to abrogation arguments based on subsequent sovereign acts. Indeed, the dissent goes so far as to argue that our conclusion that damages are available for breach even where the parties did not specify a remedy in the contract depends upon "reading of additional terms into the contract." *Post*, at 930. That, of course, is not the law; damages are always the default remedy for breach of contract.[30] And we suspect that most Government contractors would be quite surprised by the dissent's conclusion that, where they have failed to require an express provision that

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[29] See also Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129, 1146 (1996) ("If we allowed the government to break its contractual promises without having to pay compensation, such a policy would come at a high cost in terms of increased default premiums in future government contracts and increased disenchantment with the government generally").

[30] See, *e. g.*, Restatement (Second) of Contracts § 346, Comment *a* (1981) ("Every breach of contract gives the injured party a right to damages against the party in breach" unless "[t]he parties . . . by agreement vary the rules"); 3 E. Farnsworth, Contracts § 12.8, p. 185 (1990) ("The award of damages is the common form of relief for breach of contract. Virtually any breach gives the injured party a claim for damages").

damages will be available for breach, that remedy must be "implied in law" and therefore unavailable under the Tucker Act, *ibid.*

Nor can the dissenting view be confined to those contracts that are "regulatory" in nature. Such a distinction would raise enormous analytical difficulties; one could ask in this case whether the Government as contractor was regulating or insuring. The dissent understandably does not advocate such a distinction, but its failure to advance any limiting principle at all would effectively compromise the Government's capacity as a reliable, straightforward contractor whenever the subject matter of a contract might be subject to subsequent regulation, which is most if not all of the time.[31] Since the facts of the present case demonstrate that the Government may wish to further its regulatory goals through contract, we are unwilling to adopt any rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation.

In any event, we think the dissent goes fundamentally wrong when it concludes that "the issue of remedy for . . . breach" can arise only "[i]f the sovereign did surrender its power unequivocally." *Post*, at 929. This view ignores the

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[31] The dissent justifies its all-devouring view of unmistakability not by articulating any limit, but simply by reminding us that "'[m]en must turn square corners when they deal with the Government.'" *Post*, at 937 (quoting *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143 (1920) (Holmes, J.)). We have also recognized, however, that "'[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.'" *Heckler* v. *Community Health Services of Crawford Cty., Inc.*, 467 U. S. 51, 61, n. 13 (1984) (quoting *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting). See also *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 387–388 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street").

other, less remarkable possibility actually found by both courts that construed these contracts: that the Government agreed to do something that did not implicate its sovereign powers at all, that is, to indemnify its contracting partners against financial losses arising from regulatory change. We accordingly hold that the Federal Circuit correctly refused to apply the unmistakability doctrine here. See 64 F. 3d, at 1548. There being no need for an unmistakably clear "second promise" not to change the capital requirements, it is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform. This conclusion does not, of course, foreclose the assertion of a defense that the contracts were ultra vires or that the Government's obligation should be discharged under the common-law doctrine of impossibility, see *infra*, at 888–891, 904–910, but nothing in the nature of the contracts themselves raises a bar to respondents' claims for breach.[32]

[32] JUSTICE SCALIA offers his own theory of unmistakability, see *post*, at 919–922, which would apply in a wide range of cases and so create some tension with the general principle that the Government is ordinarily treated just like a private party in its contractual dealings, see, *e. g.*, *Perry* v. *United States*, 294 U. S., at 352, but which would be satisfied by an inference of fact and therefore offer a only a low barrier to litigation of constitutional issues if a party should, in fact, prove a governmental promise not to change the law. JUSTICE SCALIA seeks to minimize the latter concern by quoting Holmes's pronouncement on damages as the exclusive remedy at law for breach of contract, see *post*, at 919–920, but this ignores the availability of specific performance in a nontrivial number of cases, see, *e. g.*, Restatement (Second) of Contracts §§ 357–359, including the Contract Clause cases in which the unmistakability doctrine itself originated. See, *e. g.*, *Carter* v. *Greenhow*, 114 U. S. 317, 322 (1885) (stating that "the only right secured" by the Contract Clause is "to have a judicial determination, declaring the nullity of the attempt to impair [the contract's] obligation"); Note, Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts, 36 Stan. L. Rev. 1447, 1462 (1984) (suggesting that "analysis under the contract clause is limited to declaring the statute unconstitutional. The provision does not authorize the courts to award damages in lieu of requiring the state to adhere to the original terms of the contract"); cf. C. Fried, Contract as Promise 117–

B

The answer to the Government's unmistakability argument also meets its two related contentions on the score of ultra vires: that the Bank Board and FSLIC had no authority to bargain away Congress's power to change the law in the future, and that we should in any event find no such authority conferred without an express delegation to that effect. The first of these positions rests on the reserved powers doctrine, developed in the course of litigating claims that States had violated the Contract Clause. See *supra*, at 874. It holds that a state government may not contract away "an essential attribute of its sovereignty," *United States Trust*, 431 U. S., at 23, with the classic example of its limitation on the scope of the Contract Clause being found in *Stone* v. *Mississippi*, 101 U. S. 814 (1880). There a corporation bargained for and received a state legislative charter to conduct lotteries, only to have them outlawed by statute a year later. This Court rejected the argument that the charter immunized the corporation from the operation of the statute, holding that "the legislature cannot bargain away the police power of a State." *Id.*, at 817.[33]

The Government says that "[t]he logic of the doctrine . . . applies equally to contracts alleged to have been made by the federal government." Brief for United States 38. This

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118 (1981) (arguing that "Holmes's celebrated dictum . . . goes too far, is too simple"). Finally, we have no need to consider the close relationship that JUSTICE SCALIA sees between the unmistakability and sovereign acts doctrines, see *post*, at 923–924, because, even considered separately, neither one favors the Government in this case.

[33] See also *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558 (1914) ("[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant"); *West River Bridge Co.* v. *Dix*, 6 How. 507 (1848) (State's contracts do not relinquish its eminent domain power).

may be so but is also beside the point, for the reason that the Government's ability to set capital requirements is not limited by the Bank Board's and FSLIC's promises to make good any losses arising from subsequent regulatory changes. See *supra*, at 882–883. The answer to the Government's contention that the State cannot barter away certain elements of its sovereign power is that a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty.[34]

The same response answers the Government's demand for express delegation of any purported authority to fetter the exercise of sovereign power. It is true, of course, that in *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S., at 273, we said that "[t]he surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized." Hence, where "a contract has the effect of extinguishing *pro tanto* an undoubted power of government," we have insisted that "both [the contract's] existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." *Ibid.* But *Home Telephone & Telegraph* simply has no application to the pres-

[34] To the extent that JUSTICE SCALIA finds the reserved powers doctrine inapplicable because "the private party to the contract does not seek to stay the exercise of sovereign authority, but merely requests damages for breach of contract," *post*, at 923, he appears to adopt a distinction between contracts of indemnity and contracts not to change the law similar to the unmistakability analysis he rejects. He also suggests that the present case falls outside the "core governmental powers" that cannot be surrendered under the reserved powers doctrine, but this suggestion is inconsistent with our precedents. See *Stone* v. *Mississippi*, 101 U. S. 814, 817 (1880) ("[T]he legislature cannot bargain away the police power of a State"); *Veix* v. *Sixth Ward Building & Loan Assn. of Newark*, 310 U. S. 32, 38 (1940) (recognizing that thrift regulation is within the police power).

ent case, because there were no contracts to surrender the Government's sovereign power to regulate.[35]

There is no question, conversely, that the Bank Board and FSLIC had ample statutory authority to do what the Court of Federal Claims and the Federal Circuit found they did do, that is, promise to permit respondents to count supervisory goodwill and capital credits toward regulatory capital and to pay respondents' damages if that performance became impossible. The organic statute creating FSLIC as an arm of the Bank Board, 12 U. S. C. § 1725(c) (1988 ed.) (repealed 1989), generally empowered it "[t]o make contracts,"[36] and § 1729(f)(2), enacted in 1978, delegated more specific powers in the context of supervisory mergers:

> "Whenever an insured institution is in default or, in the judgment of the Corporation, is in danger of default, the Corporation may, in order to facilitate a merger or consolidation of such insured institution with another insured institution . . . guarantee such other insured institution against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default." 12 U. S. C. § 1729(f)(2) (1976 ed., Supp. V) (repealed 1989).

Nor is there any reason to suppose that the breadth of this authority was not meant to extend to contracts governing treatment of regulatory capital. Congress specifically rec-

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[35] See Speidel, Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts, 51 Geo. L. J. 516, 542 (1963) ("[W]hile the contracting officers of Agency X cannot guarantee that the United States will not perform future acts of effective government, they can agree to compensate the contractor for damages resulting from justifiable acts of the United States in its 'sovereign capacity'" (footnotes omitted)).

[36] See also 1 R. Nash & J. Cibinic, Federal Procurement Law 5 (3d ed. 1977) ("The authority of the executive to use contracts in carrying out authorized programs is . . . generally assumed in the absence of express statutory prohibitions or limitations").

ognized FSLIC's authority to permit thrifts to count goodwill toward capital requirements when it modified the National Housing Act in 1987:

> "No provision of this section shall affect the authority of the [FSLIC] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements." 12 U. S. C. § 1730h(d) (1988 ed.) (repealed 1989).

See also S. Rep. No. 100–19, p. 55 (1987) ("It is expected . . . that the [Bank Board] will retain its own authority to determine . . . the components and level of capital to be required of FSLIC-insured institutions"); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974) ("[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight"). There is no serious question that FSLIC (and the Bank Board acting through it) was authorized to make the contracts in issue.

IV

The Government's final line of defense is the sovereign acts doctrine, to the effect that "'[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.'" *Horowitz* v. *United States*, 267 U. S., at 461 (quoting *Jones* v. *United States*, 1 Ct. Cl. 383, 384 (1865)). Because FIRREA's alteration of the regulatory capital requirements was a "public and general act," the Government says, that act could not amount to a breach of the Government's contract with respondents.

The Government's position cannot prevail, however, for two independent reasons. The facts of this case do not warrant application of the doctrine, and even if that were otherwise the doctrine would not suffice to excuse liability under this governmental contract allocating risks of regulatory change in a highly regulated industry.

In *Horowitz*, the plaintiff sued to recover damages for breach of a contract to purchase silk from the Ordnance Department. The agreement included a promise by the Department to ship the silk within a certain time, although the manner of shipment does not appear to have been a subject of the contract. Shipment was delayed because the United States Railroad Administration placed an embargo on shipments of silk by freight, and by the time the silk reached Horowitz the price had fallen, rendering the deal unprofitable. This Court barred any damages award for the delay, noting that "[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." 267 U. S., at 461. This statement was not, however, meant to be read as broadly as the Government urges, and the key to its proper scope is found in that portion of our opinion explaining that the essential point was to put the Government in the same position that it would have enjoyed as a private contractor:

> "'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defend-

ants.'" *Ibid.* (quoting *Jones* v. *United States*, *supra*, at 384).

The early Court of Claims cases upon which *Horowitz* relied anticipated the Court's emphasis on the Government's dual and distinguishable capacities and on the need to treat the Government-as-contractor the same as a private party. In *Deming* v. *United States*, 1 Ct. Cl. 190 (1865), the Court of Claims rejected a suit by a supplier of army rations whose costs increased as a result of Congress's passage of the Legal Tender Act. The *Deming* court thought it "grave error" to suppose that "general enactments of Congress are to be construed as evasions of [the plaintiff's] particular contract." *Id.*, at 191. "The United States as a contractor are not responsible for the United States as a lawgiver," the court said. "In this court the United States can be held to no greater liability than other contractors in other courts." *Ibid.* Similarly, *Jones* v. *United States*, *supra*, refused a suit by surveyors employed by the Commissioner of Indian Affairs, whose performance had been hindered by the United States's withdrawal of troops from Indian country. "The United States as a contractor," the Claims Court concluded, "cannot be held liable directly or indirectly for the public acts of the United States as a sovereign." *Id.*, at 385.

The Government argues that "[t]he relevant question [under these cases] is whether the impact [of governmental action] . . . is caused by a law enacted to govern regulatory policy and to advance the general welfare." Brief for United States 45. This understanding assumes that the dual characters of Government as contractor and legislator are never "fused" (within the meaning of *Horowitz*) so long as the object of the statute is regulatory and meant to accomplish some public good. That is, on the Government's reading, a regulatory object is proof against treating the legislature as having acted to avoid the Government's contractual obligations, in which event the sovereign acts defense would

not be applicable. But the Government's position is open to serious objection.

As an initial matter, we have already expressed our doubt that a workable line can be drawn between the Government's "regulatory" and "nonregulatory" capacities. In the present case, the Government chose to regulate capital reserves to protect FSLIC's insurance fund, much as any insurer might impose restrictions on an insured as a condition of the policy. The regulation thus protected the Government in its capacity analogous to a private insurer, the same capacity in which it entered into supervisory merger agreements to convert some of its financial insurance obligations into responsibilities of private entrepreneurs. In this respect, the supervisory mergers bear some analogy to private contracts for reinsurance.[37] On the other hand, there is no question that thrift regulation is, in fact, regulation, and that both the supervisory mergers of the 1980's and the subsequent passage of FIRREA were meant to advance a broader public interest. The inescapable conclusion from all of this is that the Government's "regulatory" and "nonregulatory" capacities were fused in the instances under consideration, and we suspect that such fusion will be so common in the modern regulatory state as to leave a criterion of "regulation" without much use in defining the scope of the sovereign acts doctrine.[38]

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[37] Nor is there any substance to the claim that these were contracts that only the Government could make. The regulatory capital or net worth requirements at issue applied only to thrifts choosing to carry federal deposit insurance, see Federal Home Loan Bank System, A Guide to the Federal Home Loan Bank System 69 (5th ed. 1987), and institutions choosing to self-insure or to seek private insurance elsewhere would have been free to make similar agreements with private insurers.

[38] Moreover, if the dissent were correct that the sovereign acts doctrine permits the Government to abrogate its contractual commitments in "regulatory" cases even where it simply sought to avoid contracts it had come to regret, then the Government's sovereign contracting power would be of very little use in this broad sphere of public activity. We rejected a

An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any "regulatory statute" would flout the general principle that, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch* v. *United States*, 292 U. S., at 579.[39] Careful attention to the cases shows that the sovereign acts doctrine was meant to serve this principle, not undermine it. In *Horowitz*, for example, if the defendant had been a private shipper, it would have been entitled to assert the common-law defense of impossibility of performance against Horowitz's claim for breach. Although that defense is traditionally unavailable where the barrier to performance arises from the act of the party seeking discharge, see Restatement (Second) of Contracts § 261; 2 E. Farnsworth, Contracts § 9.6, p. 551 (1990); cf. *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 767–768, n. 10 (1983), *Horowitz* held that the "public and general" acts of the sovereign are not

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virtually identical argument in *Perry* v. *United States*, 294 U. S. 330 (1935), in which Congress had passed a resolution regulating the payment of obligations in gold. We held that the law could not be applied to the Government's own obligations, noting that "the right to make binding obligations is a competence attaching to sovereignty." *Id.*, at 353.

[39] See also *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369 (1943) ("'The United States does business on business terms'") (quoting *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527, 534 (1926)); *Perry* v. *United States*, *supra*, at 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference except that the United States cannot be sued without its consent" (citation omitted)); *United States* v. *Bostwick*, 94 U. S. 53, 66 (1877) ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf"); *Cooke* v. *United States*, 91 U. S. 389, 398 (1875) (explaining that when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there").

attributable to the Government as contractor so as to bar the Government's right to discharge. The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.[40] Neither question can be answered in the Government's favor here.

A

If the Government is to be treated like other contractors, some line has to be drawn in situations like the one before us between regulatory legislation that is relatively free of Government self-interest and therefore cognizable for the purpose of a legal impossibility defense and, on the other hand, statutes tainted by a governmental object of self-relief. Such an object is not necessarily inconsistent with a public purpose, of course, and when we speak of governmental "self-interest," we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. Cf. *Armstrong* v. *United States*, 364 U. S., at 49 (The Government may not "forc[e] some people alone to bear public burdens

[40] See *Jones* v. *United States*, 1 Ct. Cl. 383, 385 (1865) ("Wherever the public and private acts of the government seem to commingle, a citizen or corporate body must by supposition be substituted in its place, and then the question be determined whether the action will lie against the supposed defendant"); *O'Neill* v. *United States*, 231 Ct. Cl. 823, 826 (1982) (sovereign acts doctrine applies where, "[w]ere [the] contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party for the governing action"). The dissent ignores these statements (including the statement from *Jones*, from which case *Horowitz* drew its reasoning literally verbatim), when it says, *post*, at 931, that the sovereign acts cases do not emphasize the need to treat the government-as-contractor the same as a private party.

which . . . should be borne by the public as a whole"). Hence, while the Government might legitimately conclude that a given contractual commitment was no longer in the public interest, a government seeking relief from such commitments through legislation would obviously not be in a position comparable to that of the private contractor who willy-nilly was barred by law from performance. There would be, then, good reason in such circumstance to find the regulatory and contractual characters of the Government fused together, in *Horowitz*'s terms, so that the Government should not have the benefit of the defense.[41]

Horowitz's criterion of "public and general act" thus reflects the traditional "rule of law" assumption that generality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably.[42] See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516, 535–536 (1884) ("Law . . . must be not a special rule for a particular person or a particular case, but . . . '[t]he general law . . .' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general

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[41] Our Contract Clause cases have demonstrated a similar concern with governmental self-interest by recognizing that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 26 (1977); see also *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 412–413, and n. 14 (1983) (noting that a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations); cf. *Perry*, *supra*, at 350–351 (drawing a "clear distinction" between Congress's power over private contracts and "the power of the Congress to alter or repudiate the substance of its own engagements").

[42] The generality requirement will almost always be met where, as in *Deming*, the governmental action "bears upon [the Government's contract] as it bears upon all similar contracts between citizens." *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865). *Deming* is less helpful, however, in cases where, as here, the public contracts at issue have no obvious private analogs.

rules which govern society' " (citation omitted)).[43] Hence, governmental action will not be held against the Government for purposes of the impossibility defense so long as the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective. See *O'Neill* v. *United States*, 231 Ct. Cl. 823, 826 (1982) (noting that the sovereign acts doctrine recognizes that "the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts").[44] The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable. Cf. *Sun Oil Co.* v. *United States*, 215 Ct. Cl. 716, 768, 572 F. 2d 786, 817 (1978) (rejecting sovereign acts defense where the Secretary of the Interior's actions were " 'directed principally and primarily at plaintiffs' contractual right' ").[45]

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[43] The dissent accuses us of transplanting this due process principle into alien soil, see *post*, at 931–932. But this Court did not even wait until the Term following *Hurtado* before applying its principle of generality to a case that, like this one, involved the deprivation of property rights. See *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 708 (1884). More importantly, it would be surprising indeed if the sovereign acts doctrine, resting on the inherent nature of sovereignty, were not shaped by fundamental principles about how sovereigns ought to behave.

[44] See also Speidel, 51 Geo. L. J., at 539–540 (observing that "the commonly expressed conditions to the availability of the sovereign acts defense" are not only that "the act . . . must have been 'public and general,' " but also that "the damage to the contractor must have been caused indirectly"); cf. *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 191–192 (1983) (distinguishing between direct and incidental impairments under the Contract Clause).

[45] Cf. also *Resolution Trust Corporation* v. *Federal Savings and Loan Insurance Corporation*, 25 F. 3d 1493, 1501 (CA10 1994) ("The limits of this immunity [for sovereign acts] are defined by the extent to which the

The dissent would adopt a different rule that the Government's dual roles of contractor and sovereign may never be treated as fused, relying upon *Deming*'s pronouncement that "'[t]he United States as a contractor are not responsible for the United States as a lawgiver.'" *Post*, at 931 (quoting 1 Ct. Cl., at 191). But that view would simply eliminate the "public and general" requirement, which presupposes that the Government's capacities must be treated as fused when the Government acts in a nongeneral way. *Deming* itself twice refers to the "general" quality of the enactment at issue, 1 Ct. Cl., at 191, and notes that "[t]he statute bears upon [the governmental contract] as it bears upon all similar contracts between citizens, and affects it in no other way." *Ibid.* At the other extreme, of course, it is clear that any benefit at all to the Government will not disqualify an act as "public and general"; the silk embargo in *Horowitz*, for example, had the incidental effect of releasing the Government from its contractual obligation to transport Mr. Horowitz's shipment. Our holding that a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations strikes a middle course between these two extremes.[46]

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government's failure to perform is the result of legislation targeting a class of contracts to which it is a party"); *South Louisiana Grain Services, Inc.* v. *United States*, 1 Cl. Ct. 281, 287, n. 6 (1982) (rejecting sovereign acts defense where the Government agency's actions "were directed specifically at plaintiff's alleged contract performance"). Despite the dissent's predictions, the sun is not, in fact, likely to set on the sovereign acts doctrine. While an increase in regulation by contract will produce examples of the "fusion" that bars the defense, we may expect that other sovereign activity will continue to occasion the sovereign acts defense in cases of incidental effect.

[46] A different intermediate position would be possible, at least in theory. One might say that a governmental action was not "public and general" under *Horowitz* if its predominant purpose or effect was avoidance of the Government's contractual commitments. The difficulty, however, of ascertaining the relative intended or resulting impacts on governmental and

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In the present case, it is impossible to attribute the exculpatory "public and general" character to FIRREA. Although we have not been told the dollar value of the relief the Government would obtain if insulated from liability under contracts such as these, the attention given to the regulatory contracts prior to passage of FIRREA shows that a substantial effect on governmental contracts is certain. The statute not only had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised, but the specific object of abrogating enough of the acquisition contracts as to make that consequence of the legislation a focal point of the congressional debate.[47] Opponents of FIRREA's new capital requirements complained that "[i]n its present form, [FIRREA] would abrogate written agree-

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purely private contracts persuades us that this test would prove very difficult to apply.

