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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1976

OPINIONS OF JUNE 13 (CONCLUDED) THROUGH JUNE 20, 1977

ORDERS OF JUNE 14 THROUGH JUNE 20, 1977

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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Errata

430 U. S. 488: The last line of text does not end the paragraph. It continues on p. 489.

431 U. S. 803: In the citation of *In re Cunningham* v. *Nadjari,* delete "383 N. Y. S. 2d 311."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

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GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

DEATH OF MR. JUSTICE CLARK

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 16, 1977

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

THE CHIEF JUSTICE said:

Before we proceed today with the regular business of the Court, it is my sad duty to take note for the record and the Journal of the Court of the death of our beloved colleague and friend Mr. Justice Tom Clark, who served as a Justice of this Court from 1949 to 1967, after serving as Attorney General of the United States from 1945 to 1949.

His death came almost exactly 10 years after retiring from this Court. But retirement for Mr. Justice Clark was not the end but the beginning of a new career in which he was a leading spokesman for judicial improvement and which, at the same time, took him on special assignments into every one of the 11 Federal Circuits. So far as we are aware, no Judge or Justice in history sat on every Court of Appeals after his technical retirement from active service.

Even while sitting on this Court Mr. Justice Clark was a literal missionary for improvement of judicial administration, and it was logical that, when the Federal Judicial Center began operations in 1968, he was appointed its first Director. In that position, he gave standing and credibility to this important new institution created by Congress to improve the administration of justice.

When he retired as Director, he resumed regular sittings on Courts of Appeals and District Courts all over the United States. And for the past 15 years he has had a part in every major program to improve the work of the courts. He played a leading role in launching the National College of the State Judiciary at Reno, Nev., where more than 1,000 state judges have received special training in the past decade.

Last Saturday he was in his Chambers here at the Supreme Court, completing his preparation for cases he was to hear argued in the United States Court of Appeals for the Second Circuit in New York. When he did not arrive at the Court of Appeals on Monday morning, it was discovered that his death occurred during the night.

He died as he lived, deeply committed and involved in the judicial work he loved—and literally, in the tradition of the West—"with his boots on."

No one in the past 30 years has done more than Tom Clark to improve justice in our country and no one had such universal respect and affection of the lawyers and judges of this country.

I speak for all the present and former Members of the Court today in expressing our deep sorrow, and our profound sympathy, for Mrs. Clark and her family.

On an appropriate occasion after the opening of the next Term of the Court in October, the official memorial service of the Court will be conducted for Mr. Justice Clark in this Chamber.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1976

NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* MAUCLET ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

No. 76–208. Argued March 22, 1977—Decided June 13, 1977

New York statutory provision that bars certain resident aliens from state financial assistance for higher education *held* to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 7–12.

(a) State classifications based on alienage are "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson,* 403 U. S. 365, 372. P. 7.

(b) The statute discriminates against a class and is subject to strict scrutiny since it is directed at aliens and only aliens are harmed by it even though its bar against them is not absolute in that those who have applied for citizenship or those not qualified to apply who have filed statements of intent may participate in the assistance programs. *Graham* v. *Richardson, supra;* cf. *Mathews* v. *Lucas,* 427 U. S. 495, 504–505, n. 11. Pp. 7–9.

(c) Any incentive through the statute for an alien to become naturalized is not a proper state concern, since control over immigration and naturalization is exclusively a federal function. P. 10.

(d) The naturalization incentive (even if that could be accepted, *arguendo,* as a justification) or the further justification asserted by appellants, *viz.,* that the financial assistance program is confined to actual or potential voters, thus enhancing the educational level of the electorate, cannot be deemed adequate to support the statute's ban. If the

encouragement of naturalization through such programs were adequate, every discrimination against aliens could be similarly justified. And the claimed interest in educating the electorate would not be frustrated by including resident aliens in the assistance program. Pp. 10–12.

406 F. Supp. 1233, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post,* p. 12. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post,* p. 15. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 17.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for appellants. With her on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

Michael Davidson argued the cause for appellee Mauclet. With him on the brief was *Kevin Kennedy. Gary J. Greenberg* argued the cause and filed a brief for appellee Rabinovitch.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

New York, by statute, bars certain *resident* aliens from state financial assistance for higher education. N. Y. Educ. Law § 661 (3) (McKinney Supp. 1976). This litigation presents a constitutional challenge to that statute.

I

New York provides assistance, primarily in three forms, to students pursuing higher education. The first type is the Regents college scholarship. These are awarded to high school graduates on the basis of performance in a competitive examination. §§ 605 (1) and 670. Currently, in the usual case, a recipient is entitled to $250 annually for four years of study without regard to need. §§ 670 (2) and (3)(b).[1] The

[1] There also are other special competitive awards: Regents professional education in nursing scholarships, N. Y. Educ. Law §§ 605 (2) and 671

second and chief form of aid is the tuition assistance award. These are noncompetitive; they are available to both graduate and undergraduate students "enrolled in approved programs and who demonstrate the ability to complete such courses." §§ 604 (1) and 667 (1). The amount of the award depends on both tuition and income. The ceiling on assistance was $600, although it has been increased for undergraduates to $1,500. §§ 667 (3) and (4). The third form of assistance is the student loan. §§ 680–684. The loan is guaranteed by the State; a borrower meeting certain income restrictions is entitled to favorable interest rates and generally to an interest-free grace period of at least nine months after he completes or terminates his course of study. §§ 680, 682 (2) and (3).[2]

There are several general restrictions on eligibility for participation in any of these programs. § 661. For example, there is a modest durational residency requirement. § 661 (5).[3] The instant dispute, however, concerns only § 661 (3). That subsection provides:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application

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(McKinney Supp. 1976); Regents professional education in medicine or dentistry scholarships, §§ 605 (3) and 672; Regents physician shortage scholarships, §§ 605 (4) and 673; Regents war veteran scholarships, §§ 605 (5) and 674; and Regents Cornell University scholarships, § 605 (6).

[2] The loan program is largely subsidized by the Federal Government. See 20 U. S. C. §§ 1071 to 1087–2 (1970 ed. and Supp. V). (In fiscal 1976 the federal expenditure for New York's loan program was $67,208,000 and the state contribution was $9,466,000. Brief for Appellants 8 n. * and 17 n. *.) Although it appears that federal administrators have not lodged objections to the State's practice of disqualifying certain resident aliens, see App. 82, the federal standards would make eligible for assistance an alien student who "is in the United States for other than a temporary purpose and intends to become a permanent resident thereof." 45 CFR § 177.2 (a) (1976).

[3] This requirement is not the subject of challenge here. See *Vlandis* v. *Kline,* 412 U. S. 441 (1973); *Starns* v. *Malkerson,* 401 U. S. 985 (1971), aff'g 326 F. Supp. 234 (Minn. 1970).

to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States." [4]

The statute obviously serves to bar from the assistance programs the participation of all aliens who do not satisfy its terms. Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, see, *e. g.*, 8 U. S. C. § 1101 (a)(15)(F)(i); 22 CFR § 41.45 (1976), the bar of § 661 (3) is of practical significance only to resident aliens. The Court has observed of this affected group: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths,* 413 U. S. 717, 722 (1973).

II

Appellee Jean-Marie Mauclet is a citizen of France and has lived in New York since April 1969. He has been a permanent resident of the United States since November of that year. He is married to a United States citizen and has a child by that marriage. The child is also a United States citizen. App. 49. Mauclet by affidavit stated: "Although I am presently qualified to apply for citizenship and intend to reside

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[4] Section 661 (3) replaced former § 602 (2) of the State's Education Law, in effect at the times appellees' complaints were filed. 1974 N. Y. Laws, c. 942. Clause (d) was added after the commencement of the suits. 1975 N. Y. Laws, c. 663, § 1. Since clause (d) serves to make a class of aliens eligible for aid without regard to citizenship or intent to apply for citizenship, its inclusion serves to undermine the State's arguments as to the purposes served by the first three clauses. See n. 13, *infra.*

permanently in the United States, I do not wish to relinquish my French citizenship at this time." [5] *Id.*, at 50. He applied for a tuition assistance award to aid in meeting the expenses of his graduate studies at the State University of New York at Buffalo. Because of his refusal to apply for United States citizenship, his application was not processed. *Id.*, at 49–50.

Appellee Alan Rabinovitch is a citizen of Canada. He was admitted to this country in 1964 at the age of nine as a permanent resident alien. He is unmarried and, since his admission, has lived in New York with his parents and a younger sister, all of whom are Canadian citizens. He registered with Selective Service on his 18th birthday. He graduated in 1973 from the New York public school system. *Id.*, at 68, 71. As a result of a commendable performance on the competitive Regents Qualifying Examinations, Rabinovitch was informed that he was qualified for, and entitled to, a Regents college scholarship and tuition assistance. He later was advised, however, that the offer of the scholarship was withdrawn since he intended to retain his Canadian citizenship. *Id.*, at 69, 25. Rabinovitch entered Brooklyn College without financial aid from the State. He states that he "does not intend to become a naturalized American, but . . . does intend to continue to reside in New York." *Id.*, at 65.

Mauclet and Rabinovitch each brought suit in United States District Court (Mauclet in the Western District of New York and Rabinovitch in the Eastern District), alleging that the citizenship bar of § 661 (3) was unconstitutional. The same three-judge court was convened for each of the cases. Subsequently, it was ordered that the cases be heard together. App. 45. After cross motions for summary judgment, the District Court in a unanimous opinion ruled in appellees' favor. It held that § 661 (3) violated the Equal Protection Clause of the Fourteenth Amendment in that the citizenship

[5] In order to become a United States citizen, Mauclet would be required to renounce his French citizenship. 8 U. S. C. § 1448 (a).

requirement served to discriminate unconstitutionally against resident aliens.[6] 406 F. Supp. 1233 (WDNY and EDNY 1976). Its enforcement was enjoined in separate judgments. App. 103, 106.

Appellants—the various individuals and corporate entities responsible for administering the State's educational assistance programs—challenge this determination.[7] We noted probable jurisdiction. 429 U. S. 917 (1976).

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[6] Other courts also have held that discrimination against resident aliens in the distribution of educational assistance is impermissible. See, *e. g.*, *Chapman* v. *Gerard*, 456 F. 2d 577 (CA3 1972); *Jagnandan* v. *Giles*, 379 F. Supp. 1178 (ND Miss. 1974), appealed on damages and aff'd, 538 F. 2d 1166 (CA5 1976), cert. pending, No. 76–832.

[7] Appellants also argue that the District Court should not have reached the question of the applicability of § 661 (3) to the loan program because appellee Rabinovitch, who alone challenged this aspect of the assistance program, had not been denied a loan. Hence, appellants assert, he lacks standing. Early in the litigation, however, Rabinovitch submitted an unrebutted affidavit to the effect that he believed that he "may require student loans to help cover the cost of" his education and that he was "barred from receiving a student loan simply because of [his] status as an alien." App. 71. Indeed, appellants conceded in the District Court that any application from Rabinovitch for a loan would be refused because of § 661 (3). 406 F. Supp., at 1235. It is clear, therefore, that Art. III adverseness existed between the parties and that the dispute is a concrete one. The only obstacle to standing, under the circumstances, would arise from prudential considerations. And we see no reason to postpone resolution of the dispute. Rabinovitch has been denied other forms of aid and little is to be served by requiring him now to go through the formality of submitting an application for a loan, in light of the certainty of its denial. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264 (1977). Until oral argument, appellants suggested no reason why the loan program should differ from the other forms of assistance. Tr. of Oral Arg. 7. In the absence of a more timely suggestion supporting a distinction among the forms of aid, we think that nothing is to be gained by adjudicating the validity of § 661 (3) with regard to only two of the three primary assistance programs. After all, the single statutory proscription applies with equal force to all the programs.

III

The Court has ruled that classifications by a State that are based on alienage are "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971). See *Examining Board* v. *Flores de Otero,* 426 U. S. 572, 601–602 (1976); *In re Griffiths,* 413 U. S., at 721; *Sugarman* v. *Dougall,* 413 U. S. 634, 642 (1973). In undertaking this scrutiny, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *Flores de Otero,* 426 U. S., at 605. See *In re Griffiths,* 413 U. S., at 721–722. Alienage classifications by a State that do not withstand this stringent examination cannot stand.[8]

Appellants claim that § 661 (3) should not be subjected to such strict scrutiny because it does not impose a classifica-

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[8] In *Mathews* v. *Diaz,* 426 U. S. 67 (1976), the Court applied relaxed scrutiny in upholding the validity of a federal statute that conditioned an alien's eligibility for participation in a federal medical insurance program on the satisfaction of a durational residency requirement, but imposed no similar burden on citizens. The appellants can draw no solace from the case, however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States. *Id.,* at 84–87. See *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100–101 (1976); *De Canas* v. *Bica,* 424 U. S. 351, 358 n. 6 (1976).

It is perhaps worthy of note that the Medicare program under consideration in *Diaz* granted a permanent resident alien eligibility when he had resided in the United States for five years. Five years' residence is also the generally required period under federal law before an alien *may* seek to be naturalized. 8 U. S. C. § 1427 (a). Yet, ironically, this is precisely the point at which, in New York, a resident *must* petition for naturalization or, irrespective of declared intent, lose his eligibility for higher education assistance.

tion based on alienage.[9] Aliens who have applied for citizenship, or, if not qualified for it, who have filed a statement of intent to apply as soon as they are eligible, are allowed to participate in the assistance programs. Hence, it is said, the statute distinguishes "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens *vel non.*" Brief for Appellants 20.[10] Only statutory classifications of the latter type, appellants assert, warrant strict scrutiny.

Graham v. *Richardson, supra,* undermines appellants' position. In that case, the Court considered an Arizona statute that imposed a durational residency requirement for welfare benefits on aliens but not on citizens. Like the New York statute challenged here, the Arizona statute served to discriminate only within the class of aliens: Aliens who met the durational residency requirement were entitled to welfare

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[9] Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien "access to the necessities of life." Brief for Appellants 21. They are joined in this view by THE CHIEF JUSTICE in dissent. Suffice it to say, the statutory statement of purpose for the aid programs reflects the State's contrary position:

"In a world of unmatched scientific progress and technological advance, as well as of unparalleled danger to human freedom, learning has never been more crucial to man's safety, progress and individual fulfillment. In the state and nation higher education no longer is a luxury; it is a necessity for strength, fulfillment and survival." 1961 N. Y. Laws, c. 389, § 1(a).

And, in any event, the Court noted in *Graham* v. *Richardson,* 403 U. S. 365, 376 (1971), that classifications based on alienage "are inherently suspect and are therefore subject to strict scrutiny whether or not a fundamental right is impaired."

[10] The District Court dealt abruptly with appellants' contention:

"This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage." 406 F. Supp., at 1235.

benefits. The Court nonetheless subjected the statute to strict scrutiny and held it unconstitutional. The important points are that § 661 (3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.[11] Cf. *Mathews* v. *Lucas*, 427 U. S. 495, 504–505, n. 11 (1976);[12] *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 169, 172 (1972).