[47] We note that whether or not Congress intended to abrogate supervisory merger agreements providing that supervisory goodwill would count toward regulatory capital requirements has been the subject of extensive litigation in the Courts of Appeals, and that every Circuit to consider the issue has concluded that Congress did so intend. See *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F. 2d 598, 617 (CADC 1992); *Carteret Sav. Bank* v. *Office of Thrift Supervision*, 963 F. 2d 567, 581–582 (CA3 1992); *Security Sav. & Loan* v. *Director, Office of Thrift Supervision*, 960 F. 2d 1318, 1322 (CA5 1992); *Far West Federal Bank* v. *Director, Office of Thrift Supervision*, 951 F. 2d 1093, 1098 (CA9 1991); *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F. 2d 994, 1006 (CA11 1991); *Franklin Federal Sav. Bank* v. *Director, Office of Thrift Supervision*, 927 F. 2d 1332, 1341 (CA6), cert. denied, 502 U. S. 937 (1991); cf. *Resolution Trust Corporation*, *supra*, at 1502 (observing that "FIRREA's structure leaves little doubt that Congress well knew the crippling effects strengthened capital requirements would have on mergers that relied on supervisory goodwill," but concluding that Congress sought to mitigate the impact by giving OTS authority to exempt thrifts until 1991); *Charter Federal Sav. Bank* v. *Office of Thrift Supervision*, 976 F. 2d 203, 210 (CA4 1992) (accepting the conclusions of the other Circuits in dictum), cert. denied, 507 U. S. 1004 (1993).

ments made by the U. S. government to thrifts that acquired failing institutions by changing the rules in the middle of the game." 135 Cong. Rec. 12145 (1989) (statement of Rep. Ackerman). Several Congressmen observed that, "[s]imply put, [Congress] has reneged on the agreements that the government entered into concerning supervisory goodwill." House Report, at 498 (additional views of Reps. Annunzio, Kanjorski, and Flake).[48] A similar focus on the supervisory merger contracts is evident among proponents of the legislation; Representative Rostenkowski, for example, insisted that "the Federal Government should be able to change requirements when they have proven to be disastrous and con-

[48] See also House Report, at 534 (additional views of Reps. Hiler, Ridge, Bartlett, Dreier, McCandless, Saiki, Baker, and Paxon) ("For the institutions with substantial supervisory goodwill, the bill radically changes the terms of previously negotiated transactions"); *id.*, at 507–508 (additional views of Rep. LaFalce) ("Those institutions which carry intangible assets on their books do so generally under written agreements they have entered into with the U. S. government, agreements which generally state that they cannot be superseded by subsequent regulations"); *id.*, pt. 5, at 27 (additional views of Rep. Hyde) ("[Thrifts] were told that they would be able to carry this goodwill on their books as capital for substantial periods of time. . . . The courts could well construe these agreements as formal contracts. Now, . . . Congress is telling these same thrifts that they cannot count this goodwill toward meeting the new capital standards"); 135 Cong. Rec. 12063 (1989) (statement of Rep. Crane) (FIRREA "would require these S&Ls to write off this goodwill in a scant 5 years. This legislation violates the present agreements that these institutions made with the Federal Government"). Although there was less of a focus on the impact of FIRREA on supervisory goodwill in the Senate, at least two Senators noted that the new capital requirements would have the effect of abrogating government contracts. See *id.*, at 9563 (statement of Sen. Hatfield) ("The new tangible capital standards in the legislation specifically exclude supervisory goodwill, and in doing so effectively abrogate agreements made between the Federal Home Loan Bank Board, on behalf of the U. S. Government, and certain healthy thrift institutions"); *id.*, at 18874 (statement of Sen. D'Amato) (asking "whether any future transactions involving failed or failing institutions will be possible after this bill sanctions a wholesale reneging of Federal agency agreements").

trary to the public interest. The contracts between the savings and loan owners when they acquired failing institutions in the early 1980's are not contracts written in stone." 135 Cong. Rec., at 12077.[49]

This evidence of intense concern with contracts like the ones before us suffices to show that FIRREA had the substantial effect of releasing the Government from its own contractual obligations. Congress obviously expected FIRREA to have such an effect, and in the absence of any evidence to the contrary we accept its factual judgment that this would be so.[50] Nor is Congress's own judgment neutralized by the fact, emphasized by the Government, that FIRREA did not formally target particular transactions. Legislation can almost always be written in a formally gen-

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[49] See also House Report, at 545 (Supplemental Views of Reps. Schumer, Morrison, Roukema, Gonzalez, Vento, McMillen, and Hoagland) ("[A]n overriding public policy would be jeopardized by the continued adherence to arrangements which were blithely entered into by the FSLIC"); 135 Cong. Rec., at 12062 (statement of Rep. Gonzalez) ("[I]n blunt terms, the Bank Board and FSLIC insurance fund managers entered into bad deals—I might even call them steals"); *id.*, at 11789 (statement of Rep. Saxton) ("In short[,] goodwill agreements were a mistake and as the saying goes . . . 'Two wrongs don't make a right' "). These proponents defeated two amendments to FIRREA, proposed by Reps. Quillen and Hyde, which would have given thrifts that had received capital forbearances from thrift regulators varying degrees of protection from the new rules. See *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, *supra*, at 616–617; see also 135 Cong. Rec. 12068 (1989) (statement of Rep. Price) ("[T]he proponents of [the Hyde] amendment say a 'Deal is a Deal' . . . . But to claim that Congress can never change a regulator's decision . . . in the future is simply not tenable"); *Franklin Federal Sav. Bank* v. *Director, Office of Thrift Supervision*, *supra*, at 1340–1341 (reviewing the House debate and concluding that "*[n]obody* expressed the view that FIRREA did not abrogate forbearance agreements regarding supervisory goodwill" (emphasis in original)).

[50] Despite the claims of the dissent, our test does not turn upon "some sort of legislative intent," *post*, at 933. Rather, we view Congress's expectation that the Government's own obligations would be heavily affected simply as good evidence that this was, indeed, the case.

eral way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners. For like reason, it does not answer the legislative record to insist, as the Government does, that the congressional focus is irrelevant because the broad purpose of FIRREA was to "advance the general welfare." Brief for United States 45. We assume nothing less of all congressional action, with the result that an intent to benefit the public can no more serve as a criterion of a "public and general" sovereign act than its regulatory character can.[51] While our limited enquiry into the background and evolution of the thrift crisis leaves us with the understanding that Congress acted to protect the public in the FIRREA legislation, the extent to which this reform relieved the Government of its own contractual obligations precludes a finding that the statute is a "public and general" act for purposes of the sovereign acts defense.[52]

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[51] We have, indeed, had to reject a variant of this argument before. See *Lynch* v. *United States*, 292 U. S. 571, 580 (1934) (acknowledging a public need for governmental economy, but holding that "[t]o abrogate contracts, in the attempt to lessen governmental expenditure, would be not the practice of economy, but an act of repudiation"); see also Speidel, 51 Geo. L. J., at 522 (noting that even when "the Government's acts are motivated or required by public necessity . . . [t]he few decisions on point seem to reject public convenience or necessity as a defense, particularly where [the Government's action] directly alters the terms of the contract").

[52] The dissent contends that FIRREA must be a "public and general" act because it "occupies 372 pages in the Statutes at Large, and under 12 substantive titles contains more than 150 numbered sections." *Post*, at 934. But any act of repudiation can be buried in a larger piece of legislation, and if that is enough to save it then the Government's contracting power will not count for much. To the extent that THE CHIEF JUSTICE relies on the fact that FIRREA's core capital requirements applied to all thrift institutions, we note that neither he nor the Government has provided any indication of the relative incidence of the new statute in requiring capital increases for thrifts subject to regulatory agreements affecting capital and those not so subject.

C

Even if FIRREA were to qualify as "public and general," however, other fundamental reasons would leave the sovereign acts doctrine inadequate to excuse the Government's breach of these contracts. As *Horowitz* makes clear, that defense simply relieves the Government as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible. But even if the Government stands in the place of a private party with respect to "public and general" sovereign acts, it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach. As the Restatement puts it,

> "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts § 261.

See also 2 Farnsworth on Contracts § 9.6, at 543–544 (listing four elements of the impossibility defense). Thus, since the object of the sovereign acts defense is to place the Government as contractor on par with a private contractor in the same circumstances, *Horowitz*, 267 U. S., at 461, the Government, like any other defending party in a contract action, must show that the passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and must ultimately show that the language or circumstances do not indicate that the Government should be liable in any case. While we do not say that these conditions can never be satisfied when the Government contracts with participants in a regulated industry for particular regulatory treatment, we find that

the Government as such a contractor has not satisfied the conditions for discharge in the present case.

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For a successful impossibility defense the Government would have to show that the nonoccurrence of regulatory amendment was a basic assumption of these contracts. See, *e. g.*, Restatement (Second) of Contracts § 261; 2 Farnsworth, *supra*, § 9.6, at 549–550. The premise of this requirement is that the parties will have bargained with respect to any risks that are both within their contemplation and central to the substance of the contract; as Justice Traynor said, "[i]f [the risk] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." *Lloyd* v. *Murphy*, 25 Cal. 2d 48, 54, 153 P. 2d 47, 50 (1944).[53] That

[53] See also *Transatlantic Financing Corp.* v. *United States*, 363 F. 2d 312, 315 (CADC 1966) (requiring that the contingency rendering performance impossible be "'something' unexpected"); *Companhia de Navegacao Lloyd Brasiliero* v. *C. G. Blake Co.*, 34 F. 2d 616, 619 (CA2 1929) (L. Hand, J.) (asking "how unexpected at the time [the contract was made] was the event which prevented performance"); see also *Kel Kim Corp.* v. *Central Markets, Inc.*, 70 N. Y. 2d 900, 902, 524 N. E. 2d 295, 296 (1987) ("[T]he impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract"); *Barbarossa & Sons, Inc.* v. *Iten Chevrolet, Inc.*, 265 N. W. 2d 655, 659 (Minn. 1978) (asking "whether the risk of the given contingency was so unusual or unforeseen and would have such severe consequences that to require performance would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract"); *Mishara Construction Co.* v. *Transit-Mixed Concrete Corp.*, 365 Mass. 122, 129, 310 N. E. 2d 363, 367 (1974) ("The question is . . . [w]as the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance?"); *Krell* v. *Henry*, 2 K. B. 740, 752 (1903) ("The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against"); 18 W. Jaeger, Williston on Contracts § 1931, p. 8 (3d ed. 1978) ("The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been

inference is particularly compelling, where, as here, the contract provides for particular regulatory treatment (and, *a fortiori*, allocates the risk of regulatory change). Such an agreement reflects the inescapable recognition that regulated industries in the modern world do not live under the law of the Medes and the Persians, and the very fact that such a contract is made at all is at odds with any assumption of regulatory stasis. In this particular case, whether or not the reach of the FIRREA reforms was anticipated by the parties, there is no doubt that some changes in the regulatory structure governing thrift capital reserves were both foreseeable and likely when these parties contracted with the Government, as even the Government agrees. It says in its brief to this Court that "in light of the frequency with which federal capital requirements had changed in the past . . . , it would have been unreasonable for Glendale, FSLIC, or the Bank Board to expect or rely upon the fact that those requirements would remain unchanged." Brief for United States 26; see also *id.*, at 3, n. 1 (listing the changes).[54] The Federal Circuit panel in this case likewise found that the regulatory capital requirements "have been the subject of

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within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor"). Although foreseeability is generally a relevant, but not dispositive, factor, see 2 E. Farnsworth, Contracts § 9.6, at 555–556; *Opera Company of Boston, Inc.* v. *Wolf Trap Foundation for the Performing Arts*, 817 F. 2d 1094, 1101 (CA4 1987), there is no reason to look further where, as here, the risk was foreseen to be more than minimally likely, went to the central purpose of the contract, and could easily have been allocated in a different manner had the parties chosen to do so, see *id.*, at 1099–1102; 18 Williston on Contracts, *supra*, § 1953, at 119.

[54] The Government confirmed this point at oral argument. When asked whether FIRREA's tightening of the regulatory capital standards was "exactly the event that the parties assumed might happen when they made their contracts," the Government responded, "Exactly. Congress had changed capital standards many times over the years." Tr. of Oral Arg. 9.

numerous statutory and regulatory changes over the years," and "changed three times in 1982 alone." 994 F. 2d, at 801.[55] Given these fluctuations, and given the fact that a single modification of the applicable regulations could, and ultimately did, eliminate virtually all of the consideration provided by the Government in these transactions, it would be absurd to say that the nonoccurrence of a change in the regulatory capital rules was a basic assumption upon which these contracts were made. See, *e. g.*, *Moncrief* v. *Williston Basin Interstate Pipeline Co.*, 880 F. Supp. 1495, 1508 (Wyo. 1995); *Vollmar* v. *CSX Transportation, Inc.*, 705 F. Supp. 1154, 1176 (ED Va. 1989), aff'd, 898 F. 2d 413 (CA4 1990).

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Finally, any governmental contract that not only deals with regulatory change but allocates the risk of its occurrence will, by definition, fail the further condition of a successful impossibility defense, for it will indeed indicate that the parties' agreement was not meant to be rendered nugatory by a change in the regulatory law. See Restatement

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[55] See, *e. g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97–320, 96 Stat. 1469 (eliminating any fixed limits to Bank Board discretion in setting reserve requirements); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96–221, 94 Stat. 132, 160 (conferring discretionary authority on the Bank Board to set reserve requirements between 3 and 6 percent); 47 Fed. Reg. 3543 (lowering the reserve ratio from 4 to 3 percent); *id.*, at 31859 (excluding certain "contra-asset" accounts from reserve calculations); *id.*, at 52961 (permitting thrifts to count appraised equity capital toward reserves); see also *Charter Federal Sav. Bank* v. *Office of Thrift Supervision*, 976 F. 2d, at 212 (noting that because "[c]apital requirements have been an evolving part of the regulatory scheme since its inception," the Bank Board "would have expected changes in statutory requirements, including capital requirements"); *Carteret Sav. Bank* v. *Office of Thrift Supervision*, 963 F. 2d, at 581 (observing that "[i]n the massively regulated banking industry, . . . the rules of the game change with some regularity").

(Second) of Contracts § 261 (no impossibility defense where the "language or the circumstances" indicate allocation of the risk to the party seeking discharge).[56] The mere fact that the Government's contracting agencies (like the Bank Board and FSLIC) could not themselves preclude Congress from changing the regulatory rules does not, of course, stand in the way of concluding that those agencies assumed the risk of such change, for determining the consequences of legal change was the point of the agreements. It is, after all, not uncommon for a contracting party to assume the risk of an event he cannot control,[57] even when that party is an agent of the Government. As the Federal Circuit has recognized, "[Government] contracts routinely include provisions shifting financial responsibility to the Government for events which might occur in the future. That some of these events may be triggered by sovereign government action does not render the relevant contractual provisions any less binding than those which contemplate third party acts, inclement weather

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[56] See also *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F. 2d, at 957–959 (rejecting sovereign acts defense where contract was interpreted as expressly allocating the risk of change in governmental policy); Posner & Rosenfield, 6 J. Legal Studies, at 98 (noting that, subject to certain constraints, "[t]he contracting parties' chosen allocation of risk" should always be honored as the most efficient one possible).

[57] See, *e. g.*, *Chicago, M. & St. P. R. Co.* v. *Hoyt*, 149 U. S. 1, 14–15 (1893) ("There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or to pay damages for the nonperformance"). This is no less true where the event that renders performance impossible is a change in the governing law. See, *e. g.*, 4 R. Anderson, Anderson on the Uniform Commercial Code § 2–615:34, p. 286 (3d ed. 1983) ("Often in regard to impossibility due to change of law . . . there would be no difficulty in a promisor's assuming the risk of the legal possibility of his promise"); 6 A. Corbin, Corbin on Contracts § 1346, p. 432 (1962) ("Just as in other cases of alleged impossibility, the risk of prevention by courts and administrative officers can be thrown upon a contractor by a provision in the contract itself or by reason of established custom and general understanding").

and other *force majeure*." *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F. 2d 953, 958–959 (CA Fed. 1993).[58]

As to each of the contracts before us, our agreement with the conclusions of the Court of Federal Claims and the Federal Circuit forecloses any defense of legal impossibility, for those courts found that the Bank Board resolutions, Forbearance Letters, and other documents setting forth the accounting treatment to be accorded supervisory goodwill generated by the transactions were not mere statements of then-current regulatory policy, but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties. See *supra*, at 861–864. Given that the parties went to considerable lengths in procuring necessary documents and drafting broad integration clauses to incorporate their terms into the contract itself, the Government's suggestion that the parties meant to say only that the regulatory treatment laid out in these documents

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[58] See generally *Hills Materials Co.* v. *Rice*, 982 F. 2d 514, 516, n. 2 (CA Fed. 1992) ("[T]he [sovereign acts] doctrine certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts"); *D & L Construction Co.* v. *United States*, 185 Ct. Cl. 736, 752, 402 F. 2d 990, 999 (1968) ("It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that if it does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act, and that this agreement can be implied as well as expressed"); *Amino Brothers Co.* v. *United States*, 178 Ct. Cl. 515, 525, 372 F. 2d 485, 491 (same), cert. denied, 389 U. S. 846 (1967); *Gerhardt F. Meyne Co.* v. *United States*, 110 Ct. Cl. 527, 550, 76 F. Supp. 811, 815 (1948) (same). A common example of such an agreement is mandated by Federal Acquisition Regulation 52.222–43, which requires Government entities entering into certain fixed price service contracts to include a price adjustment clause shifting to the Government responsibility for cost increases resulting from compliance with Department of Labor wage and fringe benefit determinations. 48 CFR § 52.222–43 (1995).

would apply as an initial matter, subject to later change at the Government's election, is unconvincing. See *ibid.* It would, indeed, have been madness for respondents to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed.

* * *

We affirm the Federal Circuit's ruling that the United States is liable to respondents for breach of contract. Because the Court of Federal Claims has not yet determined the appropriate measure or amount of damages in this case, we remand for further proceedings.

It is so ordered.

JUSTICE BREYER, concurring.

I join the principal opinion because, in my view, that opinion is basically consistent with the following understanding of what the dissent and the Government call the "unmistakability doctrine." The doctrine appears in the language of earlier cases, where the Court states that

> "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and *will remain intact unless surrendered in unmistakable terms.*" *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982) (emphasis added).

See also *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700, 706–707 (1987); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41, 52–53 (1986). The Government and the dissent believe that this language normally shields the Government from contract liability where a change in the law prevents it from carrying out its side of the bargain. In my view, however, this language,

while perhaps appropriate in the circumstances of the cases in which it appears, was not intended to displace the rules of contract interpretation applicable to the Government as well as private contractors in numerous ordinary cases, and in certain unusual cases, such as this one. Primarily for reasons explained in the principal opinion, this doctrine does not shield the Government from liability here.

Both common sense and precedent make clear that an "unmistakable" promise to bear the risk of a change in the law is not required in every circumstance in which a private party seeks contract damages from the Government. Imagine, for example, that the General Services Administration or the Department of Defense were to enter into a garden variety contract to sell a surplus commodity such as oil, under circumstances where (1) the time of shipment is critically important, (2) the parties are aware that pending environmental legislation could prevent the shipment, and (3) the fair inference from the circumstances is that if the environmental legislation occurs and prevents shipment, a private seller would incur liability for failure to ship on time.

Under ordinary principles of contract law, one would construe the contract in terms of the parties' intent, as revealed by language and circumstance. See *The Binghamton Bridge*, 3 Wall. 51, 74 (1866) ("All contracts are to be construed to accomplish the intention of the parties"); Restatement (Second) of Contracts § 202(1) (1979) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"). If the language and circumstances showed that the parties intended the seller to bear the risk of a performance-defeating change in the law, the seller would have to pay damages. See *id.*, § 261 (no liability where "a party's performance is made impracticable without his fault by the occurrence of an event [*i. e.*, the new environmental regulation] the non-occurrence of which was a basic assumption on which the contract was made . . . *unless the*

language or the circumstances indicate the contrary" (emphasis added)).

The Court has often said, as a general matter, that the "rights and duties" contained in a Government contract "are governed generally by the law applicable to contracts between private individuals." *Lynch* v. *United States*, 292 U. S. 571, 579 (1934); see *Perry* v. *United States*, 294 U. S. 330, 352 (1935) (same); *Sinking Fund Cases*, 99 U. S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen"); *United States* v. *Klein*, 13 Wall. 128, 144 (1872) (same); *United States* v. *Gibbons*, 109 U. S. 200, 203–204 (1883) (where contract language "susceptible of two meanings," Government's broader obligation was "sufficiently plain" from "the circumstances attending the transaction"); see also, *e. g.*, *Russell* v. *Sebastian*, 233 U. S. 195, 205 (1914) (public grants to be given a "fair and reasonable" interpretation that gives effect to what it "satisfactorily appears" the government intended to convey).

The Court has also indicated that similar principles apply in certain cases where courts have had to determine whether or not a government seller is liable involving contracts resembling the ones before us. In *Lynch*, *supra*, for example, the Court held that the Federal Government must compensate holders of "war risk insurance" contracts, the promises of which it had abrogated through postcontract legislation. In the "gold clause" case, *Perry*, *supra*, the Court held that subsequent legislation could not abrogate a Government bond's promises to pay principal and interest in gold. In neither case did the Court suggest that an "unmistakable" promise, beyond that discernible using ordinary principles of contract interpretation, was necessary before liability could be imposed on the Government.

This approach is unsurprising, for in practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting. See, *e. g.*, *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S. 368, 384 (1902) (rejecting as "hardly . . . credible" the city's suggestion that the fare rate agreed on with railroad company, which "amounted to a contract," would be "subject to change from time to time" at the city's pleasure); *Murray* v. *Charleston*, 96 U. S. 432, 445 (1878) (A government contract "should be regarded as an assurance that [a sovereign right to withhold payment] will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"); *New Jersey* v. *Yard*, 95 U. S. 104, 116–117 (1877) (same). This is not to say that the government is always treated just like a private party. The simple fact that it is the government may well change the underlying circumstances, leading to a different inference as to the parties' likely intent—say, making it far less likely that they *intend* to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law. But to say this is to apply, not to disregard, the ordinary rule of contract law.

This approach is also consistent with congressional intent, as revealed in Congress' determination to permit, under the Tucker Act, awards of damages and other relief against the United States for "any claim . . . founded . . . upon any express or implied contract." 28 U. S. C. § 1491(a)(1). The thrifts invoked this provision in their complaints as the basis for jurisdiction to adjudicate their claims in the lower courts, see App. 8 (Winstar), 137 (Statesman), and 546 (Glendale); and, as the principal opinion explains, *ante*, at 858–859, the lower courts held that each proved the existence of an express promise by the Government to grant them particular regulatory treatment for a period of years. For my purposes, the provision is relevant only to show that Congress

clearly contemplated the award of damages for breach against the Government in some contexts where the Government's promises are far from "unmistakable" as the Government defines that term. While in this case, the lower courts found the promises to be "express," this Court has in other cases interpreted § 1491(a)(1) to permit claims for relief based on an "implied in fact" promise, which can be a promise "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R. Co.* v. *United States*, 261 U. S. 592, 597 (1923); see *Hercules, Inc.* v. *United States*, 516 U. S. 417, 424 (1996). These interpretations, as well as the statutory language, lend further support to the view that ordinary government contracts are typically governed by the rules applicable to contracts between private parties.

There are, moreover, at least two good reasons to think that the cases containing special language of "unmistakability" do not, as the Government suggests, impose an additional "clear-statement" rule, see Brief for United States 19, that shields the Government from liability here. First, it is not clear that the "unmistakability" language was determinative of the outcome in those cases. In two of the three cases in which that language appears (and several of the older cases from which it is derived), the private parties claimed that the sovereign had effectively promised not to change the law in an area of law *not mentioned* in the contract at issue. In *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S., at 148, for example, the contracts were leases by a sovereign Indian Tribe to private parties of rights to extract oil and gas from tribal lands. The private party claimed that the leases contained an implicit waiver of the power to impose a severance tax on the oil and gas. The Court pointed out that the leases said nothing about taxes, thereby requiring an inference of intent from "silence." *Ibid.* Though the

opinion contains language of "unmistakability," the Court was not called upon in *Merrion* to decide whether a sovereign's promise not to change the law (or to pay damages if it did) was clear enough to justify liability, because there was no evidence of *any* such promise in the "contracts" in that case. Yet, that is the effect the Government asks us to give the "unmistakability" language in *Merrion* here.

The Court in *Merrion* cited *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), and *St. Louis* v. *United Railways Co.*, 210 U. S. 266 (1908), which in turn referred to a line of cases in which the Court held that a government's grant of a bank charter did not carry with it a promise not to tax the bank unless expressed "in terms too plain to be mistaken." *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 446 (1862). These cases illustrate the same point made above: Where a state-granted charter, or franchise agreement, did not implicate a promise not to tax, the Court held that no such promise was made. See *Providence Bank* v. *Billings*, 4 Pet. 514, 560, 561 (1830) (promise not to tax "ought not to be presumed" where "deliberate purpose of the state to abandon" power to tax "does not appear"); *St. Louis*, *supra*, at 274 (right to tax "still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions"). But, where the sovereign had made an express promise not to tax, the Court gave that promise its intended effect. See *Jefferson*, *supra*, at 450; *Piqua Branch of State Bank of Ohio* v. *Knoop*, 16 How. 369, 378 (1854) (same); *New Jersey* v. *Yard*, *supra*, at 115–117 (same).

Similarly, in the second "unmistakability" case, *United States* v. *Cherokee Nation of Okla.*, 480 U. S., at 706–707, a Government treaty granted the Tribe title to a riverbed, but it said nothing about the Government's pre-existing right to navigate the river. The Court held that it was most unlikely that a treaty silent on the matter would have conveyed the Government's navigational rights to the Tribe, particularly

since "[t]he parties . . . clearly understood that the [Government's] navigational" rights were "dominant no matter how the question of riverbed ownership was resolved." *Id.*, at 706.

The remaining case, *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41 (1986), concerned an alleged promise closely related to the subject matter of the contract. A State and several state agencies claimed that Congress, in enacting a statute that gave States flexibility to include or withdraw certain employees from a federal social security program, promised *not to change* that "withdrawal" flexibility. But in *Bowen*, the statute itself expressly reserved to Congress the right to "alter, amend, or repeal" any of the statute's provisions. See *id.*, at 55. Hence, it is not surprising to find language in *Bowen* to the effect that other circumstances would have to be "unmistakable" before the Court could find a congressional promise to the contrary.

A second reason to doubt the Government's interpretation of the "unmistakability" language is that, in all these cases, the language was directed at the claim that the sovereign had made a broad promise not to legislate, or otherwise to exercise its sovereign powers. Even in the cases in which damages were sought *(e. g., Bowen, Cherokee Nation)*, the Court treated the claimed promise as a promise not to change the law, rather than as the kind of promise more normally at issue in contract cases, including this one—namely, a promise that obliges the government to hold a party harmless from a change in the law that the government remains free to make. See, *e. g.*, *Bowen*, *supra*, at 52 (lower court decision "effectively . . . forbid[s] Congress to amend a provision of the Social Security Act"); *Cherokee Nation*, *supra*, at 707 (refusing to conclude that the Tribe "gained an exemption from the [Government's navigational] servitude simply because it received title to the riverbed interests"). It is difficult to believe that the Court intended its "unmistaka-

bility" language in these unusual cases to disable future courts from inferring, from language and circumstance under ordinary contract principles, a more narrow promise in more typical cases—say, a promise not to abrogate, or to restrict severely through legislation and without compensation, the very right that a sovereign explicitly granted by contract (*e. g.*, the right to drill for oil, or to use the riverbed).

The Government attempts to answer this objection to its reading of the "unmistakability" language by arguing that *any* award of "substantial damages" against the government for breach of contract through a change in the law "unquestionably carries the danger that needed future regulatory action will be deterred," and thus amounts to an infringement on sovereignty requiring an "unmistakable" promise. Brief for Petitioner 21. But this rationale has no logical stopping point. See, *e. g.*, *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 24 (1977) ("Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. . . . Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts"). It is difficult to see how the Court could, in a principled fashion, apply the Government's rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, are properly governed by ordinary principles of contract law. To draw the line—*i. e.*, to apply a more stringent rule of contract interpretation—based only on the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory. As the Government acknowledges, see Brief for United States 41, n. 34, this Court has previously rejected the argument that Congress has "the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money." *Bowen*, *supra*, at

55 (citing *Perry,* 294 U. S., at 350–351, and *Lynch,* 292 U. S., at 576–577).

In sum, these two factors, along with the general principle that the government is ordinarily treated like a private party when it enters into contracts, means that the "unmistakability" language might simply have underscored the special circumstances that would have been required to convince the Court of the existence of the claimed promise in the cases before it. At most, the language might have grown out of unique features of sovereignty, believed present in those cases, which, for reasons of policy, might have made appropriate a special caution in implying the claimed promise. But, I do not believe that language was meant to establish an "unmistakability" rule that controls more ordinary contracts, or that controls the outcome here.

The Government attempts to show that such special circumstances, warranting application of an unmistakability principle, are present in this case. To be sure, it might seem unlikely, in the abstract, that the Government would have intended to make a binding promise that would oblige it to hold the thrifts harmless from the effects of future regulation (or legislation) in such a high-risk, highly regulated context as the accounting practices of failing savings and loans. But, as the principal opinion's careful examination of the circumstances reveals, that is exactly what the Government did. The thrifts demonstrate that specific promises were made to accord them particular regulatory treatment for a period of years, which, when abrogated by subsequent legislation, rendered the Government liable for breach of contract. These promises affect only those thrifts with preexisting contracts of a certain kind. They are promises that the banks seek to infer from the explicit language of the contracts, not ones they read into contracts silent on the matter. And, there is no special policy reason related to sovereignty which would justify applying an "unmistakability" principle here. For these reasons, I join the principal opinion.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

I agree with the principal opinion that the contracts at issue in this case gave rise to an obligation on the part of the Government to afford respondents favorable accounting treatment, and that the contracts were broken by the Government's discontinuation of that favorable treatment, as required by FIRREA, 12 U. S. C. § 1464(t). My reasons for rejecting the Government's defenses to this contract action are, however, quite different from the principal opinion's, so I must write separately to state briefly the basis for my vote.

The principal opinion dispenses with three of the four "sovereign" defenses raised by the Government simply by characterizing the contracts at issue as "risk-shifting agreements" that amount to nothing more than "promises by the Government to insure [respondents] against any losses arising from future regulatory change." *Ante*, at 881. Thus understood, the principal opinion explains, the contracts purport, not to constrain the exercise of sovereign power, but only to make the exercise of that power an event resulting in liability for the Government—with the consequence that the peculiarly sovereign defenses raised by the Government are simply inapplicable. This approach has several difficulties, the first being that it has no basis in our cases, which have not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue. But in any event, it is questionable whether, even as a matter of normal contract law, the exercise in contract characterization in which the principal opinion engages is really valid. Virtually *every* contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Holmes, The Path of the Law (1897), in 3 The Collected Works of Justice Holmes 391, 394 (S. Novick

ed. 1995). See *Horwitz-Matthews, Inc.* v. *Chicago*, 78 F. 3d 1248, 1250–1251 (CA7 1996).

In this case, it was an unquestionably sovereign act of government—enactment and implementation of provisions of FIRREA regarding treatment of regulatory capital—that gave rise to respondents' claims of breach of contract. Those claims were premised on the assertion that, in the course of entering into various agreements with respondents, the Government had undertaken to continue certain regulatory policies with respect to respondents' recently acquired thrifts; and the Government countered that assertion, in classic fashion, with the primary defense that contractual restrictions on sovereign authority will be recognized only where unmistakably expressed. The "unmistakability" doctrine has been applied to precisely this sort of situation—where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government. See, *e. g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 135–136, 145–148 (1982).

Like THE CHIEF JUSTICE, see *post*, at 924–931, I believe that the unmistakability doctrine applies here, but unlike him I do not think it forecloses respondents' claims. In my view, the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent. Generally, contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions. That is a reasonable estimation of what the parties intend. When I promise to do x in exchange for your doing y, I impliedly promise not to do anything that will disable me from doing x, or disable you from doing y—so that if either of our performances is rendered impossible by such an act on my part, I am not excused from my obligation. When the contracting party is the government, however, it is simply *not* reasonable to presume an intent of that sort. To the con-

trary, it is reasonable to presume *(unless the opposite clearly appears)* that the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts. The requirement of unmistakability embodies this reversal of the normal reasonable presumption. Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.

Here, however, respondents contend that they have overcome this reverse presumption that the Government remains free to make its own performance impossible through its manner of regulation. Their claim is that the Government quite plainly *promised* to regulate them in a particular fashion, into the future. They say that the very *subject matter* of these agreements, an essential part of the *quid pro quo*, was Government regulation; unless the Government is bound *as to that regulation*, an aspect of the transactions that reasonably must be viewed as a *sine qua non* of their assent becomes illusory. I think they are correct. If, as the dissent believes, the Government committed only "to provide [certain] treatment unless and until there is subsequent action," *post*, at 935, then the Government in effect said "we promise to regulate in this fashion for as long as we choose to regulate in this fashion"—which is an absolutely classic description of an illusory promise. See 1 R. Lord, Williston on Contracts § 1:2, p. 11 (4th ed. 1990). In these circumstances, it is unmistakably clear that the promise to accord favorable regulatory treatment must be understood as (unsurprisingly) a *promise* to accord favorable regulatory treatment. I do not accept that unmistakability demands that there be a *further* promise not to go back on the promise to accord favorable regulatory treatment.

The dissent says that if the Government agreed to accord the favorable regulatory treatment "in the short term, but

made no commitment about . . . the long term, respondents still received consideration." *Post*, at 935. That is true enough, but it is quite impossible to construe these contracts as providing for only "short term" favorable treatment, with the long term up for grabs: Either there was an undertaking to regulate respondents as agreed for the specified amortization periods, or there was no promise regarding the future at all—not even so much as a peppercorn's worth.

In sum, the special role of the agencies, and the terms and circumstances of the transactions, provide an adequate basis for saying that the promises that the trial court and the Court of Appeals for the Federal Circuit found to have been made in these cases were unmistakable ones. To be sure, those courts were not looking for "unmistakable" promises, see *post*, at 936, but unmistakability is an issue of law that we can determine here. It was found below that the Government had plainly made promises *to regulate* in a certain fashion, into the future; I agree with those findings, and I would conclude, for the reasons set forth above, that the promises were unmistakable. Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded—other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires. While it is true enough, as the dissent points out, that one who deals with the Government may need to "'turn square corners,'" *post*, at 937 (quoting *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143 (1920)), he need not turn them twice.

The Government's remaining arguments are, I think, readily rejected. The scope and force of the "reserved powers" and "express delegation" defenses—which the principal opinion thinks inapplicable based on its view of the nature of the contracts at issue here, see *ante*, at 888–890—have not been well defined by our prior cases. The notion of "reserved powers" seems to stand principally for the proposi-

tion that certain core governmental powers cannot be surrendered, see, *e. g.*, *Stone* v. *Mississippi*, 101 U. S. 814 (1880); thus understood, that doctrine would have no force where, as here, the private party to the contract does not seek to stay the exercise of sovereign authority, but merely requests damages for breach of contract. To the extent this Court has suggested that the notion of "reserved powers" contemplates, under some circumstances, nullification of even monetary governmental obligations pursuant to exercise of "the federal police power or some other paramount power," *Lynch* v. *United States*, 292 U. S. 571, 579 (1934), I do not believe that regulatory measures designed to minimize what are essentially assumed commercial risks are the sort of "police power" or "paramount power" referred to. And whatever is required by the "express delegation" doctrine is to my mind satisfied by the statutes which the principal opinion identifies as conferring upon the various federal bank regulatory agencies involved in this case authority to enter into agreements of the sort at issue here, see *ante*, at 890–891.

Finally, in my view the Government cannot escape its obligations by appeal to the so-called "sovereign acts" doctrine. That doctrine was first articulated in Court of Claims cases, and has apparently been applied by this Court in only a single case, our 3-page opinion in *Horowitz* v. *United States*, 267 U. S. 458, decided in 1925 and cited only once since, in a passing reference, see *Nortz* v. *United States*, 294 U. S. 317, 327 (1935). *Horowitz* holds that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." 267 U. S., at 461. In my view the "sovereign acts" doctrine adds little, if anything at all, to the "unmistakability" doctrine, and is avoided whenever that one would be—*i. e.*, whenever it is clear from the contract in question that the Government was committing itself not to rely upon its sovereign acts in asserting (or defending against) the doctrine of impossibility,

which is another way of saying that the Government had assumed the risk of a change in its laws. That this is the correct interpretation of *Horowitz* is made clear, I think, by our two principal cases of this century holding that the Government may not simply repudiate its contractual obligations, *Lynch* v. *United States*, *supra*, and *Perry* v. *United States*, 294 U. S. 330 (1935). Those cases, which are barely discussed in the principal opinion, failed even to mention *Horowitz*. In both of them, as here, Congress specifically set out to abrogate the *essential bargain* of the contracts at issue—and in both we declared such abrogation to amount to impermissible repudiation. See *Lynch*, *supra*, at 578–580; *Perry*, *supra*, at 350–354.

For the foregoing reasons, I concur in the judgment.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE GINSBURG joins as to Parts I, III, and IV, dissenting.

The principal opinion works sweeping changes in two related areas of the law dealing with government contracts. It drastically reduces the scope of the unmistakability doctrine, shrouding the residue with clouds of uncertainty, and it limits the sovereign acts doctrine so that it will have virtually no future application. I respectfully dissent.

I

The principal opinion properly recognizes that the unmistakability doctrine is a "special rule" of government contracting which provides, in essence, a "canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms." *Ante*, at 860. Exercises of the sovereign authority include of course the power to tax and, relevant to this case, the authority to regulate.

The most recent opinion of this Court dealing with the unmistakability doctrine is *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700 (1987). That case quoted language from *Bowen* v. *Public Agencies Opposed to Social Security*

Entrapment, 477 U. S. 41 (1986), which relied on *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982), and *Merrion*, in turn, quoted the much earlier case of *St. Louis* v. *United Railways Co.*, 210 U. S. 266 (1908). *St. Louis* involved an agreement by the city to grant street railway companies use and occupancy of the streets, in exchange for specified consideration which included an annual license fee of $25 for each car used. *Id.*, at 272. When the city later passed an ordinance amending the license tax and imposing an additional tax based on the number of passengers riding each car, the railway companies challenged that amendment as a violation of the Contracts Clause. The Court there said that such a governmental power to tax resides in the city "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." *Id.*, at 280.

Merrion, *supra*, was similar, but involved the sovereignty of an Indian Tribe. The Tribe had allowed oil companies to extract oil and natural gas deposits on the reservation land in exchange for the usual cash bonus, royalties, and rents to the Tribe. The Court found that, in so contracting, the Tribe had not surrendered its power to impose subsequently a severance tax on that production. *Merrion* explains that "[w]ithout regard to its source[—be it federal, state, local government, or Indian—]sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 455 U. S., at 148.

Next, *Bowen*, *supra*, addressed Congress' repeal of a law that had once allowed States which contracted to bring their employees into the Federal Social Security System, to terminate that agreement and their participation upon due notice. *Bowen*, therefore, considered not the imposition of a tax as *St. Louis* and *Merrion*, but an amendment to a statutory provision that existed as a background rule when and under

which the contracts were formed—much like this case. The *Bowen* Court repeated the quoted language from *Merrion*, and reminded that "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." *Bowen*, *supra*, at 52 (quoting *Merrion*, *supra*, at 147).

Finally, we have *Cherokee Nation*, *supra*, in which the Court applied the unmistakability doctrine to a treaty, rather than a typical contract. Under the treaty the United States had granted to an Indian Tribe fee simple title to a riverbed. The Tribe claimed that the United States had not reserved its navigational servitude and hence that the Government's construction of a navigational channel that destroyed the riverbed's mineral interests was a taking under the Fifth Amendment without just compensation. The Court ruled that the treaty had not provided the Tribe an exemption from the navigational servitude, quoting from *Bowen* and *Merrion* the statement that "[s]uch a waiver of sovereign authority will not be implied, but instead must be '"surrendered in unmistakable terms."'" *Id.*, at 707.

These cases have stood until now for the well-understood proposition just quoted above—a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms. Today, however, the principal opinion drastically limits the circumstances under which the doctrine will apply by drawing a distinction never before seen in our case law. The principal opinion tells us the unmistakability doctrine will apply where a plaintiff either seeks injunctive relief to hold the Government to its alleged surrender of sovereign authority (which generally means granting the plaintiff an exemption to the changed law), or seeks a damages award which would be "the equivalent of" such an injunction or exemption. *Ante*, at 879–880. But the doctrine will not apply where a plaintiff seeks an award for damages caused by the exercise of that sovereign authority. We are told that if the alleged agreement is not one to bind the Government to

refrain from exercising regulatory authority, but is one to shift the risk of a change in regulatory rules, the unmistakability doctrine does not apply. And, perhaps more remarkable, the principal opinion tells us that the Government will virtually always have assumed this risk in the regulatory context, by operation of law. *Ante*, at 869–870, 905–906.

The first problem with the principal opinion's formulation is a practical one. How do we know whether "the award of damages" will be "the equivalent of [an] exemption," *ante*, at 879–880, before we assess the damages? In this case, for example, "there has been no demonstration that awarding damages for breach would be tantamount" to an exemption to the regulatory change, *ante*, at 881; and there has been no demonstration to the contrary either. Thus we do not know in this very case whether the award of damages would "amount to" an injunction, *ante*, at 882. If it did, under the principal opinion's theory, the unmistakability doctrine *would apply*, and that application may preclude respondents' claim.

But even if we could solve that problem by determining the damages before liability, and by finding the award to be some amount other than the cost of an exemption, we would still be left with a wholly unsatisfactory distinction. Few, if any, of the plaintiffs in the unmistakability-doctrine cases would have insisted on an injunction, exemption, or their damages equivalent if they had known they could have avoided the doctrine by claiming the Government had agreed to assume the risk, and asking for an award of damages for breaching that implied agreement. It is impossible to know the monetary difference between such awards and, as the principal opinion suggests, the award for a breach of the risk-shifting agreement may even be more generous.

The principal opinion's newly minted distinction is not only untenable, but is contrary to our decisions in *Cherokee Nation* and *Bowen*. The Cherokee Nation sought damages and compensation for harm resulting from the Government's navigational servitude. *Cherokee Nation*, 480 U. S., at 701.

Indeed, one of the Tribe's arguments, upheld by the Court of Appeals, was that the United States could exercise its navigational servitude under the treaty, but that the Tribe had a right to compensation for any diminution in the value of its riverbed property.

Likewise, some of the plaintiffs in *Bowen* sought damages. They sought just compensation for the revocation of their alleged contractual right to terminate the employees' participation in the Social Security Program. The District Court in the decision which we reviewed in fact commented, as this Court reported, that it found that the "'only rational compensation would be reimbursement by the United States to the State or public agencies, of the amount of money they currently pay to the United States for their participation.'" *Bowen*, 477 U. S., at 51 (quoting *Public Agencies Opposed to Social Security Entrapment* v. *Heckler*, 613 F. Supp. 558, 575 (ED Cal. 1985)). It was only because the District Court concluded that awarding this "measure of damages" was contradictory to the will of Congress that the court refrained from making such an award and instead simply declared the statutory amendment unconstitutional. 477 U. S., at 51. Neither *Cherokee Nation* nor *Bowen* hinted that the unmistakability doctrines applied in their case because the damages remedy sought "amount[ed] to" an injunction. *Ante*, at 882.

In *St. Louis* v. *United Railways Co.*, 210 U. S. 266 (1908), the plaintiff railway companies did seek to enjoin the enforcement of the tax by the city, and perhaps that case fits neatly within the principal opinion's scaled-down version of the unmistakability doctrine. But sophisticated lawyers in the future, litigating a claim exactly like the one in *St. Louis*, need only claim that the sovereign implicitly agreed not to change their tax treatment, and request damages for breach of that agreement. There will presumably be no unmistakability doctrine to contend with, and they will be in the same position as if they had successfully enjoined the tax. Such

a result has an Alice in Wonderland aspect to it, which suggests the distinction upon which it is based is a fallacious one.

The principal opinion justifies its novel departure from existing law by noting that the contracts involved in the present case—unlike those in *Merrion*, *Bowen*, and *Cherokee Nation*—"do not purport to bind the Congress from enacting regulatory measures." *Ante*, at 881. But that is precisely what the unmistakability doctrine, as a canon of construction, is designed to determine: *Did* the contract surrender the authority to enact or amend regulatory measures as to the contracting party? If the sovereign did surrender its power unequivocally, and the sovereign breached that agreement to surrender, then and only then would the issue of remedy for that breach arise.

The second reason the principal opinion advances for its limitation on the unmistakability doctrine is that if it were applied to all actions for damages, it would impair the Government's ability to enter into contracts. But the law is well established that Congress may not simply abrogate a statutory provision obligating performance without breaching the contract and rendering itself liable for damages. See *Lynch* v. *United States*, 292 U. S. 571, 580 (1934); *Bowen*, *supra*, at 52. Equally well established, however, is that the sovereign does not shed its sovereign powers just because it contracts. See *Providence Bank* v. *Billings*, 4 Pet. 514, 565 (1830). The Government's contracting authority has survived from the beginning of the Nation with no diminution in bidders, so far as I am aware, without the curtailment of the unmistakability doctrine announced today.

The difficulty caused by the principal opinion's departure from existing law is best shown by its own analysis of the contracts presently before us. The principal opinion tells us first that "[n]othing in the documentation or the circumstances of these transactions purported to bar the Government from changing the way in which it regulated the thrift industry." *Ante*, at 868. But, it agrees with the finding of

the Federal Circuit, that "'the Bank Board and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected' in the agreements between the parties." *Ibid.** From this finding, the principal opinion goes on to say that "[w]e read this promise as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence." *Ante*, at 868–869. Then, in a footnote, the opinion concedes that "[t]o be sure, each side could have eliminated any serious contest about the correctness of their interpretive positions by using clearer language." *Ante*, at 869, n. 15.

But if there is a "serious contest" about the correctness of their interpretive positions, surely the unmistakability doctrine—a canon of construction—has a role to play in resolving that contest. And the principal opinion's reading of additional terms into the contract so that the contract contains an unstated, additional promise to insure the promisee against loss arising from the promised condition's nonoccurrence seems the very essence of a promise implied in law, which is not even actionable under the Tucker Act, rather than a promise implied in fact, which is. See *Hercules, Inc.* v. *United States*, 516 U. S. 417, 423 (1996).

At any rate, the unmistakability doctrine never comes into play, according to the principal opinion, because we cannot know whether the damages which could be recovered in later proceedings would be akin to a rebate of a tax, and therefore the "equivalent of" an injunction. This approach tosses to the winds any idea of the unmistakability doctrine as a canon of construction; if a canon of construction cannot come into play until the contract has first been interpreted as to liabil-

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*Of course it must be remembered that the Federal Circuit had also said that the unmistakability doctrine does not apply where damages are being sought, an approach that even the principal opinion cannot expressly endorse.

ity by an appellate court, and remanded for computation of damages, it is no canon of construction at all.

The principal opinion's search for some unifying theme for somewhat similar cases from *Fletcher* v. *Peck*, 6 Cranch 87, in 1810, to the present day is an interesting intellectual exercise, but its practical fruit is inedible.

II

The principal opinion also makes major changes in the existing sovereign acts doctrine which render the doctrine a shell. The opinion formally acknowledges the classic statement of the doctrine in *Horowitz* v. *United States*, 267 U. S. 458 (1925), quoting: "'[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction of the performance of the particular contract resulting from its public and general acts as a sovereign.'" *Ante*, at 892 (quoting 267 U. S., at 461). The principal opinion says that this statement cannot be taken at face value, however, because it reads "the essential point" of *Horowitz* to be "to put the Government in the same position that it would have enjoyed as a private contractor." *Ante*, at 892; see also *ante*, at 893 (*Horowitz* emphasized "the need to treat the Government-as-contractor the same as a private party"). But neither *Horowitz*, nor the Court of Claims cases upon which it relies, confine themselves to so narrow a rule. As the quotations from them in the principal opinion show, the early cases emphasized the *dual* roles of Government, as contractor and as sovereign. See, *e. g.*, *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865) ("The United States as a contractor are not responsible for the United States as a lawgiver"). By minimizing the role of lawgiver and expanding the role as private contractor, the principal opinion has thus casually, but improperly, reworked the sovereign acts doctrine.

The principal opinion further cuts into the sovereign acts doctrine by defining the "public and general" nature of an

act as depending on the government's motive for enacting it. The new test is to differentiate between "regulatory legislation that is relatively free of Government self-interest" and "statutes tainted by a governmental object of self-relief." *Ante,* at 896. We are then elevated to a higher jurisprudential level by reference to the general philosophical principles enunciated in *Hurtado* v. *California,* 110 U. S. 516, 535–536 (1884), that "[l]aw . . . must be not a special rule for a particular person or a particular case, but . . . 'the general law . . .' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'" Surely this marks a bold, if not brash, innovation in the heretofore somewhat mundane law of government contracts; that law is now to be seasoned by an opinion holding that the Due Process Clause of the Fourteenth Amendment did not make applicable to the States the requirement that a criminal proceeding be initiated by indictment of a grand jury.

The principal opinion does not tell us, nor do these lofty jurisprudential principles inform us, how we are to decide whether a particular statute is "free of governmental self-interest," on the one hand, or "tainted by" a government objective of "self-relief," on the other. In the normal sense of the word, any tax reform bill which tightens or closes tax loopholes is directed to "government self-relief," since it is designed to put more money into the public coffers. Be the act ever so general in its reform of the tax laws, it apparently would not be a "sovereign act" allowing the Government to defend against a claim by a taxpayer that he had received an interpretation from the Internal Revenue Service that a particular type of income could continue to be treated in accordance with existing statutes or regulations.

But we are told "self-relief" is not, as one might expect, necessarily determined by whether the Government benefited financially from the legislation. For example, in this case the principal opinion acknowledges that we do not know

"the dollar value of the relief the Government would obtain" if respondents had to comply with the modified capital-infusion requirements. *Ante*, at 900. Rather the opinion concludes that FIRREA, the law involved in this case, was "tainted by" self-relief based on "the attention" that Congressmen "[gave] to the regulatory contracts prior to passage" of the Act. *Ibid.*

Indeed, judging from the principal opinion's use of comments of individual legislators in connection with the enactment of FIRREA, it would appear that the sky is the limit so far as judicial inquiries into the question whether the statute was "free of governmental self-interest" or rather "tainted" by a Government objective of "self-relief." It is difficult to imagine a more unsettling doctrine to insert into the law of Government contracts. By fusing the roles of the Government as lawgiver and as contractor—exactly what *Horowitz* warned against doing—the principal opinion makes some sort of legislative intent critical in deciding these questions. When it enacted FIRREA was the Government interested in saving its own money, or was it interested in preserving the savings of those who had money invested in the failing thrifts?

I think it preferable, rather than either importing great natural-law principles or probing legislators' intent to modify the sovereign acts doctrine, to leave that law where it is. *Lynch* stands for the proposition that the congressional repeal of a statute authorizing the payment of money pursuant to a contractual agreement is a breach of that contract. But, as the term "public and general" implies, a more general regulatory enactment—whether it be the Legal Tender Acts involved in *Deming*, *supra*, or the embargo on shipments of silk by freight involved in *Horowitz*—cannot by its enforcement give rise to contractual liability on the part of the Government.