Appellants also assert that there are adequate justifications for § 661 (3). First, the section is said to offer an incentive for aliens to become naturalized. Second, the restriction on

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[11] Our Brother REHNQUIST argues in dissent that strict scrutiny is inappropriate because under § 661 (3) a resident alien can voluntarily withdraw from disfavored status. But this aspect of the statute hardly distinguishes our past decisions. By the logic of the dissenting opinion, the suspect class for alienage would be defined to include at most only those who have resided in this country for less than five years, since after that time, if not before, resident aliens are generally eligible to become citizens. 8 U. S. C. § 1427 (a). The Court has never suggested, however, that the suspect class is to be defined so narrowly. In fact, the element of voluntariness in a resident alien's retention of alien status is a recognized element in several of the Court's decisions. For example, the Court acknowledged that *In re Griffiths*, 413 U. S. 717 (1973), involved an appellant who was eligible for citizenship, but who had not filed a declaration of intention to become a citizen, and had "no present intention of doing so." *Id.*, 718 n. 1. And, insofar as the record revealed, nothing precluded the appellees in *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), from applying for citizenship. *Id.*, at 650 (REHNQUIST, J., dissenting). MR. JUSTICE REHNQUIST argued in dissent there, just as he does here today, that strict scrutiny was inappropriate in those cases because there was nothing to indicate that the aliens' status "cannot be changed by their affirmative acts." *Id.*, at 657. Nonetheless, the Court applied strict scrutiny in the cases. We see no reason to depart from them now.

[12] The footnote reads in part:

"That the statutory classifications challenged here discriminate among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children."

assistance to only those who are or will become eligible to vote is tailored to the purpose of the assistance program, namely, the enhancement of the educational level of the electorate. Brief for Appellants 22–25. Both justifications are claimed to be related to New York's interest in the preservation of its "political community." See *Sugarman* v. *Dougall,* 413 U. S., at 642–643, 647–649; *Dunn* v. *Blumstein,* 405 U. S. 330, 344 (1972).

The first purpose offered by the appellants, directed to what they describe as some "degree of national affinity," Brief for Appellants 18, however, is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere. U. S. Const., Art I, § 8, cl. 4. See *Mathews* v. *Diaz,* 426 U. S. 67, 84–85 (1976); *Graham* v. *Richardson,* 403 U. S., at 376–380; *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410, 419 (1948). But even if we accept, *arguendo,* the validity of the proffered justifications, we find them inadequate to support the ban.[13]

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[13] In support of the justifications offered for § 661 (3), appellants refer to a statement of purpose in legislation adopted in 1961 that substantially amended the State's aid programs. 1961 N. Y. Laws, c. 389, § 1. But the statement speaks only in general terms of encouraging education so as "to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations," § 1 (a), and of developing fully a "reservoir of talent and future leadership," § 1 (c)—purposes that would be served by extending aid to resident aliens as well as to citizens—and hardly supports appellants in clear and unambiguous terms. Moreover, the statutory discrimination against aliens with regard to certain Regents scholarships dates from long before. 1920 N. Y. Laws, c. 502, § 1. And the very 1961 legislation on which appellants rely abolished the statutory disqualification of aliens in favor of an administrative rule. 1961 N. Y. Laws, c. 391, §§ 2 and 18. See also §§ 7, 14, and 19. In fact, it appears that the state administrators of the aid programs did not find the purposes in the 1961 legislation that appellants urge, since between 1961 and 1969, when the precursor of § 661 (3) was

In *Sugarman* v. *Dougall,* 413 U. S., at 642, the Court recognized that the State's interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community' " might justify some consideration of alienage. But as *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters,[14] or of "elective or important nonelective" officials "who participate directly in the formulation, execution, or review of broad public policy." *Id.,* at 647. See *id.,* at 648. *In re Griffiths,* decided the same day, reflects the narrowness of the exception. In that case, despite a recognition of the vital public and political role of attorneys, the Court found invalid a state-court rule limiting the practice of law to citizens. 413 U. S., at 729.

Certainly, the justifications for § 661 (3) offered by appellants sweep far beyond the confines of the exception defined in *Sugarman.* If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified. The exception would swallow the rule. *Sugarman* clearly does not tolerate that result. Nor does the claimed interest in educating the electorate provide a justification; although such education is a laudable objective, it hardly would be frustrated by including resident aliens, as well as citizens, in the State's assistance programs.[15]

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adopted, resident aliens were allowed to receive tuition assistance awards. Brief for Appellants 15.

[14] See also *Perkins* v. *Smith,* 370 F. Supp. 134 (Md. 1974), summarily aff'd, 426 U. S. 913 (1976).

[15] Although the record does not reveal the number of aliens who are disqualified by § 661 (3), there is a suggestion that the number may be exceedingly small. See Brief for Appellee Mauclet 9 n. 4. Indeed, when asked about the cost of including aliens, appellants conceded at oral argument that "we may not be speaking about very much." Tr. of Oral

Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis. And although an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community. The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others.

Since we hold that the challenged statute violates the Fourteenth Amendment's equal protection guarantee, we need not reach appellees' claim that it also intrudes upon Congress' comprehensive authority over immigration and naturalization. See *Graham* v. *Richardson,* 403 U. S., at 378; *Truax* v. *Raich,* 239 U. S. 33, 42 (1915).

The judgments of the District Court are affirmed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, dissenting.

I join MR. JUSTICE REHNQUIST's and MR. JUSTICE POWELL's dissenting opinions, but I add this comment to point out yet other significant differences between this case and our prior cases involving alienage-based classifications.

With one exception, the prior cases upon which the Court purports to rely involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their ability to earn a livelihood. See, *e. g., Examining Board* v. *Flores de Otero,* 426 U. S. 572 (1976) (Puerto

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Arg. 6. Thus, it appears that the inclusion of resident aliens in the assistance programs will have an insubstantial impact on the cost of the programs. And, in any event, the suggestion that the State can favor citizens over aliens in the distribution of benefits was largely rejected in *Graham* v. *Richardson, supra.*

Rico statute permitted only United States citizens to practice as private civil engineers); *In re Griffiths,* 413 U. S. 717 (1973) (membership in state bar limited to citizens); *Sugarman* v. *Dougall,* 413 U. S. 634 (1973) (participation in State's competitive civil service limited to citizens); *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948) (state statute denied fishing license to persons "ineligible to citizenship"); *Truax* v. *Raich,* 239 U. S. 33 (1915) (state constitution required employers to hire "not less than eighty (80) per cent qualified electors or native-born citizens of the United States"); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (city ordinance discriminatorily enforced against aliens so as to prevent Chinese subjects, but not United States citizens, from operating laundries within the city). The only other case striking down a classification on the basis of alienage, *Graham* v. *Richardson,* 403 U. S. 365 (1971), involved the denial of *welfare* benefits essential to sustain life for aliens, while needy citizens were given such benefits. The Court has noted elsewhere the crucial role which such benefits play in providing the poor with "means to obtain essential food, clothing, housing, and medical care." *Goldberg* v. *Kelly,* 397 U. S. 254, 264 (1970) (footnote omitted).

In this case the State is not seeking to deprive aliens of the essential means of economic survival. Rather, pursuant to its broad power to regulate its education system, the State has chosen to provide some types of individuals—those it considers most likely to provide a long-range return to the local and national community—certain added benefits to facilitate participation in its system of higher education. The State is certainly not preventing aliens from obtaining an education, and indeed it is clear that appellees may attend New York colleges and universities on an equal footing with citizens. However, beyond that, the State has provided certain economic incentives to its own citizens to induce them to pursue higher studies, which in the long run will be a benefit to the

State. The State has not deemed such incentives as necessary or proper as to those aliens who are unwilling to declare their commitment to the community in which they reside by declaring their intent to acquire citizenship. Such simple declaration is all that the statute requires.

In my view, the Constitution of the United States allows States broad latitude in carrying out such programs. Where a *fundamental* personal interest is not at stake—and higher education is hardly that—the State must be free to exercise its largesse in any reasonable manner. New York, like most other States, does not have unlimited funds to provide its residents with higher education services; it is equally clear that the State has every interest in assuring that those to whom it gives special help in obtaining an education have or declare some attachment indicating their intent to remain within the State to practice their special skills. It has no interest in providing these benefits to transients from another country who are not willing to become citizens. The line drawn by the State is not a perfect one—and few lines can be—but it does provide a rational means to further the State's legitimate objectives. Resident individuals who are citizens, or who declare themselves committed to the idea of becoming American citizens, are more likely to remain in the State of New York after their graduation than are aliens whose ties to their country of origin are so strong that they decline to sever them in order to secure these valuable benefits.

I therefore conclude that the State of New York has not acted impermissibly in refusing to dispense its limited tax revenues to give assistance to aliens who by clear implication reject the opportunity to become citizens of the United States. Beyond the specific case, I am concerned that we not obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.

If a State desires—and has the means—nothing in the United States Constitution prevents it from voluntarily giving

scholarships to aliens, even to those who reject United States citizenships. But nothing heretofore found in the Constitution *compels* a State to apply its finite resources to higher education of aliens who have demonstrated no permanent attachment to the United States and who refuse to apply for citizenship.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE REHNQUIST's dissent, that New York's scheme of financial assistance to higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

> "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 28 (1973).

Our prior cases dealing with discrimination against all aliens as a class, *In re Griffiths,* 413 U. S. 717 (1973); *Sugarman* v. *Dougall,* 413 U. S. 634 (1973), and against subclasses of aliens without regard to ability or willingness to acquire citizenship, *Graham* v. *Richardson,* 403 U. S. 365 (1971), do not justify the application of strict judicial scrutiny to the legislative scheme before us today.*

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*The Court's reliance on the personal status of the appellant in *In re Griffiths* is misplaced. Our observation that Griffiths herself was eligible for citizenship but did not intend to apply, 413 U. S., at 718 n. 1, was hardly more than a factual "aside." The challenge in that case was to

I also agree with MR. JUSTICE REHNQUIST that the line New York has drawn in extending scholarship assistance in higher education is a rational one. I see no basis for the Court's statement that offering incentives to resident alien scholars to become naturalized "is not a permissible [purpose] for a State." *Ante,* at 10. In my view, the States have a substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders. As the New York Legislature declared in enacting a predecessor to the present financial assistance scheme:

> "The future progress of the state and nation and the general welfare of the people depend upon the individual development of the maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations." 1961 N. Y. Laws, c. 389, § 1 (a).

As long as its program neither discriminates "on the basis of alienage," *Graham* v. *Richardson, supra,* at 372, nor conflicts with federal immigration and naturalization policy, it is my view that New York legitimately may reserve its scholarship assistance to citizens, and to those resident aliens who

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a Connecticut Rule of Court that flatly required an applicant for admission to the bar to be a citizen of the United States. Neither eligibility for naturalization nor intent to apply was relevant under the Connecticut scheme. There was no question that Griffiths had standing to challenge a classification against all aliens, just as Mauclet and Rabinovitch unquestionably have standing to challenge the classification before us today. Yet because the scheme in *In re Griffiths* "totally exclud[ed] aliens from the practice of law," *id.,* at 719, we had no occasion in that case to consider whether a more narrowly tailored rule would be permissible. Had we done so, we would have confronted the additional question, not presented here, whether the exclusion improperly burdened the right to follow a chosen occupation. Cf. *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948); *Truax* v. *Raich,* 239 U. S. 33 (1915).

declare their intention to become citizens, of both the Nation and the State.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I am troubled by the somewhat mechanical application of the Court's equal protection jurisprudence to this case. I think one can accept the premise of *Graham* v. *Richardson,* 403 U. S. 365 (1971); *In re Griffiths,* 413 U. S. 717 (1973); and *Sugarman* v. *Dougall,* 413 U. S. 634 (1973), and therefore agree with the Court that classifications based on alienage are inherently suspect, but nonetheless feel that this case is wrongly decided. In those cases, the reason postulated for the elevation of alienage classifications to strict scrutiny was directly related to the express exclusion of aliens found in the State's classification. Here, however, we have a significantly different case. The State's classification trenches not at all upon the sole reason underlying the strict scrutiny afforded alienage classifications by this Court.

Graham v. *Richardson* is, of course, the starting point of analysis, as it was the first case to explicitly conclude that alienage classifications, like those based on race or nationality, would be subject to strict scrutiny when challenged under the Equal Protection Clause of the Fourteenth Amendment. *Graham* reasoned, 403 U. S., at 372:

> "Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate."

It is clear, therefore, that the reason alienage classifications receive heightened judicial scrutiny is because aliens, *qua* aliens, are a "discrete and insular" minority. See also *Sugarman* v. *Dougall, supra,* at 642. Presumptively, such a minority group, like blacks or Orientals, is one identifiable by

a status over which the members are powerless. Cf. *Jimenez* v. *Weinberger*, 417 U. S. 628, 631 (1974). And it is no doubt true that all aliens are, at some time, members of a discrete and insular minority in that they are identified by a status which they are powerless to change until eligible to become citizens of this country. Since, as the Court notes, federal law generally requires five years' residence by aliens lawfully admitted for permanent residence as a prerequisite to the seeking of naturalization, 8 U. S. C. § 1427 (a), aliens residing in this country necessarily are subject to a period of time during which they *must* bear this status of an "alien." [1] If a classification, therefore, places aliens in one category, and citizens in another, then, thereafter, every entering resident alien must pass through a period of time in this country during which he falls into the one category and

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[1] Title 8 U. S. C. § 1427 (a) allows application for naturalization upon the following conditions:

"No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 1430 (a) establishes a three-year residency requirement for aliens whose spouse is a citizen of the United States. See also 8 U. S. C. § 1434. Sections 1430 (b), (c), and (d) establish special categories where no prior residence in this country is required. They constitute *de minimis* exceptions, and may be properly ignored in considering alienage classifications.

not the other. Nothing except time can remove him from his identified status as an "alien" and from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control.

The prior alienage cases from this Court, utilizing strict scrutiny to strike down state statutes, all dealt with statutes where the line drawn necessarily suffered that infirmity; in all of those cases, the line drawn necessarily left incoming resident aliens afflicted with the disability for some period of time. Nothing except the passage of time could remove the alien from the classification and the disability. The statutes, therefore, involved the precise infirmity which led this Court to accord aliens "suspect classification" treatment: The line drawn by the legislature was drawn on the basis of a status, albeit temporary, that the included members were powerless to change.[2]

While the majority seems to view *Graham* v. *Richardson* as somehow different, *ante,* at 8–9, it is clear that the statute involved in that case suffered from the same weakness. By making aliens, but not citizens, await a durational residency requirement, aliens coming into the State were, because of their status, treated differently from citizens for a period of time, and during that period of time, the incoming aliens were

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[2] In *In re Griffiths,* 413 U. S. 717, 718 n. 1 (1973), the Court noted:

"[The plaintiff] is eligible for naturalization by reason of her marriage to a citizen of the United States and residence in the United States for more than three years, 8 U. S. C. § 1430 (a). She has not filed a declaration of intention to become a citizen of the United States, 8 U. S. C. § 1445 (f), and has no present intention of doing so."

The eligibility of plaintiff in that case, however, was not built into the classification scheme. The state-court rule prevented any alien from becoming an attorney, and of course reached those resident aliens who, having not satisfied the jurisdictional prerequisites to citizenship, could not change their disfavored status.

powerless to remove themselves from that disability (unless they could become citizens). There was nothing else the alien could do to avoid the period of discriminatory treatment.