Judged by these standards, FIRREA was a general regulatory enactment. It is entitled "[a]n [a]ct to reform, recapi-

talize, and consolidate the Federal deposit insurance system, to enhance the regulatory and enforcement powers of federal financial institutions regulatory agencies, and for other purposes." 103 Stat. 183. As the principal opinion itself explains, "FIRREA made *enormous changes* in the structure of federal thrift regulation by (1) abolishing FSLIC and transferring its functions to other agencies; (2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation; (3) replacing the Bank Board with the Office of Thrift Supervision . . . ; and (4) establishing the Resolution Trust Corporation to liquidate or otherwise dispose of certain closed thrifts and their assets." *Ante*, at 856 (emphasis added). The Act occupies 372 pages in the Statutes at Large, and under 12 substantive titles contains more than 150 numbered sections. Among those sections are the ones involved in the present case. Insofar as this comprehensive enactment regulated the use of goodwill, it did so without respect to how closely the savings association was regulated; its provisions dealt with the right of *any* thrift association, after the date of its enactment, to count intangible assets as capital. See 12 U. S. C. §§ 1464(t)(1)(A), (2), (3), (9). And by these provisions, the capital standards of thrifts were brought into line with those applicable to national banks. See § 1464(t)(1)(C). The principal opinion does not dispute that Congress, through this mammoth legislation, "acted to protect the public." *Ante*, at 903.

III

JUSTICE SCALIA finds that the unmistakability doctrine does apply to the contracts before us. He explains that when the government is a contracting party, "it is reasonable to presume . . . that the sovereign does *not* promise that none of its multifarious sovereign acts . . . will incidentally disable it or the other party from performing," under the contract, "*unless the opposite clearly appears.*" *Ante*, at 921. In other words, the sovereign's right to take subsequent action continues "unless th[e] right has been specifi-

cally surrendered in terms which admit of no other reasonable interpretation." *St. Louis*, 210 U. S., at 280. JUSTICE SCALIA finds that the presumption has been rebutted here; he, like JUSTICE BREYER, finds that the Government had made a promise that its subsequent action would not frustrate the contract. JUSTICE SCALIA, however, finds that obligation is contained implicitly within the "promis[e] to regulate . . . in a particular fashion," and the Government's consideration. *Ante*, at 921.

But that is hardly what one normally thinks to be "unmistakable terms." Indeed, that promise plus consideration is no different from what JUSTICE SCALIA says applies to private parties. *Ante*, at 920. The Government has "promise[d] to do *x* in exchange for [respondents] doing *y*," and in so doing "*impliedly* promise[d] not to do anything that [would] disable [the Government] from doing *x*, or disable [respondents] from doing *y*—so that if either of [the parties'] performances is rendered impossible by such an act on [the Government's] part, [the Government is] not excused from [its] obligation." *Ibid.* (emphasis added). But more than this is required for Government contracts, as JUSTICE SCALIA had seemed to acknowledge.

His point about *quid pro quo* adds little, for it necessarily assumes that there has been a promise to provide a particular regulatory treatment which cannot be affected by subsequent action, as opposed to a promise to provide that treatment unless and until there is subsequent action. *Ante*, at 921. But determining which promise the Government has made is precisely what the unmistakability doctrine is designed to determine. If the Government agreed to treat the losses acquired by respondents as supervisory goodwill in the short term, but made no commitment about their regulatory treatment over the long term, respondents still received consideration. Such consideration would be especially valuable to an unhealthy thrift because it would provide "a number of immediate benefits to the acquiring

thrift" that would stave off foreclosure. Brief for United States 27.

In addition, JUSTICE SCALIA does not himself make the findings necessary for respondents to prevail, but relies on the findings of the trial court and the Court of Appeals for the Federal Circuit with respect to what the Government actually promised. *Ante*, at 922. But both the trial court and the Court of Appeals held the unmistakability doctrine did *not* apply here. Therefore, even under JUSTICE SCALIA's own premises, these findings are insufficient because they were made under a mistaken view of the applicable law.

IV

JUSTICE BREYER in his separate concurrence follows a different route to the result reached by the principal opinion. But even under his own view of the law, he omits a necessary step in the reasoning required to hold the Government liable. He says that "the lower courts held that each [respondent] proved the existence of an express promise by the Government to grant them particular regulatory treatment for a period of years." *Ante*, at 913. But the Government could have made that promise and *not* made the further promise to pay respondents in the event that the regulatory regime changed. JUSTICE BREYER concludes that second promise did exist as a matter of fact, but he never makes that finding himself. Instead, he says that the "principal opinion's careful examination of the circumstances reveals" that the Government did "inten[d] to make a binding promise . . . to hold the thrifts harmless from the effects of future regulation (or legislation)." *Ante*, at 918. But the principal opinion does not treat this as a question of fact at all, as JUSTICE BREYER does, but instead as something which occurs by operation of law.

JUSTICE BREYER relies on this illusory factual finding while at the same time commenting how implausible it would be for the Government to have intended to insure against a

change in the law. He notes that "it might seem unlikely" for the Government to make such a promise, *ibid.*, and further comments that because the contracting party is the Government, it may be "far less likely that [the parties] *intend[ed]* to make a promise that will oblige the Government to hold private parties harmless in the event of a change in the law," *ante,* at 913.

The short of the matter is that JUSTICE BREYER and JUSTICE SCALIA cannot reach their desired result, any more than the principal opinion can, without changing the status of the Government to just another private party under the law of contracts. But 75 years ago Justice Holmes, speaking for the Court in *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141, 143 (1920), said that "[m]en must turn square corners when they deal with the Government." The statement was repeated in *Federal Crop Ins. Corp.* v. *Merrill,* 332 U. S. 380, 385 (1947). The wisdom of this principle arises, not from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government.

V

A moment's reflection suggests that the unmistakability doctrine and the sovereign acts doctrine are not entirely separate principles. To the extent that the unmistakability doctrine is faithfully applied, the cases will be rare in which close and debatable situations under the sovereign acts doctrine are presented. I do not believe that respondents met either of these tests, and I would reverse the judgment of the Court of Appeals for the Federal Circuit outright or remand the case to that court for reconsideration in light of these tests as I have enunciated them.

Per Curiam

PENNSYLVANIA *v.* LABRON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 95–1691. Decided July 1, 1996*

In No. 95–1691, police found cocaine when they searched the trunk of respondent Labron's car after observing him and others engaging in drug transactions on a Philadelphia street. In No. 95–1738, a search of respondent Kilgore's truck during a drug raid on his home turned up cocaine. In both cases, probable cause existed for the searches, but the police did not obtain warrants. The Pennsylvania Supreme Court suppressed the evidence seized in each case, holding that the Fourth Amendment requires police to obtain a warrant before searching an automobile unless exigent circumstances are present.

Held: The automobile exception to the Fourth Amendment's warrant requirement requires only that there be probable cause to conduct a search. This Court's early cases establishing the automobile exception were based on the automobile's ready mobility, an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. See, *e. g.*, *California* v. *Carney*, 471 U. S. 386, 390–391. More recent cases provide a further justification: the individual's reduced privacy expectation in an automobile, owing to its pervasive regulation. *Ibid.* This Court's jurisdiction in Labron's case is secure. The Commonwealth's automobile exception jurisprudence appears to be interwoven with federal law, and the adequacy and independence of any possible state-law ground for the exception is not clear from the face of the Pennsylvania Supreme Court's opinion. *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041. Since the opinion in Kilgore's case rests on the explicit conclusion that the officers' conduct violated the Fourth Amendment, this Court has jurisdiction to review that judgment as well.

Certiorari granted; No. 95–1691, 543 Pa. 86, 669 A. 2d 917, and No. 95–1738, 544 Pa. 439, 677 A. 2d 311, reversed and remanded.

PER CURIAM.

In these two cases, the Supreme Court of Pennsylvania held that the Fourth Amendment, as applied to the States through the Fourteenth, requires police to obtain a warrant

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*Together with No. 95–1738, *Pennsylvania* v. *Kilgore*, also on petition for writ of certiorari to the same court.

before searching an automobile unless exigent circumstances are present. Because the holdings rest on an incorrect reading of the automobile exception to the Fourth Amendment's warrant requirement, we grant the petitions for certiorari and reverse.

In *Labron,* No. 95–1691, police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car from which the drugs had been produced, and found bags containing cocaine. The Pennsylvania Supreme Court agreed with the trial court (but not with the intermediate court of appeals, 428 Pa. Super. 616, 626 A. 2d 646 (1993), whose judgment it reversed) that this evidence should be suppressed. 543 Pa. 86, 669 A. 2d 917 (1995). After surveying our precedents on the automobile exception as well as some of its own decisions, the court "conclude[d] that this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Id.*, at 100, 669 A. 2d, at 924. Satisfied the police had time to secure a warrant, *id.*, at 100–103, 699 A. 2d, at 924–925, the court held that "the warrantless search of this stationary vehicle violated constitutional guarantees," *id.,* at 101, 669 A. 2d, at 924.

In *Kilgore,* No. 95–1738, an undercover informant agreed to buy drugs from respondent Randy Lee Kilgore's accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made to a farmhouse where she met with Randy Kilgore and obtained the drugs. After the drugs were delivered and the Kilgores were arrested, police searched the farmhouse with the consent of its owner and also searched Randy Kilgore's pickup truck; they had seen the Kilgores walking to and from the truck, which was parked in the driveway of the farmhouse. The search turned up cocaine on the truck's floor. The trial court denied Randy Kilgore's motion to suppress the cocaine, holding the officers had probable cause to make the search.

The appellate court affirmed. 437 Pa. Super. 491, 650 A. 2d 462 (1994). The Supreme Court of Pennsylvania reversed, citing *Labron* and holding that although there was probable cause to search the truck, 544 Pa. 439, 444, 677 A. 2d 311, 313 (1995), the search violated the Fourth Amendment because no exigent circumstances justified the failure to obtain a warrant, *id.*, at 445, 677 A. 2d, at 313–314.

The Supreme Court of Pennsylvania held the rule permitting warrantless searches of automobiles is limited to cases where " 'unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.' " 543 Pa., at 100, 669 A. 2d, at 924, quoting *Commonwealth* v. *White*, 543 Pa. 45, 53, 669 A. 2d 896, 901 (1995) (emphasis deleted). This was incorrect. Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. *California* v. *Carney*, 471 U. S. 386, 390–391 (1985) (tracing the history of the exception); *Carroll* v. *United States*, 267 U. S. 132 (1925). More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. *Carney*, *supra*, at 391–392. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more. *Carney*, *supra*, at 393. As the state courts found, there was probable cause in both of these cases: Police had seen respondent Labron put drugs in the trunk of the car they searched and had seen respondent Kilgore act in ways that suggested he had drugs in his truck. We conclude the searches of the automobiles in these cases did not violate the Fourth Amendment.

Respondent Labron claims we have no jurisdiction to review the judgment in his case because the Pennsylvania Supreme Court's opinion rests on an adequate and independ-

ent state ground, viz., "this Commonwealth's jurisprudence of the automobile exception." 543 Pa., at 100, 669 A. 2d, at 924. We disagree. The language we have quoted is not a "plain statement" sufficient to tell us "the federal cases [were] being used only for the purpose of guidance, and d[id] not themselves compel the result that the court ha[d] reached." *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception, see, *e. g.*, 543 Pa., at 95, 669 A. 2d, at 921 (observing *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978), cited *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971)); 543 Pa., at 100, 669 A. 2d, at 924 (stating *Commonwealth* v. *White*, *supra*, rested in part upon the Pennsylvania Supreme Court's analysis of *Chambers* v. *Maroney*, 399 U. S. 42 (1970)). The law of the Commonwealth thus appears to us "interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S., at 1040–1041. Our jurisdiction in Labron's case is secure. *Ibid.* The opinion in respondent Kilgore's case, meanwhile, rests on an explicit conclusion that the officers' conduct violated the Fourth Amendment; we have jurisdiction to review this judgment as well.

Respondent Labron's motion to proceed *in forma pauperis* is granted. The petitions for writs of certiorari are granted, the judgments of the Supreme Court of Pennsylvania are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The decisions that the Court summarily reverses today are two of a trilogy of cases decided by the Pennsylvania Su-

preme Court within three days of each other. See 544 Pa. 439, 677 A. 2d 311 (1995); *Commonwealth* v. *White*, 543 Pa. 45, 669 A. 2d 896 (1995); 543 Pa. 86, 669 A. 2d 917 (1995).[1] In each case, that court concluded that citizens of Pennsylvania are protected from warrantless searches and seizures of their automobiles absent exigent circumstances. But a fair reading of both *White* (the holding of which the Commonwealth has not challenged in this Court) and *Labron* (which the Court reverses today) demonstrates that their judgments almost certainly rested upon the Pennsylvania court's independent consideration of its own Constitution. For that reason, I do not believe that we have jurisdiction over the decision in *Labron*, just as we would not have jurisdiction in *White*. See 28 U. S. C. § 1257(a).[2] Furthermore, when considered in light of those two more carefully reasoned decisions, there is no reason for this Court to disturb the state court's finding in *Kilgore*, since the result will almost certainly be affirmed on remand.

In its *per curiam* decision, this Court concludes that because the decision in *Labron* cited state decisions which in turn referred to two 25-year-old cases of this Court, any reference to state law is "'interwoven with the federal law.'" *Ante*, at 941 (quoting *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983)). These references, however, seem to me a rather short thread with which to weave—let alone upon which to hang—our jurisdiction.

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[1] Each decision was issued by a different division of the Pennsylvania Supreme Court.

[2] Even if, as the Court concludes, *ante*, at 941, some element of residual doubt suggests that Pennsylvania's Supreme Court drew inspiration from our interpretations of the Federal Constitution, I do not think that reliance sufficient to justify expending this Court's time—or that of the Pennsylvania Supreme Court—simply to scour the state decisions of all references to the Federal Constitution. See *infra*, at 943–950.

In my opinion, the best reading of *Labron*'s plain language is that it relied on adequate and independent state grounds. The majority decision below includes references to four sources of federal law: the Federal Constitution and three federal cases. None of the references demonstrates that the decision rested upon anything other than state law.

The decision begins with the proposition, not at issue here, that "the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution generally require that searches be predicated upon a warrant issued by a neutral and detached magistrate." 543 Pa., at 93, 669 A. 2d, at 920 (citations omitted). It then reviews the history of the so-called "automobile exception" to the warrant requirement by quoting several passages from our decision in *Carroll* v. *United States*, 267 U. S. 132 (1925), which first established the exception, and then quotes a passage from *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970),[3] which appears to support the proposition under federal law that the Court emphasizes here today (that the existence of probable cause is sufficient in and of itself to justify a search of a vehicle). 543 Pa., at 94–95, 669 A. 2d, at 920–921.

Rather than follow the developments of federal law, however, the decision then specifically and immediately notes that "[w]hen reviewing warrantless automobile searches *in this Commonwealth*, we have constantly held that 'there is no "automobile exception" as such and [that] the constitutional protections are applicable to searches and seizures of a person's car.' *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978) (citing *Coolidge* v. *New Hampshire*,

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[3] As the Pennsylvania Supreme Court noted, in *Chambers* we held that "'[f]or constitutional purposes, [there is] no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.'" 543 Pa. 86, 95, 669 A. 2d 917, 921 (1995) (quoting *Chambers* v. *Maroney*, 399 U. S., at 52).

403 U. S. 443 . . . (1971))." *Id.*, at 95, 669 A. 2d, at 921 (emphasis added). From that point onward, the only reference to federal law in the decision's remaining 30 citations is a recognition that *White*, the sole decision of this trio of "exigent circumstance" cases that is not before our Court, was "based upon" that Court's analysis of *Chambers*. 543 Pa., at 99–100, 669 A. 2d, at 923–924. Every other citation in *Labron* is to Pennsylvania law.

Because *White* was issued on the same day as *Labron* and reached an identical conclusion regarding the "exigent circumstances" rule, that decision is worth reviewing. In *White*, the court hesitated before considering the merits of the case "to address the Commonwealth's claim that White has waived his claim that the search of his automobile was illegal under Article I, Section 8 of the Pennsylvania Constitution because he did not set forth his state constitutional claims in the manner required." The Commonwealth's claim, the court found, was "meritless." "White clearly raises a claim under the Pennsylvania Constitution, cites cases in support of his claim, and relates the cases to the claim. That is sufficient." 543 Pa., at 50, 669 A. 2d, at 899.

Having established the importance of the state constitutional claim to the defendant's argument, *White* went on to discuss the "exigent circumstance" exception at issue here in light of both federal and state law. And although the court's analysis relied upon our decision in *Chambers* v. *Maroney*, it cited none of the subsequent cases in which this Court has effectively converted the "automobile exception" into an absolute rule allowing searches in the presence of probable cause. See 543 Pa., at 49–53, 669 A. 2d, at 899–901; n. 6, *infra* (noting that the Pennsylvania courts' failure to refer to this Court's subsequent decisions in this area may be intentional rather than ignorant). Stressing the independent evaluation it makes of its State Constitution, the Pennsylvania court also rejected our decision in *New York* v. *Belton*,

453 U. S. 454 (1981), on state constitutional grounds. See 543 Pa., at 54–58, 669 A. 2d, at 901–903.[4]

Notably, the Commonwealth has not asked this Court to review the Pennsylvania court's decision in *White*, even though the search in that case would be affirmed under the Commonwealth's and this Court's understanding of Pennsylvania's holding regarding exigent circumstances. I also note that lower state courts have explicitly read *White* as establishing a state constitutional right, not a federal right. *Commonwealth* v. *Haskins*, 450 Pa. Super. 540, 545, 677 A. 2d 328, 330 (1996) ("In order to search an automobile without a warrant, the police must still show the existence of both probable cause and exigent circumstances. *Commonwealth* v. *White*, 543 Pa. 45, 669 A. 2d 896 (1995). . . . In *White*, our Supreme Court reiterated that the Pennsylvania Constitution requires such a showing"); see also *Commonwealth* v. *Yedinak*, 450 Pa. Super. 352, 359, n. 5, 676 A. 2d 1217, 1220, n. 5 (1996) ("The Pennsylvania Supreme Court recently held that the Pennsylvania Constitution provides greater protection than the United States Constitution with regard to automobile searches in *Commonwealth* v. *White*").

The lower courts' understanding regarding the state-law nature of *White*—and my understanding of the state-law nature of *Labron* as well—is almost perfectly reflected in the dissents to each case that were penned by Justice Castille. In both instances, Justice Castille recognizes, even more explicitly than the majority, that the decisions were based on state law.

In *Labron*, for instance, his main point was that the defendant had no standing to challenge the constitutionality of

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[4] Although the court's main opinion in *Commonwealth* v. *White* also asked whether the search would have been permissible as a search incident to an arrest, the dissent later noted that the only question presented in the appeal was whether "exigent circumstances" were necessary to permit a warrantless search of a car based on probable cause. See 543 Pa., at 72–73, 669 A. 2d, at 910.

the search of a car that he did not own. In making his argument, however, he noted that "the majority correctly characterizes *Pennsylvania law* regarding the 'automobile exception' to the warrant requirement." 543 Pa., at 104, 669 A. 2d, at 926 (emphasis added). And although he reviewed decisions of this Court on standing to claim violations of the Fourth Amendment, he went on to note: "*Under Article I, Section 8 of the Pennsylvania Constitution*, however, this Court looks to several additional factors to determine whether a criminal defendant has standing to challenge the admission of evidence against him." *Id.*, at 106, 669 A. 2d, at 927 (emphasis added).

In *White*, Justice Castille stated that he believed that "the automobile exception to the warrant requirements of *this Commonwealth* should be a *per se* rule regardless of how much time police may have to obtain a warrant," 543 Pa., at 70, 669 A. 2d, at 909 (emphasis added), and he further concluded that he would "urge the adoption of a bright line rule that would allow warrantless searches of all automobiles for which police have independent probable cause," *id.*, at 71, 669 A. 2d, at 909–910. Of course, if Justice Castille were interpreting federal, rather than state, law, he would not have the luxury of "urging the adoption" of a particular rule.[5]

Having reviewed the range of the Pennsylvania courts' statements regarding the source of the "exigent circumstances" rule, it is worthwhile to review this Court's understanding of when a state decision is based on adequate and independent state grounds. In *Michigan* v. *Long*, the Court adopted a "plain statement" rule for determining whether a state decision rested on "independent and adequate" state-law grounds. "[B]ecause of [our] respect for state courts,

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[5] Justice Castille also specifically noted that the *Belton* decision was not raised by the parties, and that the majority's discussion of it was dicta, further emphasizing that his emphasis on Pennsylvania law was related to the sole issue that he believed presented: whether a warrantless search of an automobile requires both probable cause and an exigent circumstance.

and [a] desire to avoid advisory opinions, . . . we [did] not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions." 463 U. S., at 1040. 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 held, we would conclude that the State decided as it did because federal law required it to do so. *Id.*, at 1040–1041.

Given the explicit and nearly exclusive references to state law that I review above, it seems to me that the Court's decision to take jurisdiction in *Labron* not only extends *Michigan* v. *Long* beyond its original scope, but stands its rationale on its head. *Labron* does not rest "primarily" on federal law; as Justice Castille understood it, as the briefing in *White* understood it, and as the Commonwealth's decision to stay out of *White* demonstrates, every indication is that the rule adopted in *Labron* and *White* rests primarily on state law. Nor are these holdings "interwoven" with federal law: Both *Labron* and *White* cite only two federal cases, both over a quarter-century old; rather than implicitly conclude that the absence of any reference to more recent decisions is due to poor legal research, I would trust the Pennsylvania courts' ability to understand and choose to deviate from our federal law. Certainly it would be a more respectful approach, in a case where the question is as close as it is in this case, to conclude that the State had made a conscious decision to depart from the jurisprudence of this Court rather than an error of law.[6]

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[6] Indeed, the author of *Labron* noted in *White* that "the history of Article I, Section 8 and case-law interpreting it reveal a history of according a limited expectation of privacy in an automobile independently under the Pennsylvania Constitution. Therefore, the question before us today is not whether we wish to extend additional privacy protections to the Appellant

The nature of the Pennsylvania court's reliance on federal law in these cases, therefore, is quite different from that which spurred the Court to conclude in *Michigan* v. *Long* that the judgment of the Michigan Supreme Court had not relied on adequate and independent state grounds. There, as the Court noted, the decision below "referred twice to the State Constitution in its opinion, but otherwise relied *exclusively* on federal law." 463 U. S., at 1037 (emphasis

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but whether we wish to follow the United States Supreme Court and sharply curtail a privacy interest long recognized by this Court." *Commonwealth* v. *White*, 543 Pa., at 62, 669 A. 2d, at 905.

To this end, I find it particularly interesting that only two Pennsylvania courts have cited the decision in *California* v. *Carney*, 471 U. S. 386 (1985), upon which the *per curiam* decision relies as modern support for its interpretation of federal constitutional law. See *Commonwealth* v. *Rosenfelt*, 443 Pa. Super. 616, 632–634, 662 A. 2d 1131, 1139 (1995); *Commonwealth* v. *Camacho*, 425 Pa. Super. 567, 625 A. 2d 1242 (1995). Each of those decisions expressly noted the presence of conflict between federal and state law on this issue.

In *Camacho*, the Superior Court noted "the discrepancy between some of the Commonwealth's past cases and federal cases which speak to automobile searches" in cases like those at issue here. *Id.*, at 576, n. 2, 625 A. 2d, at 1247, n. 2. After reviewing the holding in *Carney*, the court noted that the state cases concluding that there was no *per se* "'automobile exception'" were "simply dated and not in keeping with the tenor of current law." 425 Pa. Super., at 577, n. 2, 625 A. 2d, at 1247, n. 2.

The court in *Rosenfelt* reached an alternative explanation for the conflict—and a result identical to that reached in the cases reversed by the Court today. There, the defendant agreed that the search of the vehicle was not illegal under federal law. Citing *Carney*, the court noted that the federal "automobile exception" had "jettison[ed]" the requirement of exigency, essentially converting the exception into a *per se* rule allowing a search once probable cause exists. See 443 Pa. Super., at 633, 644–645, 662 A. 2d, at 1139, 1145. Noting that the State Constitution could extend greater protections to Pennsylvania citizens than did the Federal Constitution, but that its Supreme Court had not yet decided whether that was the case, the Superior Court went on to review the issue on its own and found a state constitutional violation. *Ibid.* After it decided the cases at issue here, the Pennsylvania Supreme Court denied the Commonwealth's appeal. See 544 Pa. 605, 674 A. 2d 1070 (1996) (table).

added). The dissents below also relied explicitly and *exclusively* on decisions of this Court. *Id.*, at 1037, n. 2; *Michigan* v. *Long*, 413 Mich. 461, 473–486, 320 N. W. 2d 866, 870–875 (1982) (Coleman, C. J., dissenting, Moody, J., concurring in part and dissenting in part). Indeed, the critical holding of the Court was that the Michigan "Court of Appeals erroneously applied the principles of *Terry* v. *Ohio*." *Id.*, at 471, 320 N. W. 2d, at 869 (citation omitted).[7] The opinion in these cases presents almost precisely the opposite situation: The decision refers to the Federal Constitution once, but otherwise relies *exclusively* on state law.

For these reasons, just as the decision in *White* would not merit summary reversal were it before this Court, the decision in *Labron* should not be summarily reversed. Although *Labron* and *White* both touch upon, and even place some historical reliance upon, federal search and seizure law, each also recognizes the broad interpretation that the Pennsylvania court has given its own constitutional prohibition against warrantless searches. I therefore seriously ques-

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[7] On the many subsequent occasions in which this Court has taken jurisdiction over state decisions over which there was some dispute about the nature of the relationship between federal and state law, the state opinions were far more "interwoven" with federal law than is true in these cases. See, *e. g.*, *Illinois* v. *Rodriguez*, 497 U. S. 177, 182 (1990) (decision below did not "rely on (or even mention) any specific provision" of State Constitution); *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (state constitutional provision construed to provide protections identical to Federal Constitution); *Florida* v. *Riley*, 488 U. S. 445, 448, n. 1 (1989) (decision below mentioned State Constitution only twice, but "focused exclusively on federal cases dealing with the Fourth Amendment"); *Michigan* v. *Chesternut*, 486 U. S. 567, 571, n. 3 (1988) (decision below "said nothing to suggest that the Michigan Constitution's seizure provision provided an independent source of relief, and the court's entire analysis rested expressly on the Fourth Amendment and federal cases"); *Kentucky* v. *Stincer*, 482 U. S. 730, 735, n. 7 (1987) (decision below "consistently referred to respondent's rights under the . . . Federal Constitution as supporting its ruling"); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987) (State Constitution construed *in pari materia* with Federal Constitution).

tion whether respect for the reasoning, independence, and resources of the Pennsylvania court will be advanced by today's decision.

While *Kilgore* relies more explicitly on the Federal Constitution than the other two decisions, it decided the identical issue that was decided in *Labron* and *White* only three days before those decisions issued. The reference to the Federal Constitution upon which the Court rests its jurisdiction—only one of two references to federal law—must be read in the context of the other two decisions, each of which relied heavily upon the Commonwealth's own Constitution. In light of *Labron* and *White*, the judgment in *Kilgore* will almost certainly remain the same on remand. In such a circumstance, the rationales supporting the rule of *Michigan* v. *Long* simply do not support the decision to reverse. The petition in *Kilgore* should simply be denied.

On many prior occasions, I have noted the unfortunate effects of the rule of *Michigan* v. *Long*. See, *e. g.*, *Harris* v. *Reed*, 489 U. S. 255, 266–267 (1989) (concurring opinion); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 689–708 (1986) (dissenting opinion); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) *(per curiam)* (dissenting opinion); *Ponte* v. *Real*, 471 U. S. 491, 501–503 (1985) (opinion concurring in part); see also *Arizona* v. *Evans*, 514 U. S. 1, 24, 31–34 (1995) (GINSBURG, J., dissenting). Because the state-law ground supporting these judgments is so much clearer than has been true on most prior occasions, see n. 5, *supra*, these decisions exacerbate those effects to a nearly intolerable degree. Particularly in light of my understanding of this Court's primary role—"to protect the rights of the individual that are embodied in the Federal Constitution," *Harris*, 489 U. S., at 267—the decision to summarily reverse state decisions resting tenuously at best on federal grounds is imprudent and entirely inconsistent "with the sound administration of this Court's discretionary docket." *Ponte*, 471 U. S., at 502–503.

The Pennsylvania court has in these and other cases expressly indicated its intent to extend the protections of its Constitution beyond those available under the Federal Constitution, see, *e. g.*, *Commonwealth* v. *Edmunds*, 526 Pa. 374, 586 A. 2d 887 (1991) (setting forth test for establishing rights under Pennsylvania Constitution); *Commonwealth* v. *Rosenfelt*, 443 Pa. Super. 616, 634–637, 662 A. 2d 1131, 1140–1141 (1995) (reviewing state cases extending greater protections under the Pennsylvania Constitution). The *per curiam* decision that the Court issues today merely makes that task harder by requiring the Commonwealth to purge its decisions of any reliance on the latter, despite the value of the insights that our decisions can provide on related issues of law. By "unceremoniously reversing its judgment," *Van Arsdall*, 475 U. S., at 701 (STEVENS, J., dissenting), we also demonstrate a lack of respect for the Pennsylvania court and the sophistication of its state search and seizure law. See *id.*, at 699.

These harms are particularly unnecessary given the likely result on remand. To reinvigorate the privacy protections extended to Pennsylvania citizens under *Labron*, *Kilgore*, and *White*, the Pennsylvania Supreme Court need only set forth the appropriate talismanic language and state, even more clearly than it already has, that the "*Commonwealth's* jurisprudence of the automobile exception [requires] both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Labron*, 543 Pa., at 100, 669 A. 2d, at 924 (emphasis added).[8] While the

[8] State courts have, of course, done this on many occasions in the past. See, *e. g.*, *Ponte* v. *Real*, 471 U. S. 491, 503, n. 4 (1985) (STEVENS, J., concurring in part) (listing various cases in which reversals by this Court were followed by state-court decisions affirming the original holding on state-law grounds); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) *(per curiam)* (STEVENS, J., dissenting) (same).

result will be identical, resources and respect will have been unnecessarily lost.

I respectfully dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 952 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.

JUNE 17, 1996

Certiorari Granted—Reversed and Remanded. (See No. 95–1242, *ante,* p. 137; and No. 95–1612, *ante,* p. 149.)

Certiorari Granted—Vacated and Remanded

No. 95–239. EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Romer* v. *Evans,* 517 U. S. 620 (1996). Reported below: 54 F. 3d 261.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I dissent from the decision to remand this case in light of *Romer* v. *Evans,* 517 U. S. 620 (1996). *Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. The present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection. It can make that determination effective, of course, only by instructing its departments and agencies to obey it—which is what the Cincinnati Charter Amendment does. Thus, the consequence of holding *this* provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer,* which did not involve the issue, cannot possibly be thought to have embraced it.

I would deny certiorari in this case, or else set the case for argument to decide for ourselves the ultra-*Romer* issue that it presents.

No. 95–7430. LONDRE *v.* MERKLE, WARDEN, ET AL. 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 *Thompson* v. *Keohane*, 516 U. S. 99 (1995). Reported below: 59 F. 3d 175.

Miscellaneous Orders

No. D–1667. IN RE DISBARMENT OF GLENN. Disbarment entered. [For earlier order herein, see 517 U. S. 1131.]

No. D–1668. IN RE DISBARMENT OF KELLY. Disbarment entered. [For earlier order herein, see 517 U. S. 1131.]

No. D–1669. IN RE DISBARMENT OF EWING. Disbarment entered. [For earlier order herein, see 517 U. S. 1131.]

No. D–1670. IN RE DISBARMENT OF READY. Disbarment entered. [For earlier order herein, see 517 U. S. 1131.]

No. D–1675. IN RE DISBARMENT OF PINCHAM. Robert Eugene Pincham, Jr., of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on April 22, 1996 [517 U. S. 1153], is discharged.

No. D–1691. IN RE DISBARMENT OF BURKHART. Auben Gray Burkhart, Jr., of Memphis, Tenn., is suspended from the practice of law in this Court, and a rule will 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–1692. IN RE DISBARMENT OF KIELY. Dan Ray Kiely, of Vero Beach, Fla., is suspended from the practice of law in this Court, and a rule will 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. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $46,305.87

for the period November 18, 1995, through May 31, 1996, to be paid as follows: 30% by Nebraska, 30% by Wyoming, 15% by Colorado, and 25% by the United States. [For earlier order herein, see, *e. g.*, 516 U. S. 1026.]

No. 95–1426. ESTATE OF HANSEN *v.* CITY OF NEW HAVEN, 517 U. S. 1189. Motion of respondent for costs denied.

No. 95–1439. LAKOSKI *v.* UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 95–8550. IN RE WASHINGTON. Petition for writ of mandamus denied.

No. 95–1747. IN RE O'CONNOR ET AL.; and

No. 95–8709. IN RE JAFFER. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 95–1521. UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL. *v.* LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 45 F. 3d 469 and 74 F. 3d 1308.

No. 95–1723. GRIMMETT, TRUSTEE FOR THE BANKRUPTCY ESTATE OF SIRAGUSA, ET AL. *v.* BROWN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 75 F. 3d 506.

No. 95–1478. PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA *v.* UNITED STATES; and

No. 95–1503. MACK, SHERIFF, GRAHAM COUNTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 66 F. 3d 1025.

No. 95–1268. MARYLAND *v.* WILSON. Ct. Sp. App. Md. Motion of respondent for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondent granted. Certiorari granted. Reported below: 106 Md. App. 24, 664 A. 2d 1.

No. 95–1605. UNITED STATES *v.* GONZALES ET AL. C. A. 10th Cir. Motions of respondents Miguel Gonzales, Orlenis

Hernandez-Diaz, and Mario Perez for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 65 F. 3d 814.

No. 95–1649. KANSAS *v.* HENDRICKS; and

No. 95–9075. HENDRICKS *v.* KANSAS. Sup. Ct. Kan. Motions of Leroy Hendricks for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 259 Kan. 246, 912 P. 2d 129.

No. 95–1694. REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. *v.* DOE. C. A. 9th Cir. Motion of American Council on Education et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 65 F. 3d 771.

No. 95–1717. UNITED STATES *v.* LANIER. C. A. 6th Cir. Motion of Southern Poverty Law Center et al. for leave to file a brief as *amici curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 73 F. 3d 1380.

Certiorari Denied

No. 95–1469. RICHARD *v.* HINSON, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 70 F. 3d 415.

No. 95–1472. KLUMP *v.* DUFFUS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1368.

No. 95–1480. HOTCAVEG ET AL. *v.* KENNEDY, DIRECTOR, NATIONAL PARK SERVICE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 133.

No. 95–1483. YANEZ-PENALOZA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 473.

No. 95–1492. AKERS ET AL. *v.* PALMER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 226.

No. 95–1528. HARRIS COUNTY APPRAISAL DISTRICT ET AL. *v.* VIRGINIA INDONESIA CO. Sup. Ct. Tex. Certiorari denied. Reported below: 910 S. W. 2d 905.

No. 95–1557. SHOWA ALUMINUM CORP. ET AL. *v.* MODINE MANUFACTURING CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 75 F. 3d 1545.

No. 95–1599. KARADZIC *v.* KADIC, ON HER OWN BEHALF AND ON BEHALF OF HER INFANT SONS, BENJAMIN AND OGNJEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 70 F. 3d 232.

No. 95–1603. YONTZ *v.* ADAMS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 73 F. 3d 361.

No. 95–1635. MINNESOTA COUNCIL OF DOG CLUBS ET AL. *v.* CITY OF MINNEAPOLIS. Ct. App. Minn. Certiorari denied. Reported below: 540 N. W. 2d 903.

No. 95–1642. GOMEZ *v.* ALLEGHENY HEALTH SERVICES, INC., AKA ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 71 F. 3d 1079.

No. 95–1646. WHARF CABLE LTD. *v.* UNITED INTERNATIONAL HOLDINGS, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 393.

No. 95–1666. BABCOCK & WILCOX CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO (MATSON NAVIGATION CO., INC., ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–1679. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION *v.* CHAULK SERVICES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 1361.

No. 95–1688. HANKINS ET AL. *v.* MELTON. Ct. App. Miss. Certiorari denied. Reported below: 669 So. 2d 797.

No. 95–1695. CALIFORNIA *v.* BINDA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 95–1703. WOOD *v.* SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–1707. TIC UNITED CORP. *v.* PATTON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 1235.

No. 95–1714. NIEWALD *v.* SCAFE, CHIEF OF POLICE, OVERLAND PARK POLICE DEPARTMENT. Ct. App. Kan. Certiorari denied. Reported below: 21 Kan. App. 2d xxxix, 906 P. 2d 187.

No. 95–1719. DANIELS *v.* GREATER BALTIMORE MEDICAL CENTER ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 104 Md. App. 759.

No. 95–1735. WALKER *v.* MANVILLE PERSONAL INJURY TRUST. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1319.

No. 95–1737. LUCAS *v.* GEE ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 104 Ohio App. 3d 423, 662 N. E. 2d 382.

No. 95–1739. BREEDLOVE *v.* TYSONS MANOR HOMEOWNERS ASSN. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1230.

No. 95–1748. AARON *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 95–1753. ARENS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 73 F. 3d 379.

No. 95–1759. MINIX *v.* FRAZIER, JUDGE, JOHNSON CIRCUIT COURT (MINIX, REAL PARTY IN INTEREST). Sup. Ct. Ky. Certiorari denied.

No. 95–1761. HEINMILLER *v.* DEPARTMENT OF HEALTH OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 127 Wash. 2d 595, 903 P. 2d 433.

No. 95–1786. DOUCETTE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (SAN DIEGO UNIFIED PORT DISTRICT, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–1799. GILLELAND *v.* DUBUISSON ET AL. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 95–1801. ZAIDI *v.* CARRICO, CHIEF JUSTICE OF VIRGINIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 95–1815. BRIGHT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 4th 652, 909 P. 2d 1354.

No. 95–1817. KORNMAN ET VIR, INDIVIDUALLY AND ON BEHALF OF THEIR DEPENDENT SON, KORNMAN *v.* BLUE CROSS/BLUE SHIELD OF LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 662 So. 2d 498.

No. 95–1857. STEPHEN M. *v.* PAMELA N. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 95–1866. $227,865 IN UNITED STATES CURRENCY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 371.

No. 95–1894. LIBERTY NATURAL PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 369.

No. 95–6488. WILLIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 61 F. 3d 526.

No. 95–6724. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 63 F. 3d 242.

No. 95–7323. HOFMANN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 537 N. W. 2d 767.

No. 95–7955. CRETACCI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 62 F. 3d 307.

No. 95–7986. RODRIGUEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 875.

No. 95–8005. SHARP *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 908 S. W. 2d 752.

No. 95–8121. BOTERO-OSPINA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 71 F. 3d 783.

No. 95–8248. REESE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 582.

No. 95–8276. TOKERUD *v.* CAPITOLBANK SACRAMENTO. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 38 Cal. App. 4th 775, 45 Cal. Rptr. 2d 345.

No. 95–8299. EARLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 72 F. 3d 507.

No. 95–8569. LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 71 F. 3d 954.

No. 95–8599. HOLLIDAY *v.* PAGE. Super. Ct. Pa. Certiorari denied. Reported below: 440 Pa. Super. 490, 656 A. 2d 136.

No. 95–8601. LEWIS *v.* KNOX ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 73 F. 3d 1108.

No. 95–8608. NASH *v.* MISSISSIPPI DEPARTMENT OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8611. LACEY *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 95–8612. MCCARGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 219 App. Div. 2d 683, 631 N. Y. S. 2d 407.

No. 95–8613. LAMB *v.* NORTH DAKOTA STATE BAR BOARD. Sup. Ct. N. D. Certiorari denied. Reported below: 539 N. W. 2d 865.

No. 95–8620. HAY *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 95–8623. TEDDER *v.* ALABAMA BOARD OF PARDONS AND PAROLES. Ct. Crim. App. Ala. Certiorari denied. Reported below: 677 So. 2d 1261.

No. 95–8634. STOCKING *v.* LEE FOOK-KAI. C. A. D. C. Cir. Certiorari denied.

No. 95–8636. RUEL *v.* SACO & BIDDEFORD SAVINGS INSTITUTION ET AL. C. A. 1st Cir. Certiorari denied.

No. 95–8638. PRADO *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–8641. STEPHENS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 95–8645. RODRIGUEZ *v.* ALFORD, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 477.

No. 95–8647. KUKES *v.* MULKEY, JUDGE, SUPERIOR COURT OF CALIFORNIA, BUTTE COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8651. CARLSEN *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 95–8652. SCOTT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 221 App. Div. 2d 980, 635 N. Y. S. 2d 570.

No. 95–8654. BATES *v.* TRUE. C. A. 7th Cir. Certiorari denied. Reported below: 76 F. 3d 381.

No. 95–8660. FAISH *v.* PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 72 F. 3d 298.

No. 95–8668. ARAGON *v.* WADE, DIRECTOR, BERNALILLO COUNTY DETENTION CENTER, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 F. 3d 1248.

No. 95–8671. WILDER *v.* OKLAHOMA DEPARTMENT OF HUMAN SERVICES. Sup. Ct. Okla. Certiorari denied.

No. 95–8672. WILSON *v.* RAGEN. C. A. 6th Cir. Certiorari denied.

No. 95–8675. LUNA *v.* MILLER. C. A. 6th Cir. Certiorari denied. Reported below: 72 F. 3d 129.

No. 95–8678. CHARRON *v.* GAMMON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 69 F. 3d 851.

No. 95–8682. BELL *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 72 F. 3d 421.

No. 95–8691. WAITS *v.* CRAPPS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 68 F. 3d 463.

No. 95–8692. WASHINGTON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 95–8693. WOOLDRIDGE *v.* SCOTT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 494.

No. 95–8694. YOUNKIN *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET. C. A. 3d Cir. Certiorari denied.

No. 95–8696. TURNER *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.; TURNER *v.* ERVIN; TURNER *v.* KUYKENDALL; TURNER *v.* KUYKENDALL; and TURNER *v.* AUGUSTA COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376 (first judgment); 74 F. 3d 1234 (second, third, fourth, and fifth judgments).

No. 95–8707. LINK *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8720. BARZILLA *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 79 F. 3d 1152.

No. 95–8742. AMARILLE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 78 F. 3d 605.

No. 95–8756. BORDEN *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 95–8814. MURRAY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 184 Ariz. 9, 906 P. 2d 542.

No. 95–8833. CROASMUN *v.* FRANK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON. C. A. 3d Cir. Certiorari denied. Reported below: 82 F. 3d 404.

No. 95–8846. PHILLIPS *v.* JAMES, GOVERNOR OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8874. JOHNSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 676 A. 2d 904.

No. 95–8902. HALL *v.* DIPAOLO, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 72 F. 3d 243.

No. 95–8917. JONES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 457, 466 S. E. 2d 696.

No. 95–8922. DELA RAMA LORENZO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 307.

No. 95–8923. MEHTA ET AL. *v.* PAMRAPO SAVINGS BANK. Sup. Ct. N. J. Certiorari denied.

No. 95–8927. PARRISH *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 78 F. 3d 1473.

No. 95–8928. STAHLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 77 F. 3d 483.

No. 95–8943. RICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 394.

No. 95–8949. STAMPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1547.

No. 95–8950. PEGUERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 76 F. 3d 370.

No. 95–8964. DANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 81 F. 3d 174.

No. 95–8966. GRUBB *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 83 F. 3d 434.

No. 95–8979. MIDDLEBROOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 81 F. 3d 162.

No. 95–8988. WELLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1264.

No. 95–8994. SMITH-BOWMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 76 F. 3d 634.

No. 95–8996. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 72 F. 3d 920.

No. 95–8998. IVESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 F. 3d 182.

No. 95–8999. LEBRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 76 F. 3d 29.

No. 95–9000. KNIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 76 F. 3d 86.

No. 95–9001. INFANTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 83 F. 3d 435.

No. 95–9003. ANUDU ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 F. 3d 471.

No. 95–9008. ALMSTEDT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1139.

No. 95–9015. FLOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 77 F. 3d 491.

No. 95–9025. LUDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 81 F. 3d 164.

No. 95–9030. BENNETT *v.* UNITED STATES PAROLE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 83 F. 3d 324.

No. 95–9031. CABRERRA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 80 F. 3d 558.

No. 95–9038. OBAJULUWA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 479.

No. 95–9043. BECK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 944.

No. 95–9047. ABAYAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 73 F. 3d 380.

No. 95–9050. SCOLARI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 F. 3d 751.

No. 95–9052. CRAWFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 944.

No. 95–9054. BELLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 95–9060. EICKLEBERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 95–9061. FULLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 76 F. 3d 376.

No. 95–9064. GAITHER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 83 F. 3d 416.

No. 95–1729. FORREST, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, ET AL. *v.* BLANCHARD ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 71 F. 3d 1163.

Rehearing Denied

No. 95–8059. MINETTI *v.* LOCAL 9, INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN UNION, ET AL., 517 U. S. 1170;

No. 95–8073. DALE *v.* CHAMPION, WARDEN, 517 U. S. 1170;

No. 95–8094. KORNAHRENS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 517 U. S. 1171;

No. 95–8101. OLSEN *v.* SABAL MARKETING, INC., ET AL., 517 U. S. 1171;

No. 95–8148. IDEMUDIA *v.* CONSOLIDATED RAIL CORPORATION, 517 U. S. 1172;

No. 95–8330. MCCAULEY *v.* WINEGARDEN, JUDGE, SUPERIOR COURT OF GEORGIA, GWINNETT COUNTY, ET AL., 517 U. S. 1149; and

No. 95–8633. IN RE DAY, 517 U. S. 1186. Petitions for rehearing denied.

JUNE 18, 1996

Miscellaneous Order

No. A–1014 (95–1608). MCKENNA, DIRECTOR, RAMSEY COUNTY DEPARTMENT OF PROPERTY RECORDS AND REVENUE, ET AL. *v.* TWIN CITIES AREA NEW PARTY. C. A. 8th Cir. [Certiorari granted, 517 U. S. 1219.] Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

JUNE 20, 1996

Dismissal Under Rule 46

No. 95–797. OWENS-ILLINOIS, INC. *v.* REKDAHL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 46.

JUNE 24, 1996

Appeals Dismissed

No. 95–1681. LOUISIANA ET AL. *v.* HAYS ET AL.;

No. 95–1682. LOUISIANA LEGISLATIVE BLACK CAUCUS ET AL. *v.* HAYS ET AL.; and

No. 95–1710. UNITED STATES *v.* HAYS ET AL. Appeals from D. C. W. D. La. dismissed as moot. JUSTICE STEVENS dissents. Reported below: 936 F. Supp. 360.

Vacated and Remanded on Appeal

No. 95–378. VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL. Appeal from D. C. N. D. Ohio. Judgment vacated, and case remanded for further consideration in light of *Bush* v. *Vera*, 517 U. S. 952 (1996), and *Shaw* v. *Hunt*, 517 U. S. 899 (1996). Reported below: 912 F. Supp. 1006.

Certiorari Granted—Vacated and Remanded

No. 95–830. RENO, ATTORNEY GENERAL OF THE UNITED STATES *v.* DOE, BY LAVERY, EXECUTOR OF HIS ESTATE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lane* v. *Peña*, *ante*, p. 187. Reported below: 62 F. 3d 1424.

No. 95–6636. RYBICKI *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Koon* v. *United States*, *ante*, p. 81. Reported below: 60 F. 3d 826.

No. 95–8431. CUELLAR *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bailey* v. *United States*, 516 U. S. 137 (1995). Reported below: 71 F. 3d 878.

No. 95–8563. EDWARDS *v.* UNITED STATES. C. A. 7th 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 *Rutledge* v. *United States*, 517 U. S. 292 (1996). Reported below: 77 F. 3d 968.

Miscellaneous Orders

No. A–975. WELZ ET AL. *v.* NEW YORK. Justice Ct., Village of Dobbs Ferry, N. Y. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–1690. IN RE DISBARMENT OF WEINIG. Harvey Weinig, of New York, N. Y., 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 the practice of law before this Court. The rule to show cause, issued on June 10, 1996 [517 U. S. 1242], is discharged.

No. D–1693. IN RE DISBARMENT OF SHEFFEY. Ralph E. Sheffey, of Rochester, Minn., is suspended from the practice of law in this Court, and a rule will 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–1694. IN RE DISBARMENT OF COOK. Clifford Ronald Cook, of Sandwich, Ill., is suspended from the practice of law in this Court, and a rule will 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–1695. IN RE DISBARMENT OF SCHNEIDER. Patricia A. Schneider, of Shorewood, Ill., is suspended from the practice of law in this Court, and a rule will 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. M–70. MEDINA *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 95–1498. HILL *v.* DEPARTMENT OF THE AIR FORCE ET AL. C. A. 10th Cir. Motion of petitioner to review second extension of time to file a brief in opposition and other relief denied.

No. 95–1598. YOUNG ET AL. *v.* HARPER. C. A. 10th Cir. [Certiorari granted, 517 U. S. 1219.] Motion for appointment of counsel granted, and it is ordered that Margaret Winter, Esq., of Washington, D. C., be appointed to serve as counsel for respondent in this case.

No. 95–1773. TEXAS ET AL. *v.* HOPWOOD ET AL. C. A. 5th Cir. Motion of petitioners in No. 95–1845 to have this petition considered with No. 95–1845, *Thurgood Marshall Legal Society et al.* v. *Hopwood et al.*, granted.