In all of these cases, then, the classification made by the State conformed to the reason underlying the strict scrutiny this Court applied. But it would seem to follow that if a state statute classifies in a way which necessarily avoids the underlying reason for the strict scrutiny, the statute should be viewed in a different light. This is such a case. Under this New York statute, a resident alien has, at all times, the power to remove himself from one classification and to place himself in the other, for, at all times, he may become entitled to benefits either by becoming a citizen *or* by declaring his intention to become a citizen as soon as possible.[3] Here, unlike the other cases, the resident alien is not a member of a discrete and insular minority for purposes of the classification, even during the period that he must remain an alien, because he has at all times the means to remove himself immediately from the disfavored classification. There is no temporal disability since the resident alien may declare an intent, thereby at once removing himself from the disabled class, even if the intent cannot come to fruition for some period of time. Unlike the situation in *Griffiths, Sugarman,* and *Graham,* there exists no period of disability, defined by status, from which the alien cannot escape. The alien is not, there-

[3] As the Court notes, the state statutory scheme is challengeable at all only by resident aliens. *Ante,* at 4. While other aliens are also disqualified by the state statute in question, they are also decisively disqualified by federal law from establishing a permanent residence in this country, see 8 U. S. C. § 1101 (a)(15)(F)(i); 22 CFR § 41.45 (1976); cf. 45 CFR § 177.2 (a) (1976). Since there is no question of the plenary power of the *Federal* Government in this area, see *Mathews* v. *Diaz,* 426 U. S. 67 (1976), the Court is quite properly concerned only with the category of resident aliens, those "lawfully admitted for permanent residence." 8 U. S. C. § 1101 (a)(20). See generally *In re Griffiths, supra,* at 719–722; *Graham* v. *Richardson,* 403 U. S. 365, 371 (1971).

fore, for any period of time, forced into a position as a discrete and insular minority.[4]

Since the New York statute under challenge in this case does *not* create a discrete and insular minority by placing an inevitable disability based on status, the Court's heightened judicial scrutiny is unwarranted. The reason for the more rigorous constitutional test having ceased, the applicability of the test should likewise cease. Applying the rational-basis test, it is obvious that the statutory scheme in question should be sustained. The funds that New York wishes to spend on its higher education assistance programs are, of course, limited. New York's choice to distribute these limited funds to resident citizens and to resident aliens who intend to become citizens, while denying them to aliens who have no intention of becoming citizens, is a natural legislative judgment. By limiting the available pool of recipients to resident citizens and aliens who will become citizens, New York is able to give such recipients a larger payment from the same quantum of funds than would be the case were other aliens recipients as well. A State is entitled to decide, in distributing benefits, that resident citizens, whether or not they will remain residents of New York, are more likely to contribute to the future well-being of the State, either directly (by settling there) or indirectly (by living in some other State, but maintaining economic or social ties with New York or by improving the general well-being of the United States) than are aliens who are unwilling to renounce citizenship in a foreign country, and who may be thought more likely to return there. New

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[4] The alien, of course, must "give up" (or announce that he intends to give up) his foreign citizenship. See 8 U. S. C. § 1448 (a). In this sense, he must do something that members of the other category need not do in order to be eligible for the "favored" treatment. But, here, what is given up is the factor which distinguishes between the categories. I cannot view this as an impermissible burden which would convert this case into a case like *Griffiths* or *Sugarman*.

York may also decide, in providing student loans pursuant to N. Y. Educ. Law §§ 680–684 (McKinney Supp. 1976), that it will be easier to collect repayment sums from citizens than from aliens, should these loans be defaulted upon. These are permissible legislative judgments. Cf. *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961); *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471 (1977). When we deal, as we do here, with questions of economic legislation, our deference to the actions of a State is extremely great. *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970). New York's decision to deny educational monetary benefits to aliens who do not wish to become citizens of this country, while extending such benefits to citizens and other resident aliens, is rational, and should be sustained.

Syllabus

LEE *v.* UNITED STATES

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

No. 76–5187. Argued April 25, 1977—Decided June 13, 1977

After the prosecutor's opening statement in petitioner's bench trial for theft in violation of the Assimilative Crimes Act and the applicable Indiana statute, petitioner's counsel moved to dismiss the information on the ground that it did not allege specific intent as required by the Indiana statute. The court tentatively denied the motion subject to further study, whereupon petitioner's counsel outlined the defense and did not object to going forward with the trial. At the close of the evidence the court, though observing that petitioner's guilt had been proved beyond any reasonable doubt, granted petitioner's motion to dismiss. Thereafter, petitioner was indicted for the same crime and convicted. The Court of Appeals affirmed, rejecting petitioner's claim that the Double Jeopardy Clause barred the second trial. Petitioner contends that (1) he should never have had to undergo the first trial because the court was made aware of the defective information before jeopardy had attached, and (2) once the court had determined to hear evidence despite the defective charge, he was entitled to have the trial proceed to a formal finding of guilt or innocence. *Held:* Petitioner's retrial after dismissal of the defective information at his request did not violate the Double Jeopardy Clause. Pp. 27–34.

(a) The proceedings against petitioner did not terminate in his favor, the dismissal clearly not being predicated on any judgment that he could never be prosecuted for or convicted of the theft. The order entered by the District Court was functionally indistinguishable from a declaration of mistrial, which contemplates reprosecution of the defendant, see *United States* v. *Jorn,* 400 U. S. 470, 476. Thus any distinction between dismissals and mistrials has no significance in the circumstances here presented, and established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial fully apply in this case. *United States* v. *Jenkins,* 420 U. S. 358, distinguished. Pp. 28–31.

(b) Where a defendant, by requesting a mistrial exercises his choice in favor of terminating the trial the Double Jeopardy Clause will not bar reprosecution absent provocative or bad-faith conduct by the judge or prosecutor. *United States* v. *Dinitz,* 424 U. S. 600, 611. Here, as in *Dinitz,* the proceedings were terminated after jeopardy had attached at

the defendant's request and with his consent, and there was no judicial or prosecutorial error that was intended to provoke the motion or that was otherwise motivated by bad faith. The prosecutor's failure properly to draft the information was at most negligent, and the District Court's failure to postpone the taking of evidence until it could fully consider petitioner's motion was entirely reasonable in light of the last-minute timing of the motion and defense counsel's failure to request a continuance or otherwise stress the importance to petitioner of not being placed in jeopardy on a defective charge. Pp. 33–34.

539 F. 2d 612, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., *post*, p. 34, and REHNQUIST, J., *post*, p. 36, filed concurring opinions. MARSHALL, J., filed a dissenting opinion, *post*, p. 37.

Joseph P. Bauer, by appointment of the Court, 430 U. S. 928, argued the cause for petitioner. With him on the briefs was *Conrad Kellenberg*. [REPORTER'S NOTE: Messrs. *Bauer* and *Kellenberg* represented petitioner before this Court only. Cf. *post*, at 34, 37, and 38.]

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti*, and *Jerome M. Feit*.

MR. JUSTICE POWELL delivered the opinion of the Court.

At the first trial in this case the District Court, having heard the evidence, granted petitioner's motion to dismiss the information for failure to provide adequate notice of the crime charged. Petitioner was retried and convicted. The question is whether the second trial violated the Double Jeopardy Clause.

I

On December 21, 1973, petitioner Phillip Jerome Lee stole two billfolds from the blind operator of a newsstand and candy concession in the lobby of the United States Post Office in Fort Wayne, Ind. A security guard saw Lee take the

billfolds and apprehended him as he tried to escape. In an information filed on February 6, 1974, in the United States District Court for the Northern District of Indiana, the Government charged Lee with the crime of theft, in violation of the Assimilative Crimes Act, 18 U. S. C. § 13, and the applicable Indiana statute, Ind. Code Ann. § 10–3030 (1971).[1] Although the defect did not come to light before trial, the allegations of the information were incomplete. The Indiana statute requires proof that the theft be committed knowingly and with intent to deprive the victim of his property. The information made no mention of knowledge or intent and charged only that Lee "did take and steal" the billfolds in violation of the statute. App. 4.

Some two months before trial, Lee's lawyer withdrew and another was appointed to represent him. Lee waived his right to a jury trial and on July 16, 1974, a bench trial began as scheduled. After the prosecutor's opening statement, Lee's new lawyer moved to dismiss the information. The court remarked that the timing of the motion would make full consideration difficult:

> "Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them. So I will hear you, but you have that problem." *Id.*, at 8.

Counsel then called the court's attention to the lack of any allegation of knowledge or intent in the information. Referring the court to the Indiana case of *Miller* v. *State,* 250 Ind. 338, 236 N. E. 2d 173 (1968), he argued that if an information failed to charge the specific intent required by § 10–

[1] The statute provides in pertinent part that a person commits theft when he "knowingly . . . obtains or exerts unauthorized control over property of the owner . . . and . . . intends to deprive the owner of the use or benefit of the property . . . ." This provision has been repealed effective July 1, 1977.

3030, "then the Information must be dismissed." App. 9. The court tentatively denied the motion:

> "Well, since I have had no opportunity to study this at all, I will deny the motion at this time, but at my first opportunity I will check your citation and give consideration as appears to be warranted.
>
> "Is there anything further by way of opening statement?" *Ibid.*

Defense counsel proceeded to outline Lee's defense. He offered no objection to going forward with the trial subject to the court's further study of his motion to dismiss.

The trial lasted less than two hours. After the Government had presented its case, consisting of the testimony of the security guard and the victim, the court recessed for 15 minutes. After the recess Lee moved for a judgment of acquittal on the ground that the prosecution had failed to establish the required intent to deprive the victim of his property. Taking care to distinguish this motion from the earlier motion to dismiss on which it had "reserved the right to do some research," the court found sufficient evidence of intent to withstand any motion "directed to the Government's proof." *Id.*, at 12–13.

The defense then rested without presenting any evidence, and the court returned to the defense motions, again distinguishing between them. Speaking to defense counsel, the court said:

> "Your motion addressed to the Government's proof borders on being frivolous. Your client has been proven [*sic*] beyond any reasonable doubt in the world, there is no question about his guilt; none whatsoever." *Id.*, at 13.

The court nonetheless found it necessary to grant the motion to dismiss because of the failure of the information to charge either knowledge or intent:

> "The Federal law cases are legion that the sufficiency of the charges is dependent upon its containing the allega-

tions of all of the elements, and all of the elements here are established by the state statute.

"As much as I dislike doing so, I have no alternative but to grant your original motion of dismissal and the charge is dismissed." *Id.,* at 14.[2]

On September 25, 1974, Lee again was charged with the theft, this time in an indictment alleging all of the elements of the assimilated Indiana crime. On substantially the same evidence as had been presented at the first trial, he was convicted. On appeal, the Court of Appeals for the Seventh Circuit affirmed, rejecting Lee's claim that the second trial was barred by the Double Jeopardy Clause. 539 F. 2d 612 (1976). We granted certiorari to consider the double jeopardy issue. 429 U. S. 1037 (1977).

II

In urging that his second trial was barred by the Double Jeopardy Clause, petitioner directs his principal arguments to the conduct of the first proceeding. He contends (i) that he should never have had to undergo the first trial because the court was made aware of the defective information before jeopardy had attached;[3] and (ii) that once the court had determined to hear evidence despite the defective charge, he was entitled to have the trial proceed to a formal finding of guilt or innocence. The Government responds that petitioner

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[2] Federal Rule Crim. Proc. 7 (e) provides that a district court "may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

At no time in the course of the first trial did either the defense or the prosecution raise the possibility that the information might be amended under this provision.

[3] As this was a bench trial, jeopardy did not attach until the court began to hear evidence. *Serfass* v. *United States,* 420 U. S. 377, 388 (1975).

had only himself to blame in both respects. By the last-minute timing of his motion to dismiss, he virtually assured the attachment of jeopardy; and by failing to withdraw the motion after jeopardy had attached, he virtually invited the court to interrupt the proceedings before formalizing a finding on the merits.[4] We think that the Government has the better of the argument on both points under the principles explained in our decision in *United States* v. *Dinitz,* 424 U. S. 600 (1976).

A

The arguments of both sides proceed from the premise that the result in this case would be no different had the District Court characterized its termination of the first trial as a declaration of mistrial rather than a dismissal of the information.[5] We too begin with this premise, although we think it requires qualification in light of *United States* v. *Jenkins,* 420 U. S. 358 (1975).

In *Jenkins* the District Court, having heard the evidence in a bench trial, dismissed an indictment charging refusal to submit to induction into the Armed Services. Under the law of the Second Circuit as it stood at the time of the offense, the

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[4] Both sides assume that the District Court's statements, made to justify denial of Lee's motion for judgment of acquittal, that he had been "proven [*sic*] beyond any reasonable doubt in the world" and that there was "no question about his guilt; none whatsoever," *supra,* at 26, do not amount to a general finding of guilt. We agree that the court's comments, in the context in which they were made, cannot be viewed fairly as a general finding of guilt analogous to a jury verdict. See n. 7, *infra.*

[5] In a single footnote to his main brief, petitioner appears to rely on a distinction "between an action terminated by mistrial and one terminated by dismissal." Brief for Petitioner 18 n. 25. But in the text of that brief petitioner consistently assumes that the permissibility of retrial is controlled by the same considerations in either case. *Id.,* at 14–25. And at oral argument, counsel conceded that "whether [the termination of the first trial] is characterized as a mis-trial or characterized as a dismissal, the result in this case must be the same." Tr. of Oral Arg. 17.

induction order was improper and the defendant could not be convicted, although a subsequent decision of this Court had held otherwise. Reasoning that retroactive application of the intervening decision would be unfair, the District Court held that it could not "permit the criminal prosecution of the defendant . . . without seriously eroding fundamental and basic equitable principles of law." 349 F. Supp. 1068, 1073 (EDNY 1972), quoted at 420 U. S., at 362.[6] On this basis, and without entering any general finding of guilt or innocence, the District Court dismissed the indictment and discharged the defendant.

The issue before this Court was whether a Government appeal from the District Court's order would violate the Double Jeopardy Clause. Because of the absence of any general finding of guilt, it was clear that if the Government prevailed on the merits of its appeal, further trial proceedings would be needed to resolve "factual issues going to the elements of the offense charged." *Id.*, at 370.[7] We held that such proceedings would violate the double jeopardy guarantee: "The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor." *Ibid.* In resting our decision on this ground, we recognized that it was "of critical importance" that the proceedings in the trial court had

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[6] The findings and conclusions accompanying the District Court's order left it unclear whether the court had ruled only that the intervening decision was not retroactive or had found, in addition, that the defendant's reliance on prior law had deprived him of the required criminal intent. See 420 U. S., at 362 n. 3, and 367–368.

[7] In *United States* v. *Wilson*, 420 U. S. 332 (1975), we held that the Double Jeopardy Clause would permit a Government appeal from a post-verdict ruling because the only result of reversal would be reinstatement of the verdict. But in *Jenkins* the District Court had not reached a general finding of guilt that could be reinstated if the Government prevailed on the merits of its appeal. We noted that "[e]ven if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings." 420 U. S., at 370.

terminated "in the defendant's favor" rather than in a mistrial. *Id.*, at 365 n. 7.[8]

The distinction drawn by *Jenkins* does not turn on whether the District Court labels its action a "dismissal" or a "declaration of mistrial." The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, see *United States* v. *Jorn*, 400 U. S. 470, 476 (1971) (plurality opinion), while a dismissal may or may not do so. Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, *Jenkins* establishes that further prosecution is barred by the Double Jeopardy Clause.

In the present case, the proceedings against Lee cannot be said to have terminated in his favor. The dismissal clearly was not predicated on any judgment that Lee could never be prosecuted for or convicted of the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be little doubt that the court granted the motion to dismiss in

[8] The Court of Appeals had held that the order dismissing the indictment was an acquittal since the District Court had relied on facts developed at trial and had concluded that the statute should not be applied to Jenkins "as a matter of fact." 490 F. 2d 868, 878 (CA2 1973), quoted at 420 U. S., at 364. Our disposition made it unnecessary to address the validity of this reasoning. We recently made it clear that a trial court's ruling in favor of the defendant is an acquittal only if it "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977). In this case, petitioner concedes, as he must, that the District Court's termination of the first trial was not an acquittal.

this case in contemplation of just such a second prosecution. In short, the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.[9]

We conclude that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

B

When the District Court terminated the first trial in this case it did not act *sua sponte* but in response to a motion by defense counsel. In *United States* v. *Dinitz,* we examined the permissibility of retrial in an analogous situation where the trial court had granted a defense motion for mistrial.

In that case, after jeopardy had attached but well before verdict, the trial judge had excluded one of the defendant's lawyers from the courtroom for repeatedly disregarding his instructions. The defendant's remaining lawyer moved for a mistrial and the court granted the motion. The defendant was indicted again on the same charge, his double jeopardy claims were rejected, and he was convicted. When the double jeopardy issue reached this Court, we held that the defendant's second trial on the same charge did not violate the Fifth Amendment.

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[9] In *Illinois* v. *Somerville,* 410 U. S. 458 (1973), a state prosecutor made precisely the same mistake as was made in this case in drafting an indictment for theft. Discovery of the defect in the course of trial led the trial court to declare a mistrial over the defendant's objection. We held that termination of the trial was dictated by "manifest necessity" under the standard first articulated in *United States* v. *Perez,* 9 Wheat. 579, 580 (1824). There is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a "dismissal" rather than a mistrial. In *Jenkins* we referred specifically to *Somerville* in distinguishing proceedings that end in mistrials from those that end "in the defendant's favor." 420 U. S., at 365 n. 7.

Writing for the Court, MR. JUSTICE STEWART reiterated the rule that " 'where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.' " 424 U. S., at 607, quoting *United States* v. *Jorn, supra,* at 485 (plurality opinion). Recognizing that a prejudicial error committed by court or prosecutor generally presents the defendant with a "Hobson's choice," MR. JUSTICE STEWART nevertheless stressed the importance of preserving the defendant's "primary control over the course to be followed in the event of such error." 424 U. S., at 609.

> "Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' *United States* v. *Jorn, supra,* at 484. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." *Id.,* at 608.

Where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy

Clause generally would not stand in the way of reprosecution. Only if the underlying error was "motivated by bad faith or undertaken to harass or prejudice," *id.*, at 611, would there be any barrier to retrial:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States* v. *Jorn, supra,* at 485, threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum* v. *United States,* 372 U. S. [734, 736 (1963)]. . . ." *Ibid.*

It remains only to apply these principles to the present case.

C

In this case, as in *Dinitz,* the proceedings were terminated at the defendant's request and with his consent. Although petitioner's motion to dismiss the information was initially denied in the course of opening arguments just before the attachment of jeopardy, the court's remarks left little doubt that the denial was subject to further consideration at an available opportunity in the proceedings—a fact of which the court reminded counsel after the close of the prosecution's evidence. Counsel for petitioner made no effort to withdraw the motion, either after the initial denial or after the court's reminder that the motion was still under consideration. And counsel offered no objection when the court, having expressed its views on petitioner's guilt, decided to terminate the proceedings without having entered any formal finding on the general issue.

It follows under *Dinitz* that there was no double jeopardy barrier to petitioner's retrial unless the judicial or prosecu-

torial error that prompted petitioner's motion was "intended to provoke" the motion or was otherwise "motivated by bad faith or undertaken to harass or prejudice" petitioner. *Supra,* at 33. Here, two underlying errors are alleged: the prosecutor's failure to draft the information properly and the court's denial of the motion to dismiss prior to the attachment of jeopardy. Neither error—even assuming the court's action could be so characterized—was the product of the kind of overreaching outlined in *Dinitz.* The drafting error was at most an act of negligence, as prejudicial to the Government as to the defendant. And the court's failure to postpone the taking of evidence until it could give full consideration to the defendant's motion, far from evidencing bad faith, was entirely reasonable in light of the last-minute timing of the motion and the failure of counsel to request a continuance or otherwise impress upon the court the importance to petitioner of not being placed in jeopardy on a defective charge.[10]

We hold that petitioner's retrial after dismissal of the defective information at his request did not violate the Double Jeopardy Clause.

Affirmed.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. In so doing, I want to make plain that I read the opinion as signaling no retreat from a cardinal principle of double jeopardy law: A criminal defendant possesses a "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter,* 336 U. S. 684, 689 (1949), and the trial judge is obligated to take reasonable action in protection of this right, *United States* v. *Jorn,* 400 U. S. 470, 485–486 (1971) (plurality opinion). In the present case I agree with the Court that the conduct of the prosecutor

[10] What has been said is sufficient to dispose of petitioner's further claim that his retrial violated the Due Process Clause of the Fifth Amendment. Cf. *Palko* v. *Connecticut,* 302 U. S. 319, 328 (1937).

did not constitute unfair overreaching, and the conduct of the District Court was "entirely reasonable" in proceeding with the trial and ruling on petitioner's motion after further study. Although jeopardy had not officially attached, the defendant's motion to dismiss the information appeared so late in the day—during the opening statements—as virtually to guarantee that the trial judge would act as he did. This is especially true in the case of a challenge to an information charging an assimilated crime, for prudence might well counsel a federal judge's delaying any ruling pending further study. Certainly in this case the District Court cannot be faulted for failing to foresee that defendant's legal contention would be so easily resolved. While a continuance of the trial would have been a possibility if sought by petitioner or even on the court's own motion, I agree that the trial judge performed reasonably in not *sua sponte* stopping a trial in the middle of the opening statements and before any evidence was taken.

I emphasize, however, that an entirely different case would be presented if the petitioner had afforded the trial judge ample opportunity to rule on his motion prior to trial, and the court, in failing to take advantage of this opportunity, permitted the attachment of jeopardy before ordering the dismissal of the information. In such a circumstance, the court's action or inaction would effectively deprive petitioner of his "valued right" to receive a factual determination from the first empaneled factfinder and would subject a defendant to the "embarrassment, expense and ordeal" of a needless trial, *Green* v. *United States,* 355 U. S. 184, 187 (1957). Even if the defendant renews his motion at trial, it would not be accurate in such a situation to argue that the defense has made the choice to forgo the right of presenting its case to the first factfinder in order to attain a beneficial legal ruling. *United States* v. *Dinitz,* 424 U. S. 600 (1976); *United States* v. *Jorn, supra,* at 485. On the contrary, the defendant placed in this predicament by the trial judge would have done

everything in his power to receive a fair adjudication of his legal claims without compromising his right to proceed with the first factfinder. Honoring his double jeopardy claim thus not only is in keeping with the policies and interests served by the Clause, but also would further the cause of efficient judicial administration by encouraging defendants to present, and judges to rule, on legal claims prior to the clamor and heat of trial.

MR. JUSTICE REHNQUIST, concurring.

When two Terms ago the Court decided *Jenkins* v. *United States,* 420 U. S. 358 (1975), and *United States* v. *Wilson,* 420 U. S. 332 (1975), I had thought that a precedential foundation had been laid for double jeopardy analysis which, though perhaps somewhat oversimplified, would at least afford all of the many courts in the country which must decide such questions explicit guidance as to what we deemed the Constitution to require. I thought that dismissals (as opposed to mistrials) if they occurred at a stage of the proceeding after which jeopardy had attached, but prior to the factfinder's conclusion as to guilt or innocence, were final so far as the accused defendant was concerned and could not be appealed by the Government because retrial was barred by double jeopardy. This made the issue of double jeopardy turn very largely on temporal considerations—if the Court granted an order of dismissal during the factfinding stage of the proceedings, the defendant could not be reprosecuted, but if the dismissal came later, he could. I had thought that *United States* v. *Perez,* 9 Wheat. 579 (1824), and *Illinois* v. *Somerville,* 410 U. S. 458 (1973), offered a different basis for the treatment of mistrials, which by definition contemplate a second prosecution.

This "bright line" analysis was circumvented, however, by the Court's decision in *United States* v. *Martin Linen Supply Co.,* 430 U. S. 564 (1977), in which I did not take part.

There the Court held that even though the judgment of acquittal by the court (which I would not treat differently from a judgment of dismissal) occurred *after* the factfinding portion of the proceedings had aborted in a mistrial, but *before* the attachment of any jeopardy in a second trial, the second trial was nonetheless barred by double jeopardy.

In view of this development, I feel free to re-examine the assumptions I made when writing *Jenkins* and voting in *Wilson.* I think that the Court's opinion in the present case, though not completely in accord with those assumptions, is a well-articulated and historically defensible exposition of the Double Jeopardy Clause of the Bill of Rights. Since my assumptions did not at any rate survive *United States* v. *Martin Linen Supply Co., supra,* I join the Court's opinion.

MR. JUSTICE MARSHALL, dissenting.

It is apparent to me that this Court has today deliberately passed up an opportunity to exercise its supervisory power to prohibit rather than to condone fundamental errors in criminal procedure. At the close of its opinion, *ante,* at 34, the Court states the problem and its solution:

> "Here, two underlying errors are alleged: the prosecutor's failure to draft the information properly and the court's denial of the motion to dismiss prior to the attachment of jeopardy. Neither error—even assuming the court's action could be so characterized—was the product of the kind of overreaching outlined in *Dinitz.* The drafting error was at most an act of negligence, as prejudicial to the Government as to the defendant. And the Court's failure to postpone the taking of evidence until it could give full consideration to the defendant's motion, far from evidencing bad faith, was entirely reasonable in light of the last-minute timing of the motion and the failure of counsel to request a continuance or otherwise

impress upon the court the importance to petitioner of not being placed in jeopardy on a defective charge."

Throughout today's opinion, my Brother POWELL puts all of the blame on petitioner's lawyer, none on the United States Attorney and, indeed, does not even mention him. *Sole* responsibility for the faulty information was in the office of the United States Attorney. Even when drafting errors are committed, they can be corrected before judgment, Fed. Rule Crim. Proc. 7 (e). In this case the United States Attorney never made any effort to defend the information and did not offer to amend and correct the error. Certainly most of the responsibility for the erroneous first trial rests with the Government. "[T]hough the attorney for the sovereign must prosecute with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *United States* v. *Agurs,* 427 U. S. 97, 110–111 (1976).[1]

When the motion to dismiss the information was made, the court ruled: "Well, since I have had no opportunity to study this at all, I will deny the motion at this time, but at my first opportunity I will check your citation and give consideration as appears to be warranted." App. 9. Less than two hours thereafter the court recessed for 15 minutes and dismissed the information with the following comment:

"As much as I dislike doing so, I have no alternative but to grant your original motion of dismissal and the charge is dismissed.

". . . I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course.

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[1] "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker* v. *Wingo,* 407 U. S. 514, 527 (1972) (footnotes omitted).

> You may carry that complete message back to your department." *Id.*, at 14.

Can there be any doubt that if the 15-minute recess had been taken at the beginning of the trial the motion would have been granted before jeopardy attached? [2]

Since petitioner was needlessly placed in jeopardy twice for the same offense over his objection, I would reverse his conviction.

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[2] Since this was a bench trial without a jury there was not even a need to call a "recess"; the Judge could have postponed the taking of testimony for 15 minutes.

UNITED STATES *v.* CALIFORNIA

ON JOINT MOTION FOR ENTRY OF A SECOND SUPPLEMENTAL DECREE

No. 5, Orig. Decided June 23, 1947, and May 17, 1965—Order and decree entered October 27, 1947—Supplemental decree entered January 31, 1966—Second supplemental decree entered June 13, 1977

Joint motion for the entry of a second supplemental decree is granted and such decree is entered.

Opinions reported: 332 U. S. 19, 381 U. S. 139; order and decree reported: 332 U. S. 804; supplemental decree reported: 382 U. S. 448.

The joint motion for entry of a second supplemental decree is granted.

SECOND SUPPLEMENTAL DECREE

For the purpose of identifying with greater particularity parts of the boundary line, as defined by the Supplemental Decree of January 31, 1966, 382 U. S. 448, between the submerged lands of the United States and the submerged lands of the State of California, it is ORDERED, ADJUDGED AND DECREED that this Court's Supplemental Decree of January 31, 1966, be, and the same is hereby, further supplemented as follows:

1. *Closing Lines Across Entrances to Bodies of Inland Waters*

a. The inland waters of the following bodies of water are enclosed by straight lines between the mean lower low-water lines at the seaward ends of the jetties located at their mouths:

1. Humboldt Bay
2. Port Hueneme
3. Santa Ana River
4. Agua Hedionda Lagoon

b. The inland waters of San Francisco Bay are those enclosed by a series of straight lines from the southwestern head of Point Bonita (37°48′56″N, 122°31′44″W); thence to the western edge of an unnamed island immediately to the south (37°48′55″N, 122°31′44.2″W); thence southward to the western edge of a second unnamed island (37°48′53″N, 122°31′44″W); thence southward to the western edge of a third unnamed island (37°46′57″N, 122°30′52″W); thence to a western head of Point Lobos (37°46′53″N, 122°30′49″W). The length of this closing line is 2.18 nautical miles.

c. The inland waters of Bodega-Tomales Bay are those enclosed by a straight line drawn from Bodega Head (38° 17′53.8″N, 123°03′25.3″W); thence to the western edge of an unnamed island northwest of Tomales Point (38° 14′28.4″N, 122°59′41.5″W); thence southward to Tomales Point (38°14′26.5″N, 122°59′39″W).

d. The closing lines delineated in the foregoing paragraph are part of the coastline of California. The foregoing is without prejudice to the right of either party to assert or deny that other closing lines are part of the coastline of California for purposes of establishing the Federal-State boundary line under the Submerged Lands Act, 67 Stat. 29, as amended.

2. *Artificial Extensions of the Coastline*

The mean lower low-water line along each of the following structures is part of the coastline of California for purposes of establishing the Federal-State boundary line under the Submerged Lands Act:

a. The Morro Bay breakwater
b. The Port San Luis breakwater
c. The Santa Barbara breakwater
d. The Ventura Marina breakwater
e. The Channel Islands Harbor breakwater

f. Three rubble groins at Point Mugu
g. The Santa Monica breakwater
h. The Venice Beach groin
i. The Marina del Rey breakwater
j. Three rubble groins along Dockweiler Beach
k. The Redondo Beach breakwater
l. Two harbor jetties at Newport Bay
m. The Dana Point breakwater
n. The Oceanside breakwater
o. Two harbor jetties at entrance to Mission Bay
p. The Zuniga jetty at San Diego (including the southern seaward end of this entire structure)

The foregoing is without prejudice to the right of either party to assert or deny that other artificial structures are part of the coastline of California for purposes of establishing the Federal-State boundary line under the Submerged Lands Act.