No. 95–8723. IN RE SWENDRA; and

No. 95–8900. IN RE BALLARD ET AL. Petitions for writs of mandamus denied.

No. 95–8749. IN RE HAMPTON; and

No. 95–8848. IN RE RIVERA. Petitions for writs of mandamus and/or prohibition denied.

No. 95–9048. IN RE VAN. Petition for writ of prohibition denied.

Certiorari Granted

No. 95–897. AUER ET AL. *v.* ROBBINS ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 65 F. 3d 702.

No. 95–1853. CLINTON *v.* JONES. C. A. 8th Cir. Certiorari granted. Reported below: 72 F. 3d 1354.

No. 95–1726. UNITED STATES *v.* LABONTE ET AL. C. A. 1st Cir. Motions of respondents Alfred Hunnewell, George LaBonte, and Stephen Dyer for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 70 F. 3d 1396.

Certiorari Denied

No. 95–137. WILLIAMS ET AL. *v.* NATIONAL BASKETBALL ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 45 F. 3d 684.

No. 95–270. WORCESTER COUNTY, MARYLAND, ET AL. *v.* CANE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 59 F. 3d 165.

No. 95–1302. DIAZ MATOS *v.* PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 95–1311. PARRAVANO ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 539.

No. 95–1381. VILLAGE OF AIRMONT, NEW YORK *v.* LEBLANC-STERNBERG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 67 F. 3d 412.

No. 95–1534. CONSTELLATION DEVELOPMENT CORP. *v.* DOWDEN, SUCCESSOR TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 66 F. 3d 931.

No. 95–1558. DIAZ ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 211 App. Div. 2d 789, 622 N. Y. S. 2d 102.

No. 95–1579. PRICE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 65 F. 3d 903.

No. 95–1596. GICC CAPITAL CORP. *v.* TECHNOLOGY FINANCE GROUP, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 67 F. 3d 463.

No. 95–1601. CARROLL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 71 F. 3d 1228.

No. 95–1613. PERKINS *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. 1st Cir. Certiorari denied. Reported below: 70 F. 3d 1252.

No. 95–1619. SHANGREAU *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. 8th Cir. Certiorari denied. Reported below: 68 F. 3d 208.

No. 95–1634. PACIFIC GAS & ELECTRIC CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 953.

No. 95–1653. ST. HILAIRE, INDIVIDUALLY, AND AS EXECUTRIX FOR THE ESTATE OF ST. HILAIRE, DECEASED *v.* CITY OF LACONIA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 71 F. 3d 20.

No. 95–1672. BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 95–1881. WARE ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 70 F. 3d 639.

No. 95–1696. CHARNEY ET AL. *v.* PANITZ. Super. Ct. Pa. Certiorari denied. Reported below: 437 Pa. Super. 660, 649 A. 2d 457.

No. 95–1697. SCHAFER ET AL. *v.* KENNEDY ET UX. C. A. 8th Cir. Certiorari denied. Reported below: 71 F. 3d 292.

No. 95–1700. ESPINOSA GUERRERO ET AL. *v.* CUMMINGS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 F. 3d 1111.

No. 95–1702. VILLAGE OF SUN *v.* RITTER. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 479.

No. 95–1705. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* ROTH. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 912 S. W. 2d 583.

No. 95–1712. INVESTORS EQUITY LIFE HOLDING CO. *v.* METCALF, HAWAII INSURANCE COMMISSIONER, ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 80 Haw. 339, 910 P. 2d 110.

No. 95–1721. IMAZIO NURSERY, INC. *v.* COASTAL NURSERY ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 69 F. 3d 1560.

No. 95–1728. LOHMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 863.

No. 95–1730. NORTHROP GRUMMAN CORP. ET AL. *v.* UNITED STATES EX REL. GREEN. C. A. 9th Cir. Certiorari denied. Reported below: 59 F. 3d 953.

No. 95–1731. OHIO *v.* BEEMAN ET UX. Sup. Ct. Ohio. Certiorari denied. Reported below: 74 Ohio St. 3d 49, 656 N. E. 2d 623.

No. 95–1732. CITY OF PORTLAND *v.* NORTHWEST ENVIRONMENTAL ADVOCATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 56 F. 3d 979.

No. 95–1741. DAVIS ET AL. *v.* SHANOR, TRUSTEE. C. A. 10th Cir. Certiorari denied. Reported below: 70 F. 3d 1282.

No. 95–1750. NOLEN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 218 Ga. App. 819, 463 S. E. 2d 504.

No. 95–1752. SHERWIN-WILLIAMS CO. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. C. A. 7th Cir. Certiorari denied. Reported below: 71 F. 3d 1338.

No. 95–1755. FABRICACION METALICA DE MATAMOROS, S. A. DE C. V. *v.* HERNANDEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 475.

No. 95–1758. WILLIAMS NATURAL GAS CO. *v.* TALUS PROPERTIES LIMITED PARTNERSHIP ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 72 F. 3d 138.

No. 95–1767. UTAH WOMEN'S CLINIC, INC., ET AL. *v.* LEAVITT, GOVERNOR OF UTAH, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 75 F. 3d 564.

No. 95–1771. PIERCE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 95–1787. FLATLEY *v.* WHITMAN, GOVERNOR OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 95–1790. UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL–CIO, ET AL. *v.* LUNDY PACKING CO. ET AL. (two judgments). C. A. 4th Cir. Certiorari denied. Reported below: 68 F. 3d 1577 (first judgment); 81 F. 3d 25 (second judgment).

No. 95–1800. CHAMBLEE ET AL. *v.* JIM WALTER RESOURCES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 70 F. 3d 125.

No. 95–1813. CHEGUINA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 69 F. 3d 1143.

No. 95–1822. SCHNUCK MARKETS, INC. *v.* MARX. C. A. 10th Cir. Certiorari denied. Reported below: 76 F. 3d 324.

No. 95–1827. KLAT *v.* COUNTY OF SAN DIEGO ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–1836. BIRDSEYE ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 543 Pa. 251, 670 A. 2d 1124.

No. 95–1838. RUCKER *v.* ILLINOIS CIVIL SERVICE COMMISSION ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 272 Ill. App. 3d 1135, 688 N. E. 2d 399.

No. 95–1843. ROBINETT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 62 F. 3d 1433.

No. 95–1850. WOODS *v.* WAL-MART ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 494.

No. 95–1862. HARNISH ET UX. *v.* KEYSTONE FARM CREDIT. Super. Ct. Pa. Certiorari denied. Reported below: 447 Pa. Super. 642, 668 A. 2d 1203.

No. 95–1870. EBERWIEN *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 95–1876. LEVIN *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, SUPREME COURT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 74 F. 3d 763.

No. 95–1877. WILLIAMS *v.* AIR WISCONSIN, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 1235.

No. 95–1892. KNAPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 1470.

No. 95–1899. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 340.

No. 95–1900. EXXON CHEMICAL PATENTS, INC., ET AL. *v.* LUBRIZOL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 64 F. 3d 1553.

No. 95–1903. TIBOLT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 72 F. 3d 965.

No. 95–1907. SAENZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 F. 3d 878.

No. 95–1909. JACKSON ET UX. *v.* RUBIN, SECRETARY OF THE TREASURY. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1252.

No. 95–1921. SARNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 1470.

No. 95–1923. AMIGABLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 1508.

No. 95–1934. THEODOSOPOULOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 78 F. 3d 587.

No. 95–5022. POLANCO, AKA BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 53 F. 3d 893.

No. 95–6721. BASHIR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 57 F. 3d 1074.

No. 95–6977. MCCANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 51 F. 3d 283.

No. 95–7079. THOMAS, AKA SHISINDAY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 906 S. W. 2d 22.

No. 95–7568. BARBOUR *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 673 So. 2d 473.

No. 95–7651. GREEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 912 S. W. 2d 189.

No. 95–7867. DEMETRESS W. *v.* SAN BERNARDINO COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–7981. SIMMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 168 Ill. 2d 176, 659 N. E. 2d 922.

No. 95–8160. MCINTYRE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 266 Ga. 7, 463 S. E. 2d 476.

No. 95–8263. KELTNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 134.

No. 95–8335. WAPNICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 60 F. 3d 948.

No. 95–8391. AHMAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 309.

No. 95–8438. SANABRIA-CASARES *v.* CRABTREE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 73 F. 3d 370.

No. 95–8441. CONNER *v.* UNITED STATES; and
No. 95–8674. TITUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 F. 3d 465.

No. 95–8465. LONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1263.

No. 95–8466. MCCOY, ON BEHALF OF MCCOY *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 81 F. 3d 44.

No. 95–8483. BARRIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 66 F. 3d 340.

No. 95–8534. JUVENILE MALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 74 F. 3d 526.

No. 95–8537. SMYTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 61 F. 3d 711 and 73 F. 3d 887.

No. 95–8591. MCCALLUM *v.* EDISON COMMUNITY COLLEGE. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 881.

No. 95–8681. SIEGEL *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 95–8686. PORRATA *v.* PETERS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 95–8697. GULBRANDSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 184 Ariz. 46, 906 P. 2d 579.

No. 95–8699. DUNN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 4th 1039, 47 Cal. Rptr. 2d 638.

No. 95–8702. NICHOLS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 69 F. 3d 1255.

No. 95–8703. JACKSON *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 386.

No. 95–8705. LEKHOVITSER *v.* LEKHOVITSER. Sup. Ct. Fla. Certiorari denied. Reported below: 666 So. 2d 144.

No. 95–8706. LIGHTNER *v.* DIXON LUMBER CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8713. BRAUN *v.* STOTTS ET AL. C. A. 10th Cir. Certiorari denied.

No. 95–8716. LANE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 95–8718. ARMSTEAD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 1144.

No. 95–8719. CHAPMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 330, 464 S. E. 2d 661.

No. 95–8724. ANDERSON *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 70 F. 3d 1274.

No. 95–8726. TEEL *v.* PARKER COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 474.

No. 95–8728. R. A. D. *v.* M. H. M. Sup. Ct. Fla. Certiorari denied. Reported below: 672 So. 2d 543.

No. 95–8732. DOYLE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 79 F. 3d 1160.

No. 95–8734. FICA *v.* CRAWFORD ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8735. HAGAR *v.* NOTTINGHAM, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 95–8743. PLANTILLAS BENITEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 95–8744. DYE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 95–8745. GASTON *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 67 F. 3d 121.

No. 95–8746. HERRING *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 76 F. 3d 386.

No. 95–8748. HERNANDEZ *v.* ALONSO. Sup. Ct. Fla. Certiorari denied. Reported below: 670 So. 2d 937.

No. 95–8760. MOODY *v.* SECURITY PACIFIC FINANCIAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1255.

No. 95–8763. JABAAR *v.* KRUGER ET AL. C. A. 6th Cir. Certiorari denied.

No. 95–8771. BRENNAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8772. ARAYA *v.* UNIVERSITY OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 95–8778. DEES *v.* BRADDOCK, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 478.

No. 95–8779. HINKLE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 276 Ill. App. 3d 1139, 697 N. E. 2d 23.

No. 95–8780. GRISMORE *v.* RYDER TRUCK RENTAL ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 95–8781. FICA *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8783. GILL *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 581.

No. 95–8784. PAGE *v.* RUNYON, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied.

No. 95–8787. MACDONALD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 168 Ill. 2d 420, 660 N. E. 2d 832.

No. 95–8789. JAYNES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 342 N. C. 249, 464 S. E. 2d 448.

No. 95–8799. LINK *v.* DIRKS ET AL. C. A. 8th Cir. Certiorari denied.

No. 95–8803. ST. LOUIS *v.* TEXAS WORKERS' COMPENSATION COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 65 F. 3d 43.

No. 95–8807. ABIDEKUN *v.* COOMBE, ACTING COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 95–8817. BOWELL *v.* PRUNTY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 95–8831. SCHINDLER *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 275 Mont. 533, 913 P. 2d 1259.

No. 95–8857. FRANCE *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–8862. D'AGNILLO *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 943.

No. 95–8881. BROWN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 276 Ill. App. 3d 1143, 697 N. E. 2d 25.

No. 95–8888. WILLIAMS *v.* DALTON, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 70 F. 3d 1264.

No. 95–8894. HUDSON *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 76 F. 3d 382.

No. 95–8926. BALLENGER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 667 So. 2d 1242.

No. 95–8929. ANTONIO RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 74 F. 3d 1164.

No. 95–8944. HOLLY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 671 So. 2d 32.

No. 95–8952. PIZZO *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 95–8954. RAGLAND *v.* ROMER, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 73 F. 3d 374.

No. 95–8971. BRATTMAN *v.* GALVIN, SECRETARY OF COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 421 Mass. 508, 658 N. E. 2d 159.

No. 95–8972. LEE *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 95–8990. BARFIELD *v.* BELLSOUTH TELECOMMUNICATIONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 77 F. 3d 478.

No. 95–9012. HOUSTON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 76 F. 3d 382.

No. 95–9014. HAYNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 493.

No. 95–9022. MAYFIELD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 659 A. 2d 1249.

No. 95–9045. NANCE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 320 S. C. 501, 466 S. E. 2d 349.

No. 95–9056. AUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 81 F. 3d 161.

No. 95–9063. HERRERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 944.

No. 95–9070. POWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 F. 3d 495.

No. 95–9071. GUZMAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 79 F. 3d 1165.

No. 95–9073. HOPKINS, AKA HOPKINS BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 70 F. 3d 1507.

No. 95–9074. GARY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 74 F. 3d 304.

No. 95–9079. SOMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 66 F. 3d 337.

No. 95–9080. PIRTLE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 127 Wash. 2d 628, 904 P. 2d 245.

No. 95–9082. CAPPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 350.

No. 95–9086. COUGHENOUR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 106 Md. App. 770.

No. 95–9090. MACKENZIE *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 95–9092. FLORES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 73 F. 3d 826.

No. 95–9093. HAVENER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 77 F. 3d 493.

No. 95–9103. ALSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 72 F. 3d 920.

No. 95–9104. MURRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 F. 3d 154.

No. 95–9112. AUSTIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 95–9113. ABDUL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 75 F. 3d 327.

No. 95–9116. ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 74 F. 3d 1244.

No. 95–9120. CARON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 64 F. 3d 713.

No. 95–9121. CAMPOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 100 F. 3d 945.

No. 95–9124. WEST *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 73 F. 3d 81.

No. 95–9126. DAVIDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 79 F. 3d 1139.

No. 95–9138. JAMES, AKA ISRAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 72 F. 3d 1518.

No. 95–9159. JUVENILE MALE C. L. O. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 77 F. 3d 1075.

No. 95–9161. YU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 82 F. 3d 424.

No. 95–9163. TAPIA GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 F. 3d 171.

No. 95–9164. FARMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 73 F. 3d 836.

No. 95–1569. SIDWELL *v.* EXPRESS CONTAINER SERVICES, INC., ET AL. C. A. 4th Cir. Motion of petitioner to consolidate this case with No. 95–1840, *Parker et al.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.*, denied. Certiorari denied. Reported below: 71 F. 3d 1134.

No. 95–1670. MCDONALD *v.* YOUAKIM ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 71 F. 3d 1274.

No. 95–1720. GREEN CONSTRUCTION CO. ET AL. *v.* VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS. Sup. Ct. App. W. Va. Motion of American Insurance Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 195 W. Va. 714, 466 S. E. 2d 782.

No. 95–1734. M. H. *v.* T. J. ET AL. Ct. App. D. C. Motion of respondent M. D. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 666 A. 2d 1.

Rehearing Denied

No. 95–6997. SIWA *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1138;

No. 95–7004. MAURICIO *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1138;

No. 95–7007. DE JESUS *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1138;

No. 95–7088. DANAO *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1139;

No. 95–7147. NAVARRO *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1140;

No. 95–7463. TILLO *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1141;

No. 95–7915. SCOTT *v.* CALIFORNIA, 517 U. S. 1144;

No. 95–8058. MCQUEEN *v.* HAYES ET AL., 517 U. S. 1145;

No. 95–8080. WHITE *v.* ZIMMERS, CLERK, COURT OF COMMON PLEAS OF OHIO, MONTGOMERY COUNTY, 517 U. S. 1171;

No. 95–8124. BALELE *v.* KLAUSER, SECRETARY, DEPARTMENT OF ADMINISTRATION, ET AL., 517 U. S. 1172;

No. 95–8154. TINSLEY *v.* METHODIST HOSPITAL OF INDIANA, 517 U. S. 1146;

No. 95–8155. BECKER *v.* UNITED STATES, 517 U. S. 1126; and

No. 95–8383. SUSSMAN *v.* NEW YORK, 517 U. S. 1173. Petitions for rehearing denied.

No. 94–2133. CRAWFORD *v.* UNITED STATES DEPARTMENT OF AGRICULTURE, 516 U. S. 824; and

No. 95–6259. GERWIG *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS, 516 U. S. 1013. Motions for leave to file petitions for rehearing denied.

JUNE 26, 1996

Dismissal Under Rule 46

No. 95–1910. ZIMMER ET UX. *v.* AMERICAN TELEPHONE & TELEGRAPH COMPANY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari dismissed as to American Telephone & Telegraph Company of Michigan under this Court's Rule 46.1. Reported below: 78 F. 3d 585.

JUNE 27, 1996

Miscellaneous Order

No. A–1054 (95–9439). JOUBERT *v.* HOPKINS, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

Certiorari Denied

No. 95–9424 (A–1040). JOUBERT *v.* HOPKINS, WARDEN. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 75 F. 3d 1232.

JULY 1, 1996

Certiorari Granted—Reversed and Remanded. (See Nos. 95–1691 and 95–1738, *ante*, p. 938.)

Certiorari Granted—Vacated and Remanded

No. 95–806. PENN ADVERTISING OF BALTIMORE, INC. *v.* SCHMOKE, MAYOR OF BALTIMORE CITY, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996). Reported below: 63 F. 3d 1318.

No. 95–1010. DUVALL ET UX. *v.* BRISTOL-MYERS SQUIBB CO. ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Medtronic, Inc.* v. *Lohr*, *ante*, p. 470. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 65 F. 3d 392.

No. 95–1034. ENGLISH ET UX. *v.* MENTOR CORP. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Medtronic, Inc.* v. *Lohr*, *ante*, p. 470. Reported below: 67 F. 3d 477.

No. 95–1037. MENTOR CORP. *v.* FELDT; and
No. 95–1214. FELDT *v.* MENTOR CORP. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Medtronic, Inc.* v. *Lohr*, *ante*, p. 470. Reported below: 61 F. 3d 431.

No. 95–1058. NEVADA *v.* DESIMONE. Sup. Ct. Nev. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ursery*, *ante*, p. 267. Reported below: 111 Nev. 1221, 904 P. 2d 1.

No. 95–1323. MITCHELL ET VIR *v.* COLLAGEN CORP. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Medtronic, Inc.* v. *Lohr*, *ante*, p. 470. Reported below: 67 F. 3d 1268.

No. 95–1336. MARTIN ET VIR *v.* TELECTRONICS PACING SYSTEMS, INC., ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of

Medtronic, Inc. v. *Lohr*, *ante*, p. 470. Reported below: 70 F. 3d 39.

No. 95–1339. CONSORTI ET UX. *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gasperini* v. *Center for Humanities, Inc.*, *ante*, p. 415. Reported below: 72 F. 3d 1003.

No. 95–1367. MENTOR CORP. *v.* BINGHAM; and
No. 95–1609. BINGHAM *v.* MENTOR CORP. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Medtronic, Inc.* v. *Lohr*, *ante*, p. 470. Reported below: 77 F. 3d 478.

No. 95–1436. ILLINOIS *v.* KIMERY. Sup. Ct. Ill. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ursery*, *ante*, p. 267. Reported below: 169 Ill. 2d 260, 661 N. E. 2d 329.

No. 95–8323. COVELLI *v.* CRYSTAL, CONNECTICUT COMMISSIONER OF REVENUE SERVICES. Sup. Ct. Conn. 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. *Ursery*, *ante*, p. 267. Reported below: 235 Conn. 539, 668 A. 2d 699.

Certiorari Dismissed

No. 95–9261. SMITH *v.* PARKE, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari dismissed for want of jurisdiction. Petition for writ of habeas corpus denied.

No. 95–9264. OXFORD *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari dismissed for want of jurisdiction. Reported below: 86 F. 3d 127.

No. 95–9439. JOUBERT *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. A–970 (95–9315). WILLIAMS *v.* COUSIN-WILLIAMS. Ct. App. Neb. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. A–1027. FITZHUGH *v.* UNITED STATES. C. A. 8th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. D–1673. IN RE DISBARMENT OF POLLACK. Disbarment entered. [For earlier order herein, see 517 U. S. 1153.]

No. D–1676. IN RE DISBARMENT OF SUMMERS. Disbarment entered. [For earlier order herein, see 517 U. S. 1165.]

No. D–1696. IN RE DISBARMENT OF MORROW. John O. Morrow, Jr., of Florence, Ala., is suspended from the practice of law in this Court, and a rule will 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–1697. IN RE DISBARMENT OF KOSS. Lewis Michael Koss, of Calabasas, Cal., is suspended from the practice of law in this Court, and a rule will 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–1698. IN RE DISBARMENT OF MCATEE. James R. McAtee, of Pensacola, Fla., is suspended from the practice of law in this Court, and a rule will 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. M–72. FIKE *v.* RUGER ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 95–992. TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. D. C. D. C. [Probable jurisdiction noted, 516 U. S. 1110.] Motion of appellants to file one volume of the joint appendix under seal granted.

No. 95–9263. IN RE OXFORD; and

No. 95–9463. IN RE JOUBERT. Petitions for writs of habeas corpus denied.

Certiorari Denied

No. 95–326. J & T COAL, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 56 F. 3d 63.

No. 95–1012. CALDWELL *v.* AMERICAN BASKETBALL ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 66 F. 3d 523.

No. 95–1258. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* CARVER. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 633.

No. 95–1524. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* SHRINK MISSOURI GOVERNMENT PAC ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 71 F. 3d 1422.

No. 95–1644. COLLAGEN CORP. *v.* KENNEDY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 67 F. 3d 1453.

No. 95–1845. THURGOOD MARSHALL LEGAL SOCIETY ET AL. *v.* HOPWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 932.

No. 95–5495. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 59 F. 3d 171.

No. 95–6474. PIERCE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 60 F. 3d 886.

No. 95–7017. HENRY ET AL. *v.* CABALLERO, DIRECTOR, IDAHO DEPARTMENT OF HEALTH AND WELFARE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 51 F. 3d 894.

No. 95–7422. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 71 F. 3d 845.

No. 95–7444. STEWART *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 60 F. 3d 296 and 70 F. 3d 955.

No. 95–8470. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 72 F. 3d 96.

No. 95–1773. TEXAS ET AL. *v.* HOPWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 F. 3d 932.

Opinion of JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, respecting the denial of certiorari.

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions

process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' *judgments* that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. Acknowledging that the 1992 admissions program "has long since been discontinued and will not be reinstated," Pet. for Cert. 28, petitioners do not defend that program in this Court, see Reply to Brief in Opposition 1, 3; see also Brief for United States as *Amicus Curiae* 14, n. 13 ("We agree that the 1992 [admissions] policy was constitutionally flawed . . . ."). Instead, petitioners challenge the *rationale* relied on by the Court of Appeals. "[T]his Court," however, "reviews judgments, not opinions." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984) (footnote omitted). Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition. See Reply to Brief in Opposition 2 ("[A]ll concede this record is inadequate to assess definitively" the constitutionality of the law school's current consideration of race in its admissions process.).

Rehearing Denied

No. 95–1172. SANJUAN ET AL. *v.* AMERICAN BOARD OF PSYCHIATRY & NEUROLOGY, INC., ET AL., 516 U. S. 1159. Petition for rehearing denied.

JULY 10, 1996

Dismissal Under Rule 46

No. 95–1855. BARTON ET AL. *v.* LANDMARK LAND COMPANY OF CAROLINA, INC., ET AL. C. A. 4th Cir. Certiorari dismissed as to Joe W. Walser under this Court's Rule 46. Reported below: 76 F. 3d 553.

Miscellaneous Orders

No. A–898. D'AMARIO *v.* RHODE ISLAND. Super. Ct. Providence County, R. I. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. A–1035 (95–1962). REPUBLICAN PARTY OF ALASKA *v.* O'CALLAGHAN ET AL. Sup. Ct. Alaska. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–1059. HAYDEN ET AL. *v.* NASSAU COUNTY ET AL. Application for injunctive relief, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–11 (O. T. 1996). ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* STEWART, BY AND THROUGH RAUSCH. Application to vacate the stay of execution of sentence of death granted by the United States District Court for the Eastern District of Virginia on July 3, 1996, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JULY 16, 1996

Certiorari Denied

No. 96–5030 (A–13). JOUBERT *v.* NEBRASKA BOARD OF PARDONS ET AL. 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: 87 F. 3d 966.

No. 96–5034 (A–12). JOUBERT *v.* NEBRASKA. Sup. Ct. Neb. 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: 250 Neb. xx.

No. 96–5139 (A–21). SMITH *v.* INDIANA. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JULY 17, 1996

Miscellaneous Orders

No. A–30 (O. T. 1996). KORNAHRENS *v.* MOORE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 96–5190 (A–28). IN RE SMITH. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of mandamus denied.

No. 96–5239 (A–42). IN RE SAVINO. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE,

and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 96–5164 (A–27). SAVINO *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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 and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 82 F. 3d 593.

JULY 18, 1996

Certiorari Dismissed

No. 96–5252 (A–46). IN RE KORNAHRENS. 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 dismissed. Application for other relief denied.

JULY 31, 1996

Miscellaneous Orders

No. A–945 (95–2022). THIRY ET AL. *v.* CARLSON, SECRETARY OF TRANSPORTATION OF KANSAS, ET AL. C. A. 10th Cir. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. A–987. WEINSTEIN ET AL. *v.* NEW JERSEY REPUBLICAN PARTY ET AL. Application for injunctive relief, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 96–5408 (A–75). IN RE NAVE. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 1, 1996

Miscellaneous Orders

No. A–50 (O. T. 1996). TRUESDALE *v.* SOUTH CAROLINA. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 95–1694. REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. *v.* DOE. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1004.]

Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 95–1726. UNITED STATES *v.* LABONTE ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1016.] Motion of respondent George LaBonte for appointment of counsel granted, and it is ordered that John A. Ciraldo, Esq., of Portland, Me., be appointed to serve as counsel for respondent George LaBonte in this case. Motion of respondent Alfred Lawrence Hunnewell for appointment of counsel granted, and it is ordered that Michael C. Bourbeau, Esq., of Boston, Mass., be appointed to serve as counsel for respondent Alfred Lawrence Hunnewell in this case. Motion of respondent Stephen Dyer for appointment of counsel granted, and it is ordered that Peter Goldberger, Esq., of Ardmore, Pa., be appointed to serve as counsel for respondent Stephen Dyer in this case.

AUGUST 5, 1996

Miscellaneous Orders

No. D–1692. IN RE DISBARMENT OF KIELY. Dan Ray Kiely, of Vero Beach, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 17, 1996 [*ante*, p. 1002], is discharged.

No. D–1699. IN RE DISBARMENT OF BARR. Bonnie Jean Barr, of La Habra, Cal., is suspended from the practice of law in this Court, and a rule will 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–1700. IN RE DISBARMENT OF HENRY. Val Arturo Henry, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1701. IN RE DISBARMENT OF SCHIMENTI. Charles M. Schimenti, of Jersey City, N. J., is suspended from the practice of law in this Court, and a rule will 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–1702. IN RE DISBARMENT OF SCOTT. Arthur R. Scott, Jr., of New York, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1703. IN RE DISBARMENT OF ABRAMSON. Herbert W. Abramson, of Ft. Lauderdale, Fla., is suspended from the practice of law in this Court, and a rule will 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–1704. IN RE DISBARMENT OF COOKE. Lane J. Cooke, of Hickory, N. C., is suspended from the practice of law in this Court, and a rule will 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–1705. IN RE DISBARMENT OF GRINES. Joseph Michael Grines, of Langhorne, Pa., is suspended from the practice of law in this Court, and a rule will 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–1706. IN RE DISBARMENT OF SWAIM. John J. Swaim, of Philadelphia, Pa., is suspended from the practice of law in this Court, and a rule will 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–1707. IN RE DISBARMENT OF BARNETT. Elliott B. Barnett, of Delray Beach, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 94–9428. MCKENSLEY *v.* UNITED STATES, 516 U. S. 826;

No. 95–1292. JACOBS *v.* KERN COMMUNITY COLLEGE DISTRICT, 517 U. S. 1135;

No. 95–1461. PETITTE BROTHERS MINING CO., INC., ET AL. *v.* CONNORS, TRUSTEE, UNITED MINE WORKERS OF AMERICA 1950 PENSION PLAN, ET AL., 517 U. S. 1189;

No. 95–1551. HINCHLIFFE ET UX. *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL., 517 U. S. 1209;

No. 95–1555. CONNOR *v.* FLYNN, 517 U. S. 1210;

No. 95–1578. KELLY *v.* PENSON, 517 U. S. 1210;

No. 95–1640. ANDERSON *v.* SHARMA ET AL. (two judgments), 517 U. S. 1234;

No. 95–7022. CAPERS ET AL. *v.* UNITED STATES, 517 U. S. 1211;

No. 95–7041. CARPIO *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1139;

No. 95–7081. CABILES *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1139;

No. 95–7145. ISLA *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1139;

No. 95–7182. MAGANTE *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1140;

No. 95–7505. DAVIS *v.* MISSISSIPPI, 517 U. S. 1192;

No. 95–7663. AMOS *v.* ESMOR MANSFIELD, INC., ET AL., 517 U. S. 1110;

No. 95–7816. ESCUSA *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1142;

No. 95–7946. PULIDO *v.* UNITED STATES, 517 U. S. 1235;

No. 95–7983. SMITH *v.* HERRING, WARDEN, ET AL., 517 U. S. 1159;

No. 95–8017. BURRESS *v.* UNITARIAN-UNIVERSALIST SOCIETY OF SACRAMENTO, INC., ET AL., 517 U. S. 1169;

No. 95–8082. CUDAL *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1211;

No. 95–8114. ANDERSON *v.* DAVIS ET AL., 517 U. S. 1172;

No. 95–8138. PAJE *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1211;

No. 95–8143. SANDOVAL *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1211;

No. 95–8219. TAYLOR *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL INSTITUTE, 517 U. S. 1194;

No. 95–8224. DE GUZMAN *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1211;

No. 95–8230. JEFFRESS *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, 517 U. S. 1194;

No. 95–8237. OKOLIE ET AL. *v.* RICHARDSON, COMMISSIONER OF INTERNAL REVENUE, 517 U. S. 1161;

No. 95–8305. FABIAN *v.* SHADE, 517 U. S. 1212;

No. 95–8316. STITT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 517 U. S. 1212;

No. 95–8320. BUC-HANAN *v.* CALIFORNIA, 517 U. S. 1212;

No. 95–8356. GOLD *v.* MORRISON-KNUDSEN CO. ET AL., 517 U. S. 1213;

No. 95–8373. SPYCHALA *v.* LEWIS, WARDEN, ET AL., 517 U. S. 1223;

No. 95–8376. RODENBAUGH *v.* LEARY, 517 U. S. 1223;

No. 95–8377. PRIETO *v.* CRAWFORD ET AL., 517 U. S. 1223;

No. 95–8387. IN RE SPELLMAN, 517 U. S. 1219;

No. 95–8417. MCQUEEN *v.* MATA ET AL., 517 U. S. 1224;

No. 95–8418. MCQUEEN *v.* TURNER ET AL., 517 U. S. 1224;

No. 95–8420. MOOMCHI *v.* UNIVERSITY OF NEW MEXICO ET AL., 517 U. S. 1224;

No. 95–8433. ARTIS *v.* GARRAGHTY, WARDEN, 517 U. S. 1225;

No. 95–8474. LEVINE *v.* UNITED STATES ET AL., 517 U. S. 1225;

No. 95–8513. JONES *v.* UNITED STATES, 517 U. S. 1198;

No. 95–8514. BOUNDS *v.* UNITED STATES, 517 U. S. 1198;

No. 95–8521. LEWIS *v.* CENTURY MORTGAGE CO. ET AL., 517 U. S. 1237;

No. 95–8522. ALVAREZ *v.* OFFICE OF PERSONNEL MANAGEMENT, 517 U. S. 1226;

No. 95–8533. DEDES *v.* PAGE ET AL., 517 U. S. 1237;

No. 95–8546. MCQUEEN *v.* CANNON ET AL., 517 U. S. 1247;

No. 95–8580. WILLIAMS *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., 517 U. S. 1248;

No. 95–8597. SCOTT *v.* MOYER, CHIEF JUSTICE, SUPREME COURT OF OHIO, ET AL., 517 U. S. 1226;

No. 95–8625. IN RE CROWDER, 517 U. S. 1207;

No. 95–8649. AYARS *v.* NEW JERSEY, 517 U. S. 1227;

No. 95–8690. TILLI *v.* VAN ANTWERPEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ET AL., 517 U. S. 1227;

No. 95–8696. TURNER *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.; TURNER *v.* ERVIN; TURNER *v.* KUYKENDALL; TURNER *v.* KUYKENDALL; and TURNER *v.* AUGUSTA COUNTY SHERIFF'S DEPARTMENT ET AL., *ante*, p. 1010;

No. 95–8709. IN RE JAFFER, *ante*, p. 1003;

No. 95–8742. AMARILLE *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 1010;

No. 95–8769. CAMPBELL *v.* UNITED STATES, 517 U. S. 1228;
No. 95–8796. IN RE SISK, 517 U. S. 1219;
No. 95–8818. BAXTER *v.* CITY OF LOS ANGELES, CALIFORNIA, 517 U. S. 1249;
No. 95–8900. IN RE BALLARD ET AL., *ante*, p. 1016;
No. 95–8919. IN RE LORENZ, 517 U. S. 1232;
No. 95–8927. PARRISH *v.* COLORADO ET AL., *ante*, p. 1011; and
No. 95–9047. ABAYAN *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 1012. Petitions for rehearing denied.

No. 95–1190. MCCLARAN, DIRECTOR, CHILD SUPPORT SERVICES, TENNESSEE DEPARTMENT OF HUMAN SERVICES *v.* DAVIS ET AL., 517 U. S. 1128;
No. 95–8309. JEDRZEJEWSKI *v.* MENACKER, 517 U. S. 1212; and
No. 95–8670. TRUESDALE *v.* UNITED STATES, 517 U. S. 1215. Motions for leave to file petitions for rehearing denied.

No. 95–8824. PANDEY *v.* PAUL REVERE LIFE INSURANCE CO. ET AL., 517 U. S. 1251. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 95–9263 (A–64). IN RE OXFORD, *ante*, p. 1032. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for rehearing denied.

No. 95–9264 (A–64). OXFORD *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante*, p. 1031. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for rehearing dismissed.

AUGUST 6, 1996

Miscellaneous Order

No. 96–5395 (A–73). IN RE PARKER. 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. Petition for writ of habeas corpus denied. Petition for writ of review denied.

AUGUST 8, 1996

Miscellaneous Orders

No. 96–5483 (A–96). IN RE HATCH. Application for stay of execution of sentence of death, presented to JUSTICE BREYER,

and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 96–5505 (A–98). IN RE HATCH. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 96–5504 (A–97). HATCH *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 924 P. 2d 284.

AUGUST 9, 1996

Miscellaneous Order

No. A–100 (O. T. 1996). AKE *v.* WARD, WARDEN, ET AL. Application for stay of execution of sentence of death of Steven Keith Hatch, presented to JUSTICE BREYER, and by him referred to the Court, denied.

AUGUST 19, 1996

Miscellaneous Orders

No. A–1005. DUBIN *v.* UNITED STATES. Application for leave to file petition for writ of certiorari in excess of the page limitations, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–106 (O. T. 1996). MARTINI *v.* OFFICE OF THE PUBLIC DEFENDER. Sup. Ct. N. J. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

AUGUST 21, 1996

Miscellaneous Orders

No. A–137 (O. T. 1996). STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* MATA. Application to vacate the stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

No. A–141 (O. T. 1996). MATA *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–1671. IN RE DISBARMENT OF WALL. Disbarment entered. [For earlier order herein, see 517 U. S. 1153.]

No. D–1672. IN RE DISBARMENT OF JENNINGS. Disbarment entered. [For earlier order herein, see 517 U. S. 1153.]

No. D–1674. IN RE DISBARMENT OF MIMS. Disbarment entered. [For earlier order herein, see 517 U. S. 1165.]

No. D–1677. IN RE DISBARMENT OF WITT. Disbarment entered. [For earlier order herein, see 517 U. S. 1185.]

No. D–1678. IN RE DISBARMENT OF HIRSH. Disbarment entered. [For earlier order herein, see 517 U. S. 1185.]

No. D–1679. IN RE DISBARMENT OF BROWN. Disbarment entered. [For earlier order herein, see 517 U. S. 1185.]

No. D–1681. IN RE DISBARMENT OF BIEDERMAN. Disbarment entered. [For earlier order herein, see 517 U. S. 1207.]

No. D–1682. IN RE DISBARMENT OF BRAMHALL. Disbarment entered. [For earlier order herein, see 517 U. S. 1217.]

No. D–1683. IN RE DISBARMENT OF CLINARD. Disbarment entered. [For earlier order herein, see 517 U. S. 1217.]

No. D–1684. IN RE DISBARMENT OF BLOOMFIELD. Disbarment entered. [For earlier order herein, see 517 U. S. 1217.]

No. D–1685. IN RE DISBARMENT OF REILLY. Disbarment entered. [For earlier order herein, see 517 U. S. 1218.]

No. D–1686. IN RE DISBARMENT OF JONES. Disbarment entered. [For earlier order herein, see 517 U. S. 1218.]

No. D–1687. IN RE DISBARMENT OF GOTTFRIED. Disbarment entered. [For earlier order herein, see 517 U. S. 1231.]

No. D–1688. IN RE DISBARMENT OF GARRIGAN. Disbarment entered. [For earlier order herein, see 517 U. S. 1242.]

No. D–1689. IN RE DISBARMENT OF TAYLOR. Disbarment entered. [For earlier order herein, see 517 U. S. 1242.]

No. D–1703. IN RE DISBARMENT OF ABRAMSON. Herbert W. Abramson, of Ft. Lauderdale, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on August 5, 1996 [*ante,* p. 1038], is discharged.

No. D–1708. IN RE DISBARMENT OF LEHMAN. Stephen Edward Lehman, of Spartanburg, S. C., is suspended from the practice of law in this Court, and a rule will 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–1709. IN RE DISBARMENT OF HOARE. Michael J. Hoare, of St. Louis, Mo., is suspended from the practice of law in this Court, and a rule will 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–1710. IN RE DISBARMENT OF SANDVOSS. Rolf H. G. Sandvoss, of Mt. Kisco, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1711. IN RE DISBARMENT OF ESSRICK. Carol Barbara Essrick, of Burtonsville, Md., is suspended from the practice of law in this Court, and a rule will 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–1712. IN RE DISBARMENT OF HATCHER. John E. Hatcher, Jr., of Orlando, Fla., is suspended from the practice of law in this Court, and a rule will 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–1713. IN RE DISBARMENT OF SPANN. Ronald Thomas Spann, of Ft. Lauderdale, Fla., is suspended from the practice of law in this Court, and a rule will 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–1714. IN RE DISBARMENT OF SCHOOR. Michael Mercier Schoor, of Irving, Tex., is suspended from the practice of law in this Court, and a rule will 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–1715. IN RE DISBARMENT OF GRIBETZ. Kenneth Gribetz, of Monsey, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1716. IN RE DISBARMENT OF GROSSMAN. Marc Elliot Grossman, of White Plains, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1717. IN RE DISBARMENT OF LEVIN. M. Louis Levin, of Phoenix, Ariz., is suspended from the practice of law in this Court, and a rule will 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. 96–228. IN RE SHAW ET AL. Motion of petitioners to expedite consideration of petition for writ of mandamus granted. Petition for writ of mandamus denied.

Certiorari Denied

No. 96–5601 (A–120). JOHNSON *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Ct. Common Pleas of Jasper County, S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

No. 96–5629 (A–128). MATA *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 185 Ariz. 319, 916 P. 2d 1035.

AUGUST 22, 1996

Dismissal Under Rule 46

No. 95–9366. LITTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Order

No. 96–5679 (A–142). IN RE MATA. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 27, 1996

Miscellaneous Orders

No. D–1693. IN RE DISBARMENT OF SHEFFEY. Disbarment entered. [For earlier order herein, see *ante,* p. 1015.]

No. D–1694. IN RE DISBARMENT OF COOK. Disbarment entered. [For earlier order herein, see *ante,* p. 1015.]

No. D–1707. IN RE DISBARMENT OF BARNETT. Elliott B. Barnett, of Delray Beach, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on August 5, 1996 [*ante,* p. 1038], is discharged.

No. D–1718. IN RE DISBARMENT OF LARENE. N. C. Deday LaRene, of Detroit, Mich., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 94–9689. O'LEARY *v.* UNITED STATES, 516 U. S. 850;

No. 95–1530. GLAVEY *v.* DIME SAVINGS BANK OF NEW YORK, 517 U. S. 1221;

No. 95–1671. SOFFER *v.* QUEENS COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, 517 U. S. 1245;

No. 95–1672. BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante,* p. 1017;

No. 95–1881. WARE ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante,* p. 1017;

No. 95–1787. FLATLEY *v.* WHITMAN, GOVERNOR OF NEW JERSEY, ET AL., *ante,* p. 1019;

No. 95–1817. KORNMAN ET VIR, INDIVIDUALLY AND ON BEHALF OF THEIR DEPENDENT SON, KORNMAN *v.* BLUE CROSS/BLUE SHIELD OF LOUISIANA, *ante,* p. 1007;

No. 95–1843. ROBINETT *v.* UNITED STATES, *ante*, p. 1020;

No. 95–1866. $227,865 IN UNITED STATES CURRENCY *v.* UNITED STATES, *ante*, p. 1007;

No. 95–1909. JACKSON ET UX. *v.* RUBIN, SECRETARY OF THE TREASURY, *ante*, p. 1020;

No. 95–6510. GRAY *v.* NETHERLAND, WARDEN, *ante*, p. 152;

No. 95–8335. WAPNICK *v.* UNITED STATES, *ante*, p. 1021;

No. 95–8425. JANNEH *v.* THE REGENCY ET AL., 517 U. S. 1224;

No. 95–8455. NAVA *v.* UNITED STATES SOCCER FEDERATION, 517 U. S. 1225;

No. 95–8528. SLATON *v.* MILLER, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL COMPLEX, PENDLETON, INDIANA, 517 U. S. 1214;

No. 95–8566. YOUNGS *v.* WHELESS, BANKRUPTCY JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL., 517 U. S. 1247;

No. 95–8570. CALHOUN *v.* ALLEN ET AL., 517 U. S. 1247;

No. 95–8589. TUCKER *v.* MONTGOMERY WARD CREDIT CORP., 517 U. S. 1248;

No. 95–8599. HOLLIDAY *v.* PAGE, *ante*, p. 1008;

No. 95–8623. TEDDER *v.* ALABAMA BOARD OF PARDONS AND PAROLES, *ante*, p. 1008;

No. 95–8636. RUEL *v.* SACO & BIDDEFORD SAVINGS INSTITUTION ET AL., *ante*, p. 1008;

No. 95–8660. FAISH *v.* PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, *ante*, p. 1009;

No. 95–8671. WILDER *v.* OKLAHOMA DEPARTMENT OF HUMAN SERVICES, *ante*, p. 1009;

No. 95–8681. SIEGEL *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, *ante*, p. 1022;

No. 95–8682. BELL *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1009;

No. 95–8756. BORDEN *v.* MASSACHUSETTS, *ante*, p. 1010;

No. 95–8771. BRENNAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1024;

No. 95–8772. ARAYA *v.* UNIVERSITY OF THE DISTRICT OF COLUMBIA, *ante*, p. 1024;

No. 95–8780. GRISMORE *v.* RYDER TRUCK RENTAL ET AL., *ante*, p. 1024;

No. 95–8798. STANCIL *v.* MOO & OINK, INC., 517 U. S. 1238;

No. 95–8836. FELKER *v.* TURPIN, WARDEN, *ante*, p. 651;

No. 95–8848. In re Rivera, *ante,* p. 1016;

No. 95–8850. Williams *v.* Abbey Medical, Inc., 517 U. S. 1239;

No. 95–8875. LeBon *v.* United States, 517 U. S. 1249;

No. 95–8926. Ballenger *v.* Mississippi, *ante,* p. 1025;

No. 95–8944. Holly *v.* Mississippi, *ante,* p. 1025;

No. 95–8952. Pizzo *v.* Cain, Warden, et al., *ante,* p. 1025; and

No. 95–9071. Guzman *v.* Office of Personnel Management, *ante,* p. 1026. Petitions for rehearing denied.

No. 95–7855. Morris *v.* United States, 516 U. S. 1181. Motion for leave to file petition for rehearing denied.

August 29, 1996

Dismissal Under Rule 46

No. 95–1974. Southwestern Bell Corp. et al. *v.* Great Western Directories, Inc., et al.; and

No. 95–1982. Great Western Directories, Inc. *v.* Southwestern Bell Telephone Co. et al. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 63 F. 3d 1378 and 74 F. 3d 613.

September 4, 1996

Dismissal Under Rule 46

No. 95–1919. Poway Unified School District et al. *v.* Lovell, a Minor, By and Through Her Guardian ad Litem, Lovell, et al. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Order

No. A–140 (O. T. 1996). Bentsen et al. *v.* Vera et al.;

No. A–144 (O. T. 1996). Lawson et al. *v.* Vera et al.; and

No. A–159 (O. T. 1996). Laney et al. *v.* Vera et al. D. C. S. D. Tex. Applications for stay, presented to Justice Scalia, and by him referred to the Court, denied.

September 5, 1996

Miscellaneous Orders

No. D–1695. In re Disbarment of Schneider. Disbarment entered. [For earlier order herein, see *ante,* p. 1015.]

No. D–1696. IN RE DISBARMENT OF MORROW. Disbarment entered. [For earlier order herein, see *ante,* p. 1032.]

No. D–1697. IN RE DISBARMENT OF KOSS. Disbarment entered. [For earlier order herein, see *ante,* p. 1032.]

No. D–1719. IN RE DISBARMENT OF GOLKIN. Alan R. Golkin, of Niagara Falls, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1720. IN RE DISBARMENT OF BERTAGNOLLI. James Sheridan Bertagnolli, of Castle Rock, Colo., is suspended from the practice of law in this Court, and a rule will 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. 95–813. BENNETT ET AL. *v.* SPEAR ET AL. C. A. 9th Cir. [Certiorari granted *sub nom. Bennett* v. *Plenert,* 517 U. S. 1102.] Motion of petitioners and *amici curiae* California et al. to permit California et al. to participate in oral argument as *amici curiae* and for divided argument denied.

No. 95–928. ATHERTON *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F. S. B. C. A. 3d Cir. [Certiorari granted, 517 U. S. 1133.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 95–939. IMMIGRATION AND NATURALIZATION SERVICE *v.* ELRAMLY. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1170.] The parties are directed to brief the question of applicability of the Antiterrorism and Effective Death Penalty Act of 1996 to this case. Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., September 12, 1996. Twenty typewritten copies of each brief may be filed initially in order to meet the September 12 filing date. Forty copies of the brief prepared under this Court's Rule 33.1 are to be filed as soon as possible thereafter.

No. 95–966. O'GILVIE ET AL., MINORS *v.* UNITED STATES; and No. 95–977. O'GILVIE *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 517 U. S. 1102.] Motion of petitioner in No. 95–977 for divided argument denied. Motion of petitioners in No. 95–966 for divided argument granted.

No. 95–1065. SCHENCK ET AL. *v.* PRO-CHOICE NETWORK OF WESTERN NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 516 U. S. 1170.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–1201. LOPEZ ET AL. *v.* MONTEREY COUNTY, CALIFORNIA, ET AL. D. C. N. D. Cal. [Probable jurisdiction noted, 517 U. S. 1118.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–1225. UNITED STATES *v.* BROCKAMP, ADMINISTRATOR OF THE ESTATE OF MCGILL, DECEASED; and UNITED STATES *v.* SCOTT. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1232.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 95–1595. BABBITT, SECRETARY OF THE INTERIOR, ET AL. *v.* YOUPEE ET AL. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1232.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 95–1726. UNITED STATES *v.* LABONTE ET AL. C. A. 1st Cir. [Certiorari granted, *ante,* p. 1016.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 95–1263. CATERPILLAR INC. *v.* LEWIS. C. A. 6th Cir. [Certiorari granted, 517 U. S. 1133.] Motion of Product Liability Advisory Council, Inc., for leave to file a brief as *amicus curiae* granted.

SEPTEMBER 6, 1996

Miscellaneous Order

No. A–151 (O. T. 1996). DUPREE ET AL. *v.* MOORE ET AL. Application to vacate the stay entered by the United States District Court for the Southern District of Mississippi, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

SEPTEMBER 10, 1996

Miscellaneous Order

No. A–174 (95–939). IMMIGRATION AND NATURALIZATION SERVICE *v.* ELRAMLY. C. A. 9th Cir. [Certiorari granted, 516

U. S. 1170.] Applications of the parties for leave to file supplemental briefs in excess of the page limitations, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, but the briefs may not exceed 20 pages.