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

Per Curiam

NATIONAL SOCIALIST PARTY OF AMERICA ET AL. *v.* VILLAGE OF SKOKIE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 76–1786. Decided June 14, 1977

The Illinois Supreme Court denied a stay of the trial court's injunction prohibiting petitioners from marching, walking, or parading in the uniform of the National Socialist Party of America or otherwise displaying the swastika, and from distributing pamphlets or displaying materials inciting or promoting hatred against Jews or persons of any faith, ancestry, or race, and also denied leave for an expedited appeal. *Held:*

1. The Illinois Supreme Court's order is a final judgment for purposes of this Court's jurisdiction, since it finally determined the merits of petitioners' claim that the injunction will deprive them of First Amendment rights during the period of appellate review.

2. The State must allow a stay where procedural safeguards, including immediate appellate review, are not provided, and the Illinois Supreme Court's order denied this right.

Certiorari granted; reversed and remanded.

PER CURIAM.

On April 29, 1977, the Circuit Court of Cook County entered an injunction against petitioners. The injunction prohibited them from performing any of the following actions within the village of Skokie, Ill.: "[m]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion." The Illinois Appellate Court denied an application for stay pending appeal. Applicants then filed a petition for a stay in the Illinois Supreme Court, together with a request for

a direct expedited appeal to that court. The Illinois Supreme Court denied both the stay and leave for an expedited appeal. Applicants then filed an application for a stay with MR. JUSTICE STEVENS, as Circuit Justice, who referred the matter to the Court.

Treating the application as a petition for certiorari from the order of the Illinois Supreme Court, we grant certiorari and reverse the Illinois Supreme Court's denial of a stay. That order is a final judgment for purposes of our jurisdiction, since it involved a right "separable from, and collateral to" the merits, *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949). See *Abney* v. *United States,* 431 U. S. 651 (1977); cf. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 476–487 (1975). It finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete. If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, *Freedman* v. *Maryland,* 380 U. S. 51 (1965), including immediate appellate review, see *Nebraska Press Assn.* v. *Stuart,* 423 U. S. 1319, 1327 (1975) (BLACKMUN, J., in chambers). Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right.

Reversed and remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE WHITE would deny the stay.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

The Court treats an application filed here to stay a judgment of the Circuit Court of Cook County as a petition for certiorari to review the refusal of the Supreme Court of

Illinois to stay the injunction. It summarily reverses this refusal of a stay. I simply do not see how the refusal of the Supreme Court of Illinois to stay an injunction granted by an inferior court within the state system can be described as a "[f]inal judgmen[t] or decre[e] rendered by the highest court of a State in which a decision could be had," which is the limitation that Congress has imposed on our jurisdiction to review state-court judgments under 28 U. S. C. § 1257. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 476–487 (1975), relied upon by the Court, which surely took as liberal a view of this jurisdictional grant as can reasonably be taken, does not support the result reached by the Court here. In *Cox* there had been a final decision on the federal claim by the Supreme Court of Georgia, which was the highest court of that State in which such a decision could be had. Here all the Supreme Court of Illinois has done is, in the exercise of the discretion possessed by every appellate court, to deny a stay of a lower court ruling pending appeal. No Illinois appellate court has heard or decided the merits of applicants' federal claim.

I do not disagree with the Court that the provisions of the injunction issued by the Circuit Court of Cook County are extremely broad, and I would expect that if the Illinois appellate courts follow cases such as *Freedman* v. *Maryland,* 380 U. S. 51 (1965), and *Nebraska Press Assn.* v. *Stuart,* 423 U. S. 1319 (1975), relied upon by the Court, the injunction will be at least substantially modified by them. But I do not believe that in the long run respect for the Constitution or for the law is encouraged by actions of this Court which disregard the limitations placed on us by Congress in order to assure that an erroneous injunction issued by a state trial court does not wrongly interfere with the constitutional rights of those enjoined.

E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* COLLINS ET AL.

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

No. 75–1870. Argued March 2, 1977—Decided June 16, 1977*

In approving the merger of a closed-end investment company (Christiana), 98% of whose assets consisted of Du Pont & Co. common stock, into an affiliate company (Du Pont), the Securities and Exchange Commission (SEC) *held* to have reasonably exercised its discretion under § 17(b) of the Investment Company Act of 1940, as amended, in valuing Christiana essentially on the basis of the market value of Du Pont stock rather than on the lower basis of Christiana's outstanding stock. Since the record before the SEC clearly reveals substantial evidence to support the findings of the SEC and since that agency's conclusions of law were based on a construction of the statute consistent with the legislative intent, the Court of Appeals erred in rejecting the SEC's conclusion and substituting its own judgment for that of the SEC. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 209. Pp. 52–57.

532 F. 2d 584, reversed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 57. REHNQUIST, J., took no part in the consideration or decision of the cases.

Daniel M. Gribbon argued the cause for petitioners in No. 75–1870. With him on the briefs were *Matthew J. Broderick* and *Richard S. Seltzer*. *David Ferber* argued the cause for petitioner in No. 75–1872. With him on the briefs were former *Solicitor General Bork, Acting Solicitor General Friedman, Jacob H. Stillman,* and *James R. Miller.*

Richard J. Collins, Jr., respondent, argued the cause *pro se* and filed a brief in both cases. *Lewis C. Murtaugh,* respond-

*Together with No. 75–1872, *Securities and Exchange Commission* v. *Collins et al.*, also on certiorari to the same court.

ent, argued the cause *pro se* in both cases. With him on the brief was *Timothy J. Murtaugh III.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari [1] in these cases to determine whether the Securities and Exchange Commission, in approving the merger of a closed-end investment company into an affiliate company, reasonably exercised its discretion under the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.* The Commission valued the investment company essentially on the basis of the market value of the securities which constituted substantially all of its assets rather than on the lower basis of its own outstanding stock.

The statutory scheme here is relatively straightforward. Section 17 of the Investment Company Act of 1940, 15 U. S. C. § 80a–17, forbids an "affiliated person," as defined in the Act,[2] to purchase any securities or other property from a registered investment company unless the Commission finds, *inter alia,* that the "evidence establishes that . . . the terms of the proposed transaction, including the consideration to be paid or

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[1] 429 U. S. 815 (1976).

[2] Title 15 U. S. C. § 80a–2 (a) (3) defines an "affiliated person" as follows:

"(3) 'Affiliated person' of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof."

received, are reasonable and fair and do not involve overreaching on the part of any person concerned . . . ." [3]

A

(1) The merger in this litigation involves Christiana Securities Co., a closed-end, nondiversified management investment company, and E. I. du Pont de Nemours & Co., a large industrial operating company engaged principally in the manufacture of chemical products. Christiana was formed in 1915 in order to preserve family control of Du Pont & Co. At the time the present merger negotiations were announced in April 1972, 98% of Christiana's assets consisted of Du Pont common stock.[4] This block of Du Pont stock in turn comprised approximately 28.3% of the outstanding common stock of Du Pont.[5] For purposes of this litigation, Christiana has been presumed to have at least the potential to control Du Pont, although it submits that "this potential lies dormant and unexercised and that there is no actual control relationship." SEC Investment Company Act Release No. 8615 (1974), 5 S. E. C. Docket 745, 747 (1974).

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[3] Section 17 (b) also requires that the proposed transaction be (1) consistent with the policy of each registered investment company concerned, and (2) consistent with "the general purposes of this title." 54 Stat. 815, 15 U. S. C. §§ 80a–17 (b)(2), (3). These criteria are not contested here.

[4] Christiana owns 13,417,120 shares of Du Pont. It also holds a relatively small amount of Du Pont preferred stock. Its other assets consist of two daily newspapers in Wilmington, Del., and 3.5% of the stock of the Wilmington Trust Co., which, in turn, holds more than one-half of Christiana's common stock as trustee. SEC Investment Company Act Release No. 8615 (1974).

[5] According to the applicants' Notice of Filing of Application, SEC Investment Company Act Release No. 7402 (1972), Du Pont has 47,566,694 shares of common stock outstanding held by approximately 224,964 shareholders.

Christiana itself has 11,710,103 shares of common stock outstanding[6] and has about 8,000 shareholders. Unlike Du Pont stock, which is traded actively on the New York and other national stock exchanges, Christiana shares are traded in the over-the-counter market. Since virtually all of its assets are Du Pont common stock, the market price of Christiana shares reflects the market price of Du Pont stock. However, as is often the case with closed-end investment companies, Christiana's own stock has historically sold at a discount from the market value of its Du Pont holdings.[7] Apparently, this discount is primarily tax related since Christiana pays a federal intercorporate tax on dividends. Its stockholders are also subject to potential capital-gains tax on the unrealized appreciation of Christiana's Du Pont stock which has a very low tax base. Additionally, the relatively limited market for Christiana stock likely influences the discount.

In 1972, Christiana's management concluded that, because of the tax disadvantages and the discount at which its shares sold, Christiana should be liquidated and its stockholders become direct owners of Du Pont stock. Christiana's board of directors proposed liquidation of Christiana by means of a tax-free merger into Du Pont. Du Pont would purchase Christiana's assets by issuing to Christiana shareholders new certificates of Du Pont stock. In more concrete terms, Du Pont would acquire Christiana's $2.2 billion assets and assume its liabilities of approximately $300,000. In so doing, Du Pont would acquire from Christiana 13,417,120 shares of its own common stock. Du Pont would then issue 13,228,620 of its shares directly to Christiana holders. This would be

[6] Ninety-five and one-half percent of these shares are held by 338 people. SEC Investment Company Act Release No. 8615, *supra*.

[7] In the two years preceding the date of the announcement of the merger negotiations, this discount was generally in the range of 20%–25%. *Ibid.*

188,500 shares less than Du Pont would receive from Christiana. As a result of the merger, each share of Christiana common stock would be converted into 1.123 shares of Du Pont common stock. That ratio was ascertained by taking the market price of Christiana's Du Pont stock and its other assets, subtracting Christiana's relatively nominal liabilities, and making certain other minor adjustments. Direct ownership of Du Pont shares would increase the market value of the Christiana shareholders' holdings and Du Pont would have acquired Christiana's assets at a 2.5% discount from their net value. The Internal Revenue Service ruled the merger would be tax free.

(2) Du Pont and Christiana filed a joint application with the Commission for exemption under § 17 of the Investment Company Act. Administrative proceedings followed. The Commission's Division of Investment Management Regulation supported the application. A relatively small number of Du Pont shareholders, including the respondents in this case, opposed the transaction. Their basic argument was that, since Christiana was valued on the basis of its assets, Du Pont stock, rather than the much lower market price of its own outstanding stock, the proposed merger would be unfair to the shareholders of Du Pont since it provides relatively greater benefits to Christiana shareholders than to shareholders of Du Pont. The objecting stockholders argued that Du Pont & Co. should receive a substantial share of the benefit realized by Christiana shareholders from the elimination of the 23% discount from net asset value at which Christiana stock was selling. They also argued that the merger would depress the market price of Du Pont stock because it would place more than 13 million marketable Du Pont shares directly in the hands of Christiana shareholders.

After the hearing, the parties waived the initial administrative recommendations and the record was submitted

directly to the Commission. The Commission unanimously granted the application. Basically, it viewed the proposed transaction as an exchange of equivalents—Christiana's Du Pont stock to be acquired by Du Pont in exchange for Du Pont stock issued directly to Christiana shareholders. It held that, for purposes of § 17 (b), the proper guide for evaluating Christiana was the market price of Christiana's holdings of Du Pont stock:

> "Here justice requires no ventures into the unknown and unknowable. An investment company, whose assets consist entirely or almost entirely of securities the prices of which are determined in active and continuous markets, can normally be presumed to be worth its net asset value. . . . The simple, readily usable tool of net asset value does the job much better than an accurate gauge of market impact (were there one) could." 5 S. E. C. Docket, at 751.

The fact that Du Pont might have obtained more favorable terms because of its strategic bargaining position or by use of alternative methods of liquidating Christiana was considered not relevant by the Commission. In its view, the purpose of § 17 was to prevent persons in a strategic position from getting more than fair value. The Commission found no detriment in the transaction to Du Pont or to the value of its outstanding shares. Any depressing effects on the price of Du Pont would be brief in duration and the intrinsic value of an investment in Du Pont would not be altered by the merger. Moreover, in the Commission's view, any valuation involving a significant departure from net asset value would "run afoul of Section 17 (b)(1) of the Act"; it would strip long-term investors in companies like Christiana of the intrinsic worth of the securities which underlie their holdings.

A panel of the United States Court of Appeals for the Eighth Circuit divided in setting aside the Commission's

determination. *Collins* v. *SEC*, 532 F. 2d 584 (1976).[8] The majority held that the Securities and Exchange Commission had erred, as a matter of law, in determining that Christiana should be presumptively valued on the basis of the market value of its principal asset, common stock of Du Pont. "[I]n judging transactions between dominant and subservient parties, the test is 'whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.' *Pepper* v. *Litton*, 308 U. S. 295, 306–307 . . . (1939)." *Id.*, at 592. Employing this standard, the Court of Appeals majority concluded that the record did not support the Commission's finding that the terms of the merger were "reasonable and fair" since the "economic benefits to Christiana shareholders from the merger are immediate and substantial," *id.*, at 601, while "benefits to present Du Pont shareholders are minimal." *Id.*, at 602. The court concluded that, from Du Pont's viewpoint, "the degree of [control] dispersion attained . . . does not justify the substantial premium paid for the Christiana stock." *Id.*, at 603. The panel also held that the Commission had erred in failing to give weight to the "occasional detriment to Du Pont shareholders," *id.*, at 605, caused by the increase of available Du Pont stock in the market.

B

In determining whether the Court of Appeals correctly set aside the order of the Commission, we begin by examining the nature of the regulatory process leading to the decision that court was required to review. In *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694 (1975), we noted that the Investment Company Act of 1940, 15 U. S. C. § 80a–1 *et seq.*, "vests in the SEC broad regulatory authority over the business practices of the investment companies." 422 U. S., at 704–705. The Act was the product of congressional concern

[8] A petition for rehearing en banc was denied by an equally divided court.

that existing legislation in the securities field did not afford adequate protection to the purchasers of investment company securities. Prior to the enactment of the legislation, Congress mandated an intensive study of the investment company industry.[9] One of the problems specifically identified was the numerous transactions between investment companies and persons affiliated with them which resulted in a distinct advantage to the "insiders" over the public investors.[10] Section 17 was the specific congressional response to this problem.[11] Congress therefore charged the Commission, in scrutinizing a merger such as this, to take into account the peculiar characteristics of such a transaction in the investment company industry. Recognizing that an "arm's length bargain," cf. *Pepper* v. *Litton,* 308 U. S. 295, 307 (1939), is rarely a realistic possibility in transactions between an affiliate and an investment company, Congress substituted, in effect, the informed judgment of the Commission to determine, *inter alia,* whether the transaction was "reasonable and fair and [did] not involve overreaching on the part of any person concerned." [12]

Given the wide variety of possible transactions between an investment company and its affiliates, Congress, quite understandably, made no attempt to define this standard with any greater precision. Instead, it followed the practice frequently employed in other administrative schemes. The

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[9] Section 30 of the Public Utility Holding Company Act, 49 Stat. 837, 15 U. S. C. § 79z–4, mandated that the SEC undertake such a study. See *United States* v. *National Assn. of Securities Dealers,* 422 U. S. 694, 704 (1975).