SEPTEMBER 11, 1996

Dismissal Under Rule 46

No. 96–86. WOODS *v.* SATURN DISTRIBUTION CORP. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 78 F. 3d 424.

Miscellaneous Order

No. A–183 (O. T. 1996). FELKER *v.* TURPIN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

SEPTEMBER 16, 1996

Vacated and Remanded After Certiorari Granted

No. 95–939. IMMIGRATION AND NATURALIZATION SERVICE *v.* ELRAMLY. C. A. 9th Cir. [Certiorari granted, 516 U. S. 1170.] Judgment vacated and case remanded for further consideration in light of the Antiterrorism and Effective Death Penalty Act of 1996.

SEPTEMBER 17, 1996

Miscellaneous Order

No. 96–5998 (A–205). IN RE STEWART. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

SEPTEMBER 19, 1996

Miscellaneous Orders

No. A–110 (96–5496). HICKS *v.* UNITED STATES. C. A. 7th Cir. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–133 (96–5882). PARARAS-CARAYANNIS *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A–1004 (96–232). DUBIN *v.* UNITED STATES. C. A. 9th Cir. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

Certiorari Denied

No. 96–5975 (A–210). ATKINS *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Ct. Common Pleas of Charleston County, S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 20, 1996

Miscellaneous Orders

No. D–1691. IN RE DISBARMENT OF BURKHART. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D–1698. IN RE DISBARMENT OF MCATEE. Disbarment entered. [For earlier order herein, see *ante*, p. 1032.]

No. D–1721. IN RE DISBARMENT OF BARTRON. R. Greg Bartron, of Watertown, S. D., is suspended from the practice of law in this Court, and a rule will 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–1722. IN RE DISBARMENT OF CUNNINGHAM. Willie Lorena Cunningham, of San Antonio, Tex., is suspended from the practice of law in this Court, and a rule will 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–1723. IN RE DISBARMENT OF PEAVY. Don E. Peavy, Sr., of Fort Worth, Tex., is suspended from the practice of law in this Court, and a rule will 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–1724. IN RE DISBARMENT OF PARKS. Michael Lynn Parks, of Houston, Tex., is suspended from the practice of law in

this Court, and a rule will 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–1725. IN RE DISBARMENT OF HUGHES. Jim D. Hughes, of Rockport, Tex., is suspended from the practice of law in this Court, and a rule will 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–1726. IN RE DISBARMENT OF CARON. Robert E. Caron, of Troy, Mich., is suspended from the practice of law in this Court, and a rule will 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–1727. IN RE DISBARMENT OF ADAMS. Eugene Joseph Adams, of New City, N. Y., is suspended from the practice of law in this Court, and a rule will 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–1728. IN RE DISBARMENT OF MESTMAN. Gary Leo Mestman, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will 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. 95–259. WALTERS *v.* METROPOLITAN EDUCATIONAL ENTERPRISES, INC., ET AL.; and

No. 95–779. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* METROPOLITAN EDUCATIONAL ENTERPRISES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 516 U. S. 1171.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–789. CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT ET AL. *v.* DILLINGHAM CONSTRUCTION, N. A., INC., ET AL. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1133.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–1268. MARYLAND *v.* WILSON. Ct. Sp. App. Md. [Certiorari granted, *ante,* p. 1003.] Motion of the Acting Solicitor

General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–1376. ROBINSON *v.* SHELL OIL CO. C. A. 4th Cir. [Certiorari granted, 517 U. S. 1154.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 95–974. ARIZONANS FOR OFFICIAL ENGLISH ET AL. *v.* ARIZONA ET AL. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1102.] Motion of respondent Maria-Kelly Yniguez for divided argument denied. Motion of respondent Arizona for divided argument denied.

No. 95–1184. GLICKMAN, SECRETARY OF AGRICULTURE *v.* WILEMAN BROTHERS & ELLIOTT, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1232.] Motions of National Association of State Departments of Agriculture et al., Washington Apple Commission et al., and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted.

No. 95–1402. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF HUBERT, DECEASED, C & S SOVRAN TRUST CO. (GEORGIA) N. A., CO-EXECUTOR. C. A. 11th Cir. [Certiorari granted, 517 U. S. 1166.] Motion of American College of Trust and Estate Counsel for leave to file a brief as *amicus curiae* granted.

No. 95–1425. ABRAMS ET AL. *v.* JOHNSON ET AL.; and

No. 95–1460. UNITED STATES *v.* JOHNSON ET AL. D. C. S. D. Ga. [Probable jurisdiction noted, 517 U. S. 1207.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 95–1717. UNITED STATES *v.* LANIER. C. A. 6th Cir. [Certiorari granted, *ante,* p. 1004.] Motions of American Civil Liberties Union et al., NOW Legal Defense and Education Fund et al., Southern Poverty Law Center et al., and Vivian Forsythe-Archie et al. for leave to file briefs as *amici curiae* granted.

No. 95–1723. GRIMMETT, TRUSTEE FOR THE BANKRUPTCY ESTATE OF SIRAGUSA, ET AL. *v.* BROWN ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1003.] Motions of National Association of Securities and Commercial Law Attorneys and Plaintiffs'

Executive Committee, MDL No. 1069, et al. for leave to file briefs as *amici curiae* granted.

SEPTEMBER 26, 1996

Dismissal Under Rule 46

No. 96–5660. VELARDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 86 F. 3d 1167.

OCTOBER 1, 1996

Probable Jurisdiction Noted

No. 95–2031. YOUNG ET AL. *v.* FORDICE ET AL. Appeal from D. C. S. D. Miss. Probable jurisdiction noted. Brief of appellants is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply.

Certiorari Granted

No. 95–1621. HARBOR TUG & BARGE CO. *v.* PAPAI ET UX. C. A. 9th Cir. Motion of Industrial Indemnity Co. for leave to file a brief as *amicus curiae* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Reported below: 67 F. 3d 203.

No. 95–1858. VACCO, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* QUILL ET AL. C. A. 2d Cir. Motions of Agudath Israel of America, Carl Anderson, Commissioner, et al., United States Catholic Conference et al., and Catholic Medical Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon

opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Case is set for oral argument in tandem with No. 96–110, *Washington et al.* v. *Glucksberg et al., infra,* p. 1057. Reported below: 80 F. 3d 716.

No. 95–1872. STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, ET AL. *v.* A–1 CONTRACTORS ET AL. C. A. 8th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Reported below: 76 F. 3d 930.

No. 95–1873. ADAMS ET AL. *v.* ROBERTSON ET AL. Sup. Ct. Ala. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Reported below: 676 So. 2d 1265.

No. 95–8736. OGBOMON *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Reported below: 55 F. 3d 638.

No. 96–110. WASHINGTON ET AL. *v.* GLUCKSBERG ET AL. C. A. 9th Cir. Motion of American Medical Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Case is set for oral argument in tandem with No. 95–1858, *Vacco, Attorney General of New York, et al.* v. *Quill et al.*, *supra*, p. 1055. Reported below: 79 F. 3d 790.

No. 96–126. CHANDLER ET AL. *v.* MILLER, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. This Court's Rule 29.2 does not apply. Reported below: 73 F. 3d 1543.

OCTOBER 2, 1996

Dismissal Under Rule 46

No. 95–1745. UNITED STATES *v.* LOPEZ. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 71 F. 3d 954.

Miscellaneous Order

No. 95–1521. UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL. *v.* LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1003.] The parties are directed to brief the question of applicability of § 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (enacted as Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104–208, 110 Stat. 3009–701 ("Authority to Determine Visa Processing Procedures") (amending 8 U. S. C.

§ 1152(a)(1))) to this case and whether this case is moot. Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., October 11, 1996. Twenty typewritten copies of each brief may be filed initially in order to meet the October 11 filing date. Forty copies of the brief prepared under this Court's Rule 33.1 are to be filed as soon as possible thereafter.

October 3, 1996

Miscellaneous Orders

No. 95–1441. Blessing, Director, Arizona Department of Economic Security *v.* Freestone et al., on Behalf of Their Minor Children. C. A. 9th Cir. [Certiorari granted, 517 U. S. 1186.] Motion of respondents to consider remanding this case or dismissing certiorari as improvidently granted in light of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 denied.

No. 96–6220 (A–245). In re Bell. 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. Petition for writ of habeas corpus denied. Petition for extraordinary writ pursuant to this Court's Rule 20.3 denied. Petition for appropriate writ pursuant to 28 U. S. C. § 1651(a) denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1993, 1994 AND 1995

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1993	**1994**	**1995**	**1993**	**1994**	**1995**	**1993**	**1994**	**1995**	**1993**	**1994**	**1995**
Number of cases on dockets	12	11	11	2,442	2,515	2,456	5,332	5,574	5,098	7,786	8,100	7,565
Number disposed of during term	1	2	5	2,065	2,154	2,081	4,616	4,976	4,511	6,682	7,132	6,597
Number remaining on dockets	11	9	6	377	361	375	716	598	587	1,104	968	968

	TERMS		
	1993	**1994**	**1995**
Cases argued during term	99	94	90
Number disposed of by full opinions	93	91	87
Number disposed of by per curiam opinions	6	3	3
Number set for reargument	0	0	0
Cases granted review this term	[1] 99	96	106
Cases reviewed and decided without oral argument	[2] 70	[3] 69	[4] 120
Total cases to be available for argument at outset of following term	[1] 40	39	52

[1] Includes 93–714, suggestion of mootness.

[2] Includes 92–6259, denied June 14, 1993.

[3] Includes S–1.

[4] Does not include 94–1412, denied May 30, 1995.

JULY 1, 1996

INDEX

ABORTION.

State law—Severability of provisions.—Tenth Circuit erred in invalidating one provision in Utah's abortion law on ground that it was not severable from another provision that had been struck down as unconstitutional. Leavitt v. Jane L., p. 137.

ABUSE-OF-DISCRETION STANDARD OF REVIEW. See **Constitutional Law,** VIII, 1; **United States Sentencing Guidelines,** 2.

ADMISSION TO VIRGINIA MILITARY INSTITUTE. See **Constitutional Law,** IV.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. See also **Constitutional Law,** V.

Habeas corpus petitions.—Act, which makes substantial changes in habeas corpus procedures, does not preclude this Court from entertaining a habeas petition, but does affect standards governing granting of relief. Felker v. Turpin, p. 651.

ANTITRUST ACTS.

Sherman Act—Labors laws.—Federal labor laws shield from a Sherman Act antitrust attack an agreement among several members of a multiemployer bargaining unit to implement after impasse terms of their last best good-faith wage offer. Brown v. Pro Football, Inc., p. 231.

ARIZONA. See **Constitutional Law,** I.

AT-WILL GOVERNMENT CONTRACTS. See **Constitutional Law,** VI, 2, 3.

AUTOMOBILE SEARCHES. See **Constitutional Law,** IX.

BANKRUPTCY.

Priorities—Tax claim.—Government's claim for "tax" under 26 U. S. C. § 4971(a) is not entitled to bankruptcy priority as an "excise tax" under 11 U. S. C. § 507(a)(7)(E), but it was error to subordinate claim to claims of other general, unsecured creditors under § 510(c). United States v. Reorganized CF&I Fabricators of Utah, Inc., p. 213.

***BRADY* CLAIM.** See **Habeas Corpus.**

BREACH OF CONTRACT. See **Financial Institutional, Reform, Recovery, and Enforcement Act of 1989.**

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992. See **Constitutional Law,** VI, 1.

CAMPAIGNS FOR CONGRESSIONAL OFFICES. See **Federal Election Campaign Act of 1971.**

CASE OR CONTROVERSY. See **Mootness.**

CIVIL FORFEITURES. See **Constitutional Law,** II.

CLAIM SUBORDINATION. See **Bankruptcy.**

CONFIDENTIALITY OF PATIENT-PSYCHOTHERAPIST COMMUNICATION. See **Federal Rules of Evidence.**

CONGRESSIONAL CAMPAIGN EXPENDITURES. See **Federal Election Campaign Act of 1971.**

CONSTITUTIONAL LAW.

I. Access to Courts.

Prisoners—Adequacy of legal research facilities.—District Court's injunction ordering sweeping changes in Arizona's prison law library and legal assistance programs exceeds constitutional requirements for a right of access to courts set forth in *Bounds* v. *Smith*, 430 U. S. 817, 828. Lewis v. Casey, p. 343.

II. Double Jeopardy.

What constitutes punishment—Civil forfeitures.—Civil forfeitures do not constitute punishment for purposes of Double Jeopardy Clause, and thus Clause does not prohibit Government from both punishing a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding. United States v. Ursery, p. 267.

III. Due Process.

Murder trial—Accused's mental state—Effect of intoxication.—Montana Supreme Court's conclusion, that respondent was denied due process in his murder trial when state law prohibited his voluntary intoxication from being taken into consideration in determining existence of mental state element of criminal offense, is reversed. Montana v. Egelhoff, p. 37.

IV. Equal Protection of the Laws.

Discrimination on basis of sex—Virginia Military Institute—Admission policy.—Virginia's categorical exclusion of women from educational opportunities VMI provides denies equal protection to women; and Virginia's remedy—to maintain VMI as a male-only college and create a separate program for women—does not cure constitutional violation. United States v. Virginia, p. 515.

V. Exceptions and Suspension Clauses.

Habeas corpus—Antiterrorism and Effective Death Penalty Act of 1996.—Act, which makes substantial changes in habeas corpus proce-

CONSTITUTIONAL LAW—Continued.

dures, does not violate Exceptions Clause or Suspension Clause. Felker v. Turpin, p. 651.

VI. Freedom of Speech.

1. *Cable Television Consumer Protection and Competition Act of 1992—Leased channel operators—Segregation of offensive programming.*—Section 10(b) of Act—which requires cable system operators to segregate certain patently offensive programming, to place it on a single channel, and to block that channel from viewer access unless viewer requests access—violates First Amendment. Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, p. 727.

2. *Independent government contractors—Retaliation for speech.*—First Amendment protections of *Elrod* v. *Burns*, 427 U. S. 347, and *Branti* v. *Finkel*, 445 U. S. 507—that prohibit government officials from discharging public employees for refusing to support a political party or its candidate, unless political affiliation is an appropriate requirement for job in question—extend to instances where government retaliates against a contractor for exercise of rights of political association or expression of political allegiance. O'Hare Truck Service, Inc. v. City of Northlake, p. 712.

3. *Independent government contractors—Retaliation for speech.*—First Amendment protects independent contractors from termination or prevention of automatic renewal of their at-will government contracts in retaliation for their speech; and balancing test of *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, adjusted to weigh government's interests as contractor, determines that protection's extent. Board of Comm'rs, Wabaunsee Cty. v. Umbehr, p. 668.

VII. Immunity from Suit.

Federal Government—Rehabilitation Act of 1973.—Congress has not waived Government's sovereign immunity against monetary damages for violations of § 504(a) of Rehabilitation Act of 1973, which prohibits discrimination based on disability under any Executive agency program or activity. Lane v. Peña, p. 187.

VIII. Right to Jury Trial.

1. *Diversity case—Application of state damages law.*—New York law controlling excessive or inadequate damages awards can be given effect in federal courts, without detriment to Seventh Amendment right to jury trial, if federal trial judge applies State's review standard and appellate review is limited to abuse of discretion. Gasperini v. Center for Humanities, Inc., p. 415.

2. *Multiple petty offenses—Aggregate prison term.*—A defendant who is prosecuted in a single proceeding for multiple petty offenses does not have a Sixth Amendment right to a jury trial where aggregate prison

CONSTITUTIONAL LAW—Continued.
term authorized for offenses exceeds six months. Lewis v. United States, p. 322.

IX. Searches and Seizures.

Warrant requirement—Automobile exception.—Pennsylvania Supreme Court misread automobile exception to Fourth Amendment's warrant requirement when it held that police must obtain a warrant before searching a car unless exigent circumstances are present. Pennsylvania v. Labron, p. 938.

COURTS OF APPEALS. See **Abortion; United States Sentencing Guidelines,** 2.

CRIMINAL LAW. See **Antiterrorism and Effective Death Penalty Act of 1996; Constitutional Law,** I; II; V; VIII, 2; IX; **Habeas Corpus; Mootness; United States Sentencing Guidelines.**

***DE NOVO* STANDARD OF REVIEW.** See **United States Sentencing Guidelines,** 2.

DEPARTURE FROM SENTENCING RANGE. See **United States Sentencing Guidelines.**

DISCLOSURE OF PATIENT-PSYCHOTHERAPIST COMMUNICATION. See **Federal Rules of Evidence.**

DISCRIMINATION IN EDUCATIONAL OPPORTUNITIES. See **Constitutional Law,** IV.

DISCRIMINATION ON BASIS OF DISABILITY. See **Constitutional Law,** VII.

DISCRIMINATION ON BASIS OF SEX. See **Constitutional Law,** IV.

DIVERSITY JURISDICTION. See **Constitutional Law,** VIII, 1.

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DUE PROCESS. See **Constitutional Law,** III.

EDUCATIONAL OPPORTUNITIES DISCRIMINATION. See **Constitutional Law,** IV.

ELECTIONS. See **Federal Election Campaign Act of 1971.**

EMPLOYER AND EMPLOYEES. See **Antitrust Acts.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

EXCEPTIONS CLAUSE. See **Constitutional Law,** V.

EXCESSIVE DAMAGES. See **Constitutional Law,** VIII, 1.

EXCISE TAXES. See **Bankruptcy.**

EXPENDITURES ON CONGRESSIONAL CAMPAIGNS. See **Federal Election Campaign Act of 1971.**

FEDERAL ELECTION CAMPAIGN ACT OF 1971.

Party Expenditure Provision.—Tenth Circuit's judgment upholding constitutionality of Act's "Party Expenditure Provision"—which imposes dollar limits upon political party expenditures in connection with a congressional candidate's general election campaign—is vacated. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, p. 604.

FEDERAL RULES OF EVIDENCE.

Disclosure of patient-psychotherapist communication.—Confidential conversations between a patient and her psychotherapist, a clinical social worker, and notes taken during their counseling sessions are protected from compelled disclosure under Rule 501. Jaffee v. Redmond, p. 1.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** VIII, 1; **Medical Device Amendments of 1976.**

FINANCIAL INSTITUTIONAL, REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989.

Breach of contract—Government's liability for damages.—Federal Circuit's judgment that United States is liable to thrift institutions for breach of contract occasioned by Congress' subsequent passage of Act is affirmed. United States v. Winstar Corp., p. 839.

FIRST AMENDMENT. See **Constitutional Law,** VI.

FOOTBALL. See **Antitrust Acts.**

FORFEITURE OF PROPERTY. See **Constitutional Law,** II.

FOURTEENTH AMENDMENT. See **Constitutional Law,** IV.

FOURTH AMENDMENT. See **Constitutional Law,** IX.

FREEDOM OF SPEECH. See **Constitutional Law,** VI.

GOVERNMENT CONTRACTORS. See **Constitutional Law,** VI, 2, 3.

GUIDELINES SENTENCING RANGES. See **United States Sentencing Guidelines.**

HABEAS CORPUS. See also **Antiterrorism and Effective Death Penalty Act of 1996; Constitutional Law,** V.

Brady, notice-of-evidence, and misrepresentation claims.—Habeas petitioner's *Brady* v. *Maryland*, 373 U. S. 83, claim is procedurally barred and his notice-of-evidence claim seeks retroactive application of a new rule,

HABEAS CORPUS—Continued.
but Fourth Circuit must decide whether he properly raised a misrepresentation claim. Gray v. Netherland, p. 152.

IMMUNITY FROM SUIT. See **Constitutional Law,** VII.

INDEPENDENT CONTRACTORS. See **Constitutional Law,** VI, 2, 3.

INTOXICATION AS ELEMENT OF A DEFENSE. See **Constitutional Law,** III.

JURY TRIALS. See **Constitutional Law,** VIII.

JUSTICIABILITY. See **Mootness.**

LABOR. See **Antitrust Acts.**

LEGAL RESEARCH FACILITIES FOR PRISONERS. See **Constitutional Law,** I.

MEDICAL DEVICE AMENDMENTS OF 1976.
Pre-emption of state law.—Amendments did not pre-empt Lohrs' state-law, common-law claims against manufacturer of a failed pacemaker. Medtronic, Inc. v. Lohr, p. 470.

MENTAL STATE AS ELEMENT OF A CRIMINAL DEFENSE. See **Constitutional Law,** III.

MISREPRESENTATION CLAIM. See **Habeas Corpus.**

MONTANA. See **Constitutional Law,** III.

MOOTNESS.
Appeal of District Court's order.—Petitioner's appeal of a District Court's order that he release respondent from custody or schedule him for a new trial is not made moot by fact that a new trial has been ordered, since a substantial remedy will be available to State if it can avoid burden of a new trial. Calderon v. Moore, p. 149.

MULTIEMPLOYER BARGAINING UNITS. See **Antitrust Acts.**

MULTIPLE PETTY OFFENSES. See **Constitutional Law,** VIII, 2.

MURDER. See **Constitutional Law,** III.

NEW YORK. See **Constitutional Law,** VIII, 1.

NOTICE-OF-EVIDENCE CLAIM. See **Habeas Corpus.**

PACEMAKERS. See **Medical Device Amendments of 1976.**

PARTY EXPENDITURE PROVISION. See **Federal Election Campaign Act of 1971.**

PATIENT-PSYCHOTHERAPIST COMMUNICATION. See **Federal Rules of Evidence.**

PENNSYLVANIA. See **Constitutional Law,** IX.

PETTY OFFENSES. See **Constitutional Law,** VIII, 2.

POLITICAL PARTY EXPENDITURES. See **Federal Election Campaign Act of 1971.**

POLITICAL SPEECH. See **Constitutional Law,** VI, 2, 3.

PRE-EMPTION OF STATE LAW. See **Medical Device Amendments of 1976.**

PRIORITIES OF CREDITORS' CLAIMS. See **Bankruptcy.**

PRISONERS. See **Constitutional Law,** I.

PRODUCT LIABILITY. See **Medical Device Amendments of 1976.**

PROFESSIONAL FOOTBALL. See **Antitrust Acts.**

PSYCHOTHERAPIST-PATIENT COMMUNICATION. See **Federal Rules of Evidence.**

PUNISHMENT. See **Constitutional Law,** II.

REHABILITATION ACT OF 1973. See **Constitutional Law,** VII.

RENEWAL OF GOVERNMENT CONTRACTS. See **Constitutional Law,** VI, 2, 3.

RIGHT OF ACCESS TO COURTS. See **Constitutional Law,** I.

RIGHT TO JURY TRIAL. See **Constitutional Law,** VIII, 1.

SEARCHES AND SEIZURES. See **Constitutional Law,** IX.

SENTENCING RANGES. See **United States Sentencing Guidelines.**

SEVENTH AMENDMENT. See **Constitutional Law,** VIII, 1.

SEVERABILITY OF STATUTORY PROVISIONS. See **Abortion.**

SEX DISCRIMINATION. See **Constitutional Law,** IV.

SHERMAN ACT. See **Antitrust Acts.**

SIXTH AMENDMENT. See **Constitutional Law,** VIII, 2.

SOCIAL WORKERS. See **Federal Rules of Evidence.**

SOVEREIGN IMMUNITY. See **Constitutional Law,** VII.

SUPREME COURT.

Term statistics, p. 1059.

SUSPENSION CLAUSE. See **Constitutional Law,** V.

TAXES. See **Bankruptcy.**

TELEVISION. See **Constitutional Law,** VI, 1.

TERMINATION OF GOVERNMENT CONTRACTS. See **Constitutional Law,** VI, 2, 3.

THRIFT INSTITUTIONS. See **Financial Institutional, Reform, Recovery, and Enforcement Act of 1989.**

TRIAL BY JURY. See **Constitutional Law,** VIII.

UNITED STATES SENTENCING GUIDELINES.

1. *Sentencing range—Departure below statutory minimum range.*—A Government motion attesting to a defendant's substantial assistance in a criminal investigation and requesting that a district court depart below minimum of applicable Guideline sentencing range does not also authorize court to depart below a lower statutory minimum sentence. Melendez v. United States, p. 120.

2. *Sentencing range—Standard of review—Rejection of downward departure factors.*—An appeals court should not review *de novo* a decision to depart from Guideline sentencing range, but instead should ask whether district court abused its discretion; Ninth Circuit erred in rejecting certain downward departure factors. Koon v. United States, p. 81.

UTAH. See **Abortion.**

VIRGINIA MILITARY INSTITUTE. See **Constitutional Law,** IV.

WARRANTLESS SEARCHES. See **Constitutional Law,** IX.