[10] See generally Report on Investment Trust and Investment Companies, H. R. Doc. No. 279, 76th Cong., 1st Sess., 1017–1561 (1940).

[11] While the House and Senate Reports indicate that the Congress' chief concern was protection of the public investors of the investment company, S. Rep. No. 1775, 76th Cong., 3d Sess., 11–12 (1940); H. R. Rep. No. 2639, 76th Cong., 3d Sess., 9 (1940), the statute has been construed to afford protection to the stockholders of the affiliate as well. See *Fifth Avenue Coach Lines, Inc.,* 43 S. E. C. 635, 639 (1967).

[12] 15 U. S. C. § 80a–17 (b)(1).

language of the statute was cast in broad terms and designed to encompass all situations falling within the scope of the statute; an agency with great experience in the industry was given the task of applying those criteria to particular business situations in a manner consistent with the legislative intent.[13]

C

In this case, a judgment as to whether the terms of the merger were "reasonable and fair" turned upon the value assigned to Christiana. In making such an evaluation, the Commission concluded that "[t]he single, readily usable tool of net asset value does the job much better than an accurate gauge of market impact. . . ." 5 S. E. C. Docket, at 751. Investment companies, it reasoned, are essentially a portfolio of securities whose individual prices are determined by the forces of the securities marketplace. In determining value in merger situations, "asset value" is thus much more applicable to investment companies than to other corporate entities. The value of the securities surrendered is, basically, the real value received by the transferee.

In reviewing a decision of the Commission, a court must consider both the facts found and the application of the relevant statute by the agency. Congress has mandated that, in review of § 17 proceedings, "[t]he findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U. S. C. § 80a–42. A reviewing court is also to be guided by the "venerable principle that the construction

[13] This situation is quite different from that which confronted the Court earlier this Term in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977). There, the Court held that "the narrow legal issue" of implying a private right of action under the securities laws was "one peculiarly reserved for judicial resolution" and that the experience of the Commission on such a question was of "limited value." *Id.*, at 41 n. 27. By contrast, this case involves an assessment as to whether a given business arrangement is compatible with the regulatory scheme which the agency is charged by Congress to administer.

of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969). "[C]ontemporaneous construction is entitled to great weight . . . even though it was applied in cases settled by consent rather than in litigation." *FTC* v. *Mandel Bros.,* 359 U. S. 385, 391 (1959). Here, however, the Court of Appeals held, as a matter of law, that the Commission erred in the method applied in passing on the merger, thus all but ignoring the congressional limitations on judicial review of agency action.

The Commission has long recognized that the key factor in the valuation of the assets of a closed-end investment company should be the market price of the underlying securities. This method of setting the value of investment companies is, as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry. For instance, in issuing an advisory report to the United States District Court pursuant to § 173 of Chapter X of the Bankruptcy Act, the Commission advised that "it is natural that net asset value based upon market prices should be the fundamental valuation criterion used by and large in the investment company field." *Central States Electric Corp.,* 30 S. E. C. 680, 700 (1949), approved *sub nom. Central States Electric Corp.* v. *Austrian,* 183 F. 2d 879, 884 (CA4 1950), cert. denied, 340 U. S. 917 (1951). Similarly, in mergers like the one presented in this litigation, the Commission has used "net asset value" as a touchstone in its analysis. See, *e. g., Delaware Realty & Investment Co.,* 40 S. E. C. 469, 473 (1961); *Harbor Plywood Corp.,* 40 S. E. C. 1002 (1962); *Eastern States Corp.,* SEC Investment Company Act Releases Nos. 5693 and 5711 (1969).[14]

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[14] This method of valuation of closed-end investment companies was similarly employed in *ELT, Inc.,* SEC Investment Company Act Releases

Moreover, despite the characterization of the Court of Appeals to the contrary, the Commission did not employ a mechanical application of a rule or "presumption." It considered carefully the contentions of the respondents that a departure from the use of net asset value was warranted in this case. Upon analysis, it concluded that the central and controlling aspect of the merger remained the fact that it consisted of an exchange of Du Pont common stock for Du Pont common stock; it was not Christiana stock but Du Pont stock which Du Pont was receiving in the merger. As to the claim that Du Pont stock would be adversely affected over an extended period of time by volume selling, the Commission concluded there was no indication of a long-term adverse market impact. It noted that Christiana stock was held principally by long-term investors. There was no evidence that Christiana stockholders, who for years had been indirect investors in Du Pont, would now change the essential nature of their investment.

The Commission's reliance on "net asset value" in this particular case and its consequent determination that the proposed merger met the statutory standards thus rested "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts.

Nos. 8675 and 8714 (1975); *Chemical Fund, Inc.*, SEC Investment Company Act Releases Nos. 8773 and 8795 (1975); *Citizens & Southern Capital Corp.*, SEC Investment Company Act Releases Nos. 7755 and 7802 (1973); *Detroit & Cleveland Nav. Co.*, SEC Investment Company Act Releases Nos. 3082 and 3099 (1960); *Cheapside Dollar Fund, Ltd.*, SEC Investment Company Act Releases Nos. 9038 and 9085 (1975). The Commission has, of course, required that such valuations be adjusted to reflect such factors as expenses of the merger and tax considerations. *Talley Industries, Inc.*, SEC Investment Company Act Release No. 5953 (1970); and *Electric Bond & Share Co.*, SEC Investment Company Act Release No. 5215 (1967), cited by the Court of Appeals, did not rely on net asset value since the companies held substantial assets other than securities. While Christiana also had some assets other than Du Pont stock, they amounted to only 2% of its assets.

It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts." *SEC* v. *Chenery Corp.*, 332 U. S. 194, 209 (1947). In rejecting the conclusion of the Commission, the Court of Appeals substituted its own judgment for that of the agency charged by Congress with that responsibility.

We note that after receiving briefs and hearing oral argument, the Court of Appeals—over the objection of the Commission, Christiana, and Du Pont—undertook the unique appellate procedure of employing a university professor to assist the court in understanding the record and to prepare reports and memoranda for the court. Thus, the reports relied upon by that court included a variety of data and economic observations which had not been examined and tested by the traditional methods of the adversary process. We are not cited to any statute, rule, or decision authorizing the procedure employed by the Court of Appeals. Cf. Fed. Rule App. Proc. 16.

In our view, the Court of Appeals clearly departed from its statutory appellate function and applied an erroneous standard in its review of the decision of the Commission. The record made by the parties before the Commission was in accord with traditional procedures and that record clearly reveals substantial evidence to support the findings of the Commission. Moreover, the agency conclusions of law were based on a construction of the statute consistent with the legislative intent. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

MR. JUSTICE BRENNAN, dissenting.

Section 17 of the Investment Company Act of 1940, 15 U. S. C. § 80a–17, prohibits transactions between registered

investment companies and "affiliated persons," except as the Securities and Exchange Commission approves such transactions on application, if, *inter alia,* "the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned." § 80a–17 (b). The SEC approved the application of Christiana Securities Co. (Christiana) to merge into E. I. du Pont de Nemours & Co. (Du Pont), finding that the proposed transaction met the statutory standard.

Christiana was created in 1915 to concentrate the Du Pont family's holdings of Du Pont stock. Its assets consist almost entirely of Du Pont common stock, of which it holds 28.3% of the total outstanding. It is thus an investment company within the meaning of the Act, and an affiliate of Du Pont subject to the prohibitions of § 17. Although ownership of Christiana stock is essentially indirect ownership of Du Pont stock, Christiana stock is traded over-the-counter at a considerable discount from the market price of the corresponding shares of Du Pont.

For reasons unnecessary to elaborate here, Christiana is no longer regarded by its owners as a desirable control mechanism. Moreover, the tax laws make it expensive to maintain, since dividends from Du Pont are taxed when paid to Christiana, and again when passed on to the shareholders as dividends from Christiana. Elimination of Christiana is therefore desirable to its shareholders, and an agreement was reached to effectuate this goal by merging Christiana into Du Pont.[1] The terms of this agreement are set forth in the Court's opinion, *ante,* at 49–50, but in effect, Du Pont acquired its own shares from Christiana at about a 2.5% discount from

[1] Liquidation of Christiana would also have accomplished the desired result, without involving Du Pont or the prohibitions of § 17, but was apparently ruled out by Christiana because of disadvantageous tax consequences for its shareholders.

their market price, while Christiana's shareholders eliminated their costly holding company, without incurring any tax liability.[2]

It is conceded that while the primary concern of Congress in enacting the Act was the protection of investment company shareholders, § 17 (b) does not permit the SEC to authorize a transaction that is unfair to the affiliated person, any more than one that is unfair to the investment company. *Fifth Avenue Coach Lines, Inc.*, 43 S. E. C. 635 (1967). See the opinion of the Court, *ante*, at 53 n. 11.[3] The SEC found here that the transaction was fair to Du Pont's shareholders, essentially because they paid slightly less than the net asset value of Christiana. In this sense, it is true that Du Pont paid for Christiana no more than it is intrinsically "worth," and so the price could be considered "fair." However, in a market economy, the value of any commodity is no more nor less than the price arm's-length bargainers agree on. Christiana and Du Pont were not arm's-length bargainers,[4] and it is obvious that if they had been, Du Pont would have insisted on, and would have had the bargaining power to obtain, a more favorable price. Instead, the directors of Du Pont accommodated the desires of Christiana, owner of a control block of Du Pont stock, without requiring the *quid pro quo*

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[2] In contrast to the disadvantageous tax consequences of alternative means of disposing of Christiana, see n. 1, *supra*, the Internal Revenue Service had ruled that the proposed merger with Du Pont would be tax free. *Ante*, at 50.

[3] In order to be approved, the transaction must "not involve overreaching on the part of *any* person concerned." 15 U. S. C. § 80a–17(b) (emphasis supplied).

[4] Christiana owned a potentially controlling share of Du Pont. As the Court concedes, *ante*, at 53, an arm's-length bargain "is rarely a realistic possibility" in such a situation. While "Du Pont did take some steps to simulate arm's-length bargaining," 532 F. 2d 584, 598 (1976), the Court of Appeals made short shrift of their significance, *id.*, at 598–601, and the Court places no reliance on them.

they would undoubtedly have demanded from any other seller.

I do not mean to suggest that the SEC should not, as a general rule, look to the net asset value of an investment company in evaluating the fairness of transactions such as this. At least where the result of the transaction is the elimination of the investment company, the party that acquires it gets the full value of its holdings, and not just a block of stock in the investment company; the asset value thus seems in the usual case a better measure of the investment company's value than the market price of its stock. On the other hand, in a situation such as this, the depressed market price of Christiana stock may well reflect its undesirability to its present holders.[5] Even if the stock is for some reason still desirable to the purchaser, this undesirability can be translated into a benefit to him because it gives him bargaining leverage to obtain a better price.[6]

[5] In addition to the tax on intercorporate dividends, as the Court recognizes, *ante*, at 49, other disadvantages to the continued maintenance of Christiana might have been reflected in the low market price of its stock, such as the potential for high capital-gains taxation and the relative illiquidity of Christiana stock, for which there is a more limited market than for Du Pont.

[6] The SEC's argument that § 17 was intended "to prevent persons in a strategic position from getting more than fair value," *ante*, at 51, is a mere play on words. As the legislative history, examined at length by the Court of Appeals, 532 F. 2d, at 591–592, makes plain, § 17 was intended to protect minority interests from exploitation by insiders of *their* "strategic position," and to restore a situation in which "the directors of the several corporations involved in negotiations for a merger . . . are acting at arm's length in an endeavor to secure the best possible bargain for their respective stockholders." SEC, Report on Investment Trusts and Investment Companies, H. R. Doc. No. 279, 76th Cong., 1st Sess., 1414 (1940). Far from being intended to negate factors that would give one party a "strategic bargaining position" in arm's-length bargaining in the free market, the Act was specifically intended to give those factors free play, uncorrupted by insiders' desires to benefit themselves rather than the stockholders as a whole.

However accurate asset valuation may be in most contexts, each determination of what is fair and reasonable and free of overreaching must by the nature of the inquiry turn on the facts of the particular transaction involved.[7] I would hold that the SEC applied an erroneous standard in this case by presuming that in the absence of actual detriment to the purchaser, a transaction that recognizes the net asset value of an investment company is fair and reasonable. In my view the correct standard required the SEC to compare the terms of the transaction with those that would have been reached by arm's-length bargainers.[8] Here, Du Pont's directors, who were in the conflict-of-interest situation with which the Act is concerned because of Christiana's position as a controlling shareholder of Du Pont, entered a transaction that handsomely benefited Christiana, without extracting the price for Du Pont that an arm's-length negotiator would have demanded and received.[9] I therefore disagree with the SEC's

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[7] Since this is so, one might well wonder what "special and important reasons" exist for this Court to decide "whether the Securities and Exchange Commission . . . reasonably exercised its discretion" in a particular case. *Ante*, at 47. See this Court's Rule 19.

[8] Although the SEC did recognize the possibility that there might be cases in which an exception to the "net asset value" rule would be appropriate, its inquiry in this litigation turned entirely on the possible detriment of this transaction to Du Pont's shareholders. No attempt was made to determine what the results of arm's-length bargaining might have been. The Court of Appeals, correctly in my view, held that such an inquiry should have been made. Accordingly, the Court of Appeals held that the agency had applied an erroneous legal standard, and no question of invasion of the area of SEC expertise is presented.

[9] It may appear harsh to insist that, in the absence of actual detriment to its other shareholders, Du Pont press its advantage, rather than accommodate Christiana. But in accommodating Christiana, Du Pont's directors were not merely being "nice guys" in a disinterested fashion, at no cost to anyone. They were giving special consideration to an investment company that holds a controlling share of Du Pont. This is precisely the evil at which § 17 was directed.

holding that this behavior was fair and reasonable to Du Pont, or free from overreaching on the part of Du Pont's controlling shareholder, Christiana. Accordingly, I would affirm the judgment of the Court of Appeals.

Syllabus

TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.

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

No. 75–1126. Argued March 30, 1977—Decided June 16, 1977*

Respondent Hardison (hereafter respondent) was employed by Trans World Airlines (TWA), petitioner in No. 75–1126, in a department that operated 24 hours a day throughout the year in connection with an airplane maintenance and overhaul base. Respondent was subject to a seniority system in a collective-bargaining agreement between TWA and the International Association of Machinists & Aerospace Workers (union), petitioner in No. 75–1385, whereby the most senior employees have first choice for job and shift assignments as they become available, and the most junior employees are required to work when enough employees to work at a particular time or in a particular job to fill TWA's needs cannot be found. Because respondent's religious beliefs prohibit him from working on Saturdays, attempts were made to accommodate him, and these were temporarily successful mainly because on his job at the time he had sufficient seniority regularly to observe Saturday as his Sabbath. But when he sought, and was transferred to, another job where he was asked to work Saturdays and where he had low seniority, problems began to arise. TWA agreed to permit the union to seek a change of work assignments, but the union was not willing to violate the seniority system, and respondent had insufficient seniority to bid for a shift having Saturdays off. After TWA rejected a proposal that respondent work only four days a week on the ground that this would impair critical functions in the airline operations, no accommodation could be reached, and respondent was discharged for refusing to work on Saturdays. Then, having first invoked the administrative remedy provided by Title VII of the Civil Rights Act of 1964, respondent brought an action for injunctive relief against TWA and the union, claiming that his discharge constituted religious discrimination in violation of § 703 (a)(1) of the Act, which makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of his religion. He also made certain other charges against the union. His claim of religious discrimination was based on

*Together with No. 75–1385, *International Assn. of Machinists & Aerospace Workers, AFL–CIO, et al.* v. *Hardison et al.*, also on certiorari to the same court.

the 1967 Equal Employment Opportunity Commission (EEOC) guidelines in effect at the time requiring an employer, short of "undue hardship," to make "reasonable accommodations" to the religious needs of its employees, and on similar language in the 1972 amendments to Title VII. The District Court ruled in favor of both TWA and the union, holding that the union's duty to accommodate respondent's religious beliefs did not require it to ignore the seniority system, and that TWA had satisfied its "reasonable accommodations" obligation. The Court of Appeals affirmed the judgment for the union but reversed the judgment for TWA, holding that TWA had not satisfied its duty to accommodate respondent's religious needs under the EEOC guidelines. The court took the view that TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without undue hardship: (1) Within the framework of the seniority system, TWA could have permitted respondent to work a four-day week, utilizing a supervisor or another worker on duty elsewhere, even though this would have caused other shop functions to suffer; (2) TWA could have filled respondent's Saturday shift from other available personnel, even though this would have involved premium overtime pay; and (3) TWA could have arranged a "swap" between respondent and another employee either for another shift or for the Sabbath days, even though this would have involved a breach of the seniority system. *Held:* TWA, which made reasonable efforts to accommodate respondent's religious needs, did not violate Title VII, and each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines. Pp. 76–85.

(a) The seniority system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. Pp. 77–78.

(b) TWA itself cannot be faulted for having failed to work out a shift or job swap for respondent. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of employees senior to respondent; and for TWA to have arranged unilaterally for a swap would have breached the collective-bargaining agreement. An agreed-upon seniority system is not required to give way to accommodate religious observances, and it would be anomalous to conclude that by "reasonable accommodations" Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others. Title VII does not require an employer to go that far. Pp. 79–81.

(c) Under § 703 (h) of Title VII, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system is discriminatory in its effect. Pp. 81–82.

(d) To require TWA to bear more than a *de minimis* cost in order to give respondent Saturdays off would be an undue hardship, for, like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. Absent clear statutory language or legislative history to the contrary, the statute, the paramount concern of which is to eliminate discrimination in employment, cannot be construed to require an employer to discriminate against some employees in order to enable others to observe their Sabbath. Pp. 84–85.

527 F. 2d 33, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 85.

George E. Feldmiller argued the cause for petitioner in No. 75–1126. With him on the brief was *Dick H. Woods*. *Mozart G. Ratner* argued the cause for petitioners in No. 75–1385. With him on the briefs were *Plato E. Papps* and *Michael D. Gordon*.

William F. Pickett argued the cause for respondent Hardison in both cases. With him on the brief was *Thomas L. Hogan*.

Nathan Lewin argued the cause for the National Jewish Commission on Law and Public Affairs as *amicus curiae* urging affirmance. With him on the brief were *Dennis Rapps* and *Howard I. Rhine*.†

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†Briefs of *amici curiae* urging reversal were filed by *William L. Hungate, Edwin D. Akers, Jr., Charles A. Newman,* and *A. William Rolf* for the Chrysler Corp.; and by *Jay S. Siegel, Robert E. Williams,* and *Douglas S. McDowell* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Acting Solicitor General Friedman, Assistant Attorney General Days, Deputy Solicitor General Wallace, Allan A. Ryan, Jr., Brian K. Landsberg, Dennis J.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 703 (a)(1) of the Civil Rights Act of 1964, Title VII, 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(1), makes it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. At the time of the events involved here, a guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR § 1605.1 (b) (1968), required, as the Act itself now does, 42 U. S. C. § 2000e (j) (1970 ed., Supp. V), that an employer, short of "undue hardship," make "reasonable accommodations" to the religious needs of its employees. The issue in this case is the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays.

I

We summarize briefly the facts found by the District Court. 375 F. Supp. 877 (WD Mo. 1974).

Petitioner Trans World Airlines (TWA) operates a large maintenance and overhaul base in Kansas City, Mo. On June 5, 1967, respondent Larry G. Hardison was hired by TWA to work as a clerk in the Stores Department at its Kansas City base. Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, an employee must be

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Dimsey, and *Abner W. Sibal* for the United States et al.; by *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Michael A. Lockman* and *Gary G. Kress*, Assistant Attorneys General, for the State of Michigan; by *Beverly Gross* for the New York State Division of Human Rights; by *Joel M. Gora* and *Leo Pfeffer* for the American Civil Liberties Union; by *Mr. Pfeffer* for the Central Conference of American Rabbis et al.; by *Warren L. Johns* for the General Conference of Seventh-Day Adventists; and by *Ralph K. Helge* for the Worldwide Church of God.

shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.

Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement [1] that TWA maintains with petitioner International Association of Machinists and Aerospace Workers (IAM).[2] The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become available. The most senior employees have first choice for job and shift assignments, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs.

In the spring of 1968 Hardison began to study the religion known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also proscribes work on certain specified religious holidays.

When Hardison informed Everett Kussman, the manager of the Stores Department, of his religious conviction regarding

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[1] The TWA–IAM agreement provides in pertinent part:

"The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

. . . . .

"Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department . . . ." App. 214.

[2] TWA is the petitioner in No. 75–1126. Petitioners in No. 75–1385 are the international, local, and district levels of IAM, hereinafter collectively referred to as IAM or the union.

observance of the Sabbath, Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off; that Hardison would have his religious holidays off whenever possible if Hardison agreed to work the traditional holidays when asked; and that Kussman would try to find Hardison another job that would be more compatible with his religious beliefs. The problem was temporarily solved when Hardison transferred to the 11 p. m.–7 a. m. shift. Working this shift permitted Hardison to observe his Sabbath.

The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list.

In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation. TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract,[3] and Hardison had insufficient seniority to bid for a shift having Saturdays off.

A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an

[3] The union did have a Relief Committee organized to deal with the emergency problems of its members. The record reveals that in the past this Committee had been instrumental in arranging for temporary adjustments in work schedules to meet the needs of union members; but the record also reveals that the Relief Committee had almost never arranged permanent changes in work assignments and that Hardison never sought the assistance of that Committee.

employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

When an accommodation was not reached, Hardison refused to report for work on Saturdays. A transfer to the twilight shift proved unavailing since that schedule still required Hardison to work past sundown on Fridays. After a hearing, Hardison was discharged on grounds of insubordination for refusing to work during his designated shift.

Hardison, having first invoked the administrative remedy provided by Title VII, brought this action for injunctive relief in the United States District Court against TWA and IAM, claiming that his discharge by TWA constituted religious discrimination in violation of Title VII, 42 U. S. C. § 2000e–2 (a)(1). He also charged that the union had discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs. Hardison's claim of religious discrimination rested on 1967 EEOC guidelines requiring employers "to make reasonable accommodations to the religious needs of employees" whenever such accommodation would not work an "undue hardship," 29 CFR § 1605.1 (1968), and on similar language adopted by Congress in the 1972 amendments to Title VII, 42 U. S. C. § 2000e (j) (1970 ed., Supp. V).

After a bench trial, the District Court ruled in favor of the defendants. Turning first to the claim against the union, the District Court ruled that although the 1967 EEOC guidelines were applicable to unions, the union's duty to accommodate Hardison's belief did not require it to ignore its seniority system as Hardison appeared to claim.[4] As for Hardison's

[4] The District Court voiced concern that if it did not find an undue hardship in such circumstances, accommodation of religious observances might impose " 'a priority of the religious over the secular' " and thereby raise significant questions as to the constitutional validity of the statute

claim against TWA, the District Court rejected at the outset TWA's contention that requiring it in any way to accommodate the religious needs of its employees would constitute an unconstitutional establishment of religion. As the District Court construed the Act, however, TWA had satisfied its "reasonable accommodations" obligation, and any further accommodation would have worked an undue hardship on the company.

The Court of Appeals for the Eighth Circuit reversed the judgment for TWA. 527 F. 2d 33 (1975). It agreed with the District Court's constitutional ruling, but held that TWA had not satisfied its duty to accommodate. Because it did not appear that Hardison had attacked directly the judgment in favor of the union, the Court of Appeals affirmed that judgment without ruling on its substantive merits.

In separate petitions for certiorari TWA and IAM contended that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution. TWA also contended that the Court of Appeals improperly ignored the District Court's findings of fact.

We granted both petitions for certiorari. 429 U. S. 958 (1976). Because we agree with petitioners that their conduct was not a violation of Title VII,[5] we need not reach the other questions presented.

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under the Establishment Clause of the First Amendment. 375 F. Supp. 877, 883 (WD Mo. 1974), quoting Edwards & Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich. L. Rev. 599, 628 (1971).

[5] Because the judgment in its favor was affirmed by the Court of Appeals, the union was a prevailing party below; and Hardison has not filed a petition for certiorari seeking to change that judgment. It may thus appear anomalous to have granted the union's petition for certiorari as well as that of TWA. But the union's view is that the judgment below

II

The Court of Appeals found that TWA had committed an unlawful employment practice under § 703 (a)(1) of the Act, 42 U. S. C. § 2000e–2 (a)(1), which provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.[6] This is true regardless of whether

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against TWA seriously involves union interests, because the rationale of the Court of Appeals' opinion, as the union understands it, "necessarily and explicitly assumes that petitioner Unions are legally obligated to waive or vary provisions of their collective bargaining agreement in order to accommodate respondent Hardison's beliefs, if called upon by TWA to do so." Pet. for Cert. in No. 75–1385, p. 2. This would appear to be the position of Hardison and the EEOC in this Court. Since we reverse the judgment against TWA, we need not pursue further the union's status in this Court.

[6] See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 278–279 (1976); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).

From the outset, Congress has said that "[t]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." H. R. Rep. No. 914, 88th Cong., 1st Sess., 26 (1963). See 110 Cong. Rec. 13079–13080 (1964) (remarks of Sen. Clark). When Congress amended Title VII in 1972, it did not waver from its principal goal. While Congressmen differed on the best methods to eliminate discrimination in employment, no one questioned the desirability of

the discrimination is directed against majorities or minorities. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 280 (1976). See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971).

The prohibition against religious discrimination soon raised the question of whether it was impermissible under § 703 (a)(1) to discharge or refuse to hire a person who for religious reasons refused to work during the employer's normal workweek. In 1966 an EEOC guideline dealing with this problem declared that an employer had an obligation under the statute "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29 CFR § 1605.1 (1967).

In 1967 the EEOC amended its guidelines to require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968). The EEOC did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue." [7]

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seeking that goal. Compare H. R. Rep. No. 92–238 (1971) (majority report of the Committee of the Whole House), with *id.*, at 58 (minority report).

[7] The EEOC expressed the view that "undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similiar qualifications during the period of absence of the Sabbath observer," 29 CFR § 1605.1 (1968). This single example was by no means intended to be exhaustive. In substance, the EEOC left further definition of its guidelines to its review of "each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." *Ibid.* The EEOC at that time did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable, even if they do not "operate with uniformity . . . upon

This question—the extent of the required accommodation—remained unsettled when this Court, in *Dewey* v. *Reynolds Metals Co.*, 402 U. S. 689 (1971), affirmed by an equally divided Court the Sixth Circuit's decision in 429 F. 2d 324 (1970). The discharge of an employee who for religious reasons had refused to work on Sundays was there held by the Court of Appeals not to be an unlawful employment practice because the manner in which the employer allocated Sunday work assignments was discriminatory in neither its purpose nor effect; and consistent with the 1967 EEOC guidelines, the employer had made a reasonable accommodation of the employee's beliefs by giving him the opportunity to secure a replacement for his Sunday work.[8]

In part "to resolve by legislation" some of the issues raised in *Dewey*, 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph), Congress included the following definition of religion in its 1972 amendments to Title VII:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accom-

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the religious observances of [all] employees." The EEOC's present view, expressed in an *amicus curiae* brief filed in support of Hardison and the Court of Appeals' judgment, is now otherwise, at least to some extent.

[8] Judgment entered by an equally divided Court is not "entitled to precedential weight," *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972). Our ruling in *Dewey* thus does not resolve the questions there presented. Other factors, as well, make the impact of *Dewey* inconclusive. The conduct alleged to be an unlawful employment practice occurred prior to the promulgation of the 1967 guidelines, and the Court of Appeals expressed the view that those guidelines should not be given retroactive effect. Also, an earlier ruling by an arbitrator was held to have conclusively resolved the religious discrimination question in favor of the employer. But see *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). Finally, the employer in *Dewey* was not excused from a duty to accommodate; the Court of Appeals simply held that the employer had satisfied any obligation that it might have had under the statute.

modate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 701 (j), 42 U. S. C. § 2000e (j) (1970 ed., Supp. V).

The intent and effect of this definition was to make it an unlawful employment practice under § 703 (a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees. But like the EEOC guidelines, the statute provides no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of § 701 (j) is likewise of little assistance in this regard.[9] The proponent of the measure, Senator Jennings

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[9] Section 701 (j) was added to the 1972 amendments on the floor of the Senate. The legislative history of the measure consists chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of the proponent of the measure, Senator Jennings Randolph. 118 Cong. Rec. 705–706 (1972).

The Congressional Record, 118 Cong. Rec. 706–713 (1972), also contains reprints of *Dewey* and *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (MD Fla. 1971), rev'd, 464 F. 2d 1113 (CA5 1972), as well as a brief synopsis of the new provision, which makes reference to *Dewey*, 118 Cong. Rec. 7167 (1972). The significance of the legislative references to prior case law is unclear. In *Riley* the District Court ruled that an employer who discharged an employee for refusing to work on his Sabbath had not committed an unfair labor practice even though the employer had not made any effort whatsoever to accommodate the employee's religious needs. It is clear from the language of § 701 (j) that Congress intended to change this result by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation.

The reference to *Dewey* is even more opaque:

"The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Company*, 429 F. 2d 325 (6th Cir. 1970), *Affirmed by an equally divided court*, 402 U. S. 689

Randolph, expressed his general desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law," 118 Cong. Rec. 705 (1972), but he made no attempt to define the precise circumstances under which the "reasonable accommodation" requirement would be applied.[10]

In brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines. With this in mind, we turn to a consideration of whether TWA has met its obliga-

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(1971)." 118 Cong. Rec. 7167 (1972). Clearly, any suggestion in *Dewey* that an employer may not be required to make *reasonable* accommodation for the religious needs of its employees was disapproved by § 701 (j); but Congress did not indicate that "reasonable accommodation" requires an employer to do more than was done in *Dewey*, apparently preferring to leave that question open for future resolution by the EEOC. See also n. 8, *supra*.

[10] Cases decided by the Courts of Appeals since the enactment of the 1972 amendments to Title VII similarly provide us with little guidance as to the scope of the employer's obligation. In circumstances where an employer has declined to take steps that would burden some employees in order to permit another employee or prospective employee to observe his Sabbath, the Fifth, Sixth, and Tenth Circuits have found no violation for failure to accommodate. *Williams* v. *Southern Union Gas Co.*, 529 F. 2d 483 (CA10 1976); *Reid* v. *Memphis Publishing Co.*, 521 F. 2d 512 (CA6 1975), cert. denied, 429 U. S. 964 (1976), pet. for rehearing pending, No. 75–1105; *Johnson* v. *U. S. Postal Service*, 497 F. 2d 128 (CA5 1974). But the Fifth and Sixth Circuits have also reached the opposite conclusion on similar facts. *Draper* v. *United States Pipe & Foundry Co.*, 527 F. 2d 515 (CA6 1975); *Cummins* v. *Parker Seal Co.*, 516 F. 2d 544 (CA6 1975), aff'd by equally divided Court, 429 U. S. 65 (1976); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (CA5 1972). These apparent intra-Circuit conflicts may be explainable on the basis of the differing facts of each case, but neither the Fifth nor the Sixth Circuit has suggested a theory of decision to justify the differing results that have been reached.

tion under Title VII to accommodate the religious observances of its employees.

III

The Court of Appeals held that TWA had not made reasonable efforts to accommodate Hardison's religious needs under the 1967 EEOC guidelines in effect at the time the relevant events occurred.[11] In its view, TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without undue hardship. First, within the framework of the seniority system, TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere. That this would have caused other shop functions to suffer was insufficient to amount to undue hardship in the opinion of the Court of Appeals. Second—according to the Court of Appeals, also within the bounds of the collective-bargaining contract—the company could have filled Hardison's Saturday shift from other available personnel competent to do the job, of which the court said there were at least 200. That this would have involved premium overtime pay was not deemed an undue hardship. Third, TWA could have arranged a "swap between Hardison and another employee either for another shift or for the Sabbath days." In response to the assertion that this would have involved a breach of the senior-

[11] Ordinarily, an EEOC guideline is not entitled to great weight where, as here, it varies from prior EEOC policy and no new legislative history has been introduced in support of the change. *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 140–145 (1976). But where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381–382 (1969) (footnote omitted), the guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute, *i. e.,* as imposing on TWA the duty of "reasonable accommodation" in the absence of "undue hardship." We thus need not consider whether § 701 (j) must be applied retroactively to the facts of this litigation.

ity provisions of the contract, the court noted that it had not been settled in the courts whether the required statutory accommodation to religious needs stopped short of transgressing seniority rules, but found it unnecessary to decide the issue because, as the Court of Appeals saw the record, TWA had not sought, and the union had therefore not declined to entertain, a possible variance from the seniority provisions of the collective-bargaining agreement. The company had simply left the entire matter to the union steward who the Court of Appeals said "likewise did nothing."

We disagree with the Court of Appeals in all relevant respects. It is our view that TWA made reasonable efforts to accommodate and that each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines.

A

It might be inferred from the Court of Appeals' opinion and from the brief of the EEOC in this Court that TWA's efforts to accommodate were no more than negligible. The findings of the District Court, supported by the record, are to the contrary. In summarizing its more detailed findings, the District Court observed:

> "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff at which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure." 375 F. Supp., at 890–891.

It is also true that TWA itself attempted without success to find Hardison another job. The District Court's view was that TWA had done all that could reasonably be expected within the bounds of the seniority system.

The Court of Appeals observed, however, that the possibility of a variance from the seniority system was never really posed to the union. This is contrary to the District Court's findings and to the record. The District Court found that when TWA first learned of Hardison's religious observances in April 1968, it agreed to permit the union's steward to seek a swap of shifts or days off but that "the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff." *Id.*, at 888. Later, in March 1969, at a meeting held just two days before Hardison first failed to report for his Saturday shift, TWA again "offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out . . . . Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change." *Id.*, at 889. As the record shows, Hardison himself testified that Kussman was willing, but the union was not, to work out a shift or job trade with another employee. App. 76–77.

We shall say more about the seniority system, but at this juncture it appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off. Additionally, recognizing that weekend work schedules are the least popular, the company made further accommodation by reducing its work force to a bare minimum on those days.

B

We are also convinced, contrary to the Court of Appeals, that TWA itself cannot be faulted for having failed to work

out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement.

(1)

Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees. We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute,[12] but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion.

[12] "This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 778. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). In *Franks* we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the strong congressional policy of making victims of discrimination whole. *Franks* is not dispositive of the present case since here there is no evidence of past discrimination that must be remedied. Not only is the "make-whole" policy not present in this case, but, as we shall see, the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others.

Any employer who, like TWA, conducts an around-the-clock operation is presented with the choice of allocating work schedules either in accordance with the preferences of its employees or by involuntary assignment. Insofar as the varying shift preferences of its employees complement each other, TWA could meet its manpower needs through voluntary work scheduling. In the present case, for example, Hardison's supervisor foresaw little difficulty in giving Hardison his religious holidays off since they fell on days that most other employees preferred to work, while Hardison was willing to work on the traditional holidays that most other employees preferred to have off.

Whenever there are not enough employees who choose to work a particular shift, however, some employees must be assigned to that shift even though it is not their first choice. Such was evidently the case with regard to Saturday work; even though TWA cut back its weekend work force to a skeleton crew, not enough employees chose those days off to staff the Stores Department through voluntary scheduling. In these circumstances, TWA and IAM agreed to give first preference to employees who had worked in a particular department the longest.

Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective-bargaining agreement.

It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in

accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. See *supra,* at 71–72. Indeed, the foundation of Hardison's claim is that TWA and IAM engaged in religious *discrimination* in violation of 703 (a)(1) when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

(2)

Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself. Section 703 (h) provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of em-

> ployment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2 (h).

"[T]he unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Teamsters* v. *United States,* 431 U. S. 324, 352 (1977). See also *United Air Lines, Inc.* v. *Evans,* 431 U. S. 553 (1977). Section 703 (h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 758 (1976). Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.

There has been no suggestion of discriminatory intent in this case. "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion." 375 F. Supp., at 883. The Court of Appeals' conclusion that TWA was not limited by the terms of its seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory purpose had been shown. That ruling is plainly inconsistent with the dictates of § 703 (h), both on its face and as interpreted in the recent decisions of this Court.[13]

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[13] *Franks* v. *Bowman Transportation Co.,* is not to the contrary. In *Franks* we held that "once an illegal discriminatory practice occurring after the effective date of the Act is proved," 424 U. S., at 762, § 703 (h) does not bar an award of retroactive seniority status to victims of that

As we have said, TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations.[14]

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discriminatory practice. Here the suggested exception to the TWA–IAM seniority system would not be remedial; the operation of the seniority system itself is said to violate Title VII. In such circumstances, § 703 (h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose. See *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 558–560 (1977).

[14] Despite its hyperbole and rhetoric, the dissent appears to agree with—at least it stops short of challenging—the fundamental proposition that Title VII does not require an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices. This is the principal issue on which TWA and the union came to this Court. The dissent is thus reduced to (1) asserting that the statute requires TWA to accommodate Hardison even though substantial expenditures are required to do so; and (2) advancing its own view of the record to show that TWA could have done more than it did to accommodate Hardison without violating the seniority system or incurring substantial additional costs. We reject the former assertion as an erroneous construction of the statute. As for the latter, we prefer the findings of the District Judge who heard the evidence. Thus, the dissent suggests that through further efforts TWA or the union might have arranged a temporary or permanent job swap within the seniority system, despite the District Court's express finding, supported by the record, that "[t]he seniority provisions . . . precluded the possibility of plaintiff's changing his shift." 375 F. Supp., at 884. Similarly, the dissent offers two alternatives—sending Hardison back to Building 1 or allowing him to work extra days without overtime pay—that it says could have been pursued by TWA or the union, even though neither of the courts below even hinted that these suggested alternatives would have been feasible under the circumstances. Furthermore, Buildings 1 and 2 had separate seniority lists, and insofar as the record shows, a return to Building 1 would not have solved Hardison's problems. Hardison himself testified that he "gave up" his Building 1 seniority when he came to Building 2, App. 104, and that the union would not accept his early return to Building 1 in part "because the problem of seniority came up again." *Id.*, at 71. We accept the District Court's findings that TWA had done all that it could do to accommodate Hardison's religious beliefs without either incurring substantial costs or violating the seniority rights of other employees. See 375 F. Supp., at 891.

C

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.[15] Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involun-

[15] The dissent argues that "the costs to TWA of either paying overtime or not replacing respondent would [not] have been more than *de minimis*." *Post*, at 92 n. 6. This ignores, however, the express finding of the District Court that "[b]oth of these solutions would have created an undue burden on the conduct of TWA's business," 375 F. Supp., at 891, and it fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays.

tarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Reversed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

One of the most intractable problems arising under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, has been whether an employer is guilty of religious discrimination when he discharges an employee (or refuses to hire a job applicant) because of the employee's religious practices. Particularly troublesome has been the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance. The Equal Employment Opportunity Commission has grappled with this problem in two sets of regulations, and in a long line of decisions. Initially the Commission concluded that an employer was "free under Title VII to establish a normal workweek . . . generally applicable to all employees," and that an employee could not "demand any alteration in [his work schedule] to accommodate his religious needs." 29 CFR §§ 1605.1 (a)(3), (b)(3) (1967). Eventually, however, the Commission changed its view and decided that employers must reasonably accommodate such requested schedule changes except where "undue hardship" would result—for example, "where the employee's needed work cannot be per-

formed by another employee of substantially similar qualifications during the period of absence." 29 CFR § 1605.1 (b) (1976).[1] In amending Title VII in 1972 Congress confronted the same problem, and adopted the second position of the EEOC. Pub. L. 92–261, § 2(7), 86 Stat. 103, codified at 42 U. S. C. § 2000e (j) (1970 ed., Supp. V). Both before and after the 1972 amendment the lower courts have considered at length the circumstances in which employers must accommodate the religious practices of employees, reaching what the Court correctly describes as conflicting results, *ante*, at 75 n. 10. And on two occasions this Court has attempted to provide guidance to the lower courts, only to find ourselves evenly divided. *Parker Seal Co.* v. *Cummins*, 429 U. S. 65 (1976); *Dewey* v. *Reynolds Metals Co.*, 402 U. S. 689 (1971).

Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not

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[1] The Court's statement that in promulgating the second guidelines "[t]he EEOC . . . did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable," *ante*, at 72 n. 7, is incomprehensible. The preface to the later guidelines, 32 Fed. Reg. 10298 (1967), states that the "Commission hereby amends § 1605.1, Guidelines on Discrimination Because of Religion. . . . Section 1605.1 as amended shall read as follows . . . ." Thus the later guidelines expressly repealed the earlier guidelines. Moreover, the example of "undue hardship" given in the new guidelines and quoted in text makes clear that the Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for religious observances.

In its decisions subsequent to the formulation of the guidelines, the Commission has consistently held that employers must accommodate Sabbath observances where substitute employees are available. Compare CCH EEOC Decisions (1973) ¶¶ 6060, 6154, with, *e. g.*, ¶¶ 6120, 6310, 6367.

really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. I therefore dissent.

I

With respect to each of the proposed accommodations to respondent Hardison's religious observances that the Court discusses, it ultimately notes that the accommodation would have required "unequal treatment," *ante,* at 81, 84–85, in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," ultimately "signif[y] nothing."

The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious function; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules.[2] What all these cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each

[2] Many of the cases are collected in Annot., 22 ALR Fed. 580 (1975). For a perceptive discussion of the issues posed by the cases see Note, Accommodation of an Employee's Religious Practices Under Title VII, 1976 U. Ill. L. Forum 867.

instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs," *ante,* at 85, unless the employer gratuitously decides to repeal the rule *in toto.* What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

The point is perhaps best made by considering a not altogether hypothetical example. See CCH EEOC Decisions (1973) ¶ 6180. Assume that an employer requires all employees to wear a particular type of hat at work in order to make the employees readily identifiable to customers. Such a rule obviously does not, on its face, violate Title VII, and an employee who altered the uniform for reasons of taste could be discharged. But a very different question would be posed by the discharge of an employee who, for religious reasons, insisted on wearing over her hair a tightly fitted scarf which was visible through the hat. In such a case the employer could accommodate this religious practice without undue hardship—or any hardship at all. Yet as I understand the Court's analysis—and nothing in the Court's response, *ante,* at 83 n. 14, 84 n. 15, is to the contrary—the accommodation would not be required because it would afford the privilege of wearing scarfs to a select few based on their religious beliefs. The employee thus would have to give up either the religious practice or the job. This, I submit, makes a mockery of the statute.

In reaching this result, the Court seems almost oblivious of the legislative history of the 1972 amendments to Title VII which is briefly recounted in the Court's opinion, *ante,* at 73–75. That history is far more instructive than the Court allows. After the EEOC promulgated its second set of guidelines requiring reasonable accommodations unless undue hardship would result, at least two courts issued decisions questioning, whether the guidelines were consistent with Title VII. *Dewey* v. *Reynolds Metals Co.,* 429 F. 2d 324 (CA6 1970),

aff'd by equally divided Court, 402 U. S. 689 (1971); *Riley* v. *Bendix Corp.,* 330 F. Supp. 583 (MD Fla. 1971), rev'd, 464 F. 2d 1113 (CA5 1972). These courts reasoned, in language strikingly similar to today's decision, that to excuse religious observers from neutral work rules would "discriminate against . . . other employees" and "constitute unequal administration of the collective-bargaining agreement." *Dewey* v. *Reynolds Metals Co., supra,* at 330. They therefore refused to equate "religious discrimination with failure to accommodate." 429 F. 2d, at 335. When Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed the Congress of these decisions which, he said, had "clouded" the meaning of religious discrimination. 118 Cong. Rec. 706 (1972). He introduced an amendment, tracking the language of the EEOC regulation, to make clear that Title VII requires religious accommodation, even though unequal treatment would result. The primary purpose of the amendment, he explained, was to protect Saturday Sabbatarians like himself from employers who refuse "to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.,* at 705. His amendment was unanimously approved by the Senate on a roll-call vote, *id.,* at 731, and was accepted by the Conference Committee, H. R. Rep. No. 92–899, p. 15 (1972); S. Rep. No. 92–681, p. 15 (1972), whose report was approved by both Houses, 118 Cong. Rec. 7169, 7573 (1972). Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the *Dewey* decision in direct contravention of congressional intent.

The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioners' constitutional challenge unnecessary. The Court does not even rationalize its construction on this ground, however, nor could it, since "resort to an alternative construction to avoid deciding a constitutional question is appro-

priate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain* v. *Pressley,* 430 U. S. 372, 378 n. 11 (1977). Moreover, while important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer,[3] not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties, *e. g., Wisconsin* v. *Yoder,* 406 U. S. 205, 234–235, n. 22 (1972); *Sherbert* v. *Verner,* 374 U. S. 398, 409 (1963); *Zorach* v. *Clauson,* 343 U. S. 306 (1952), even when the exemption was in no way compelled by the Free Exercise Clause, *e. g., Gillette* v. *United States,* 401 U. S. 437 (1971); *Welsh* v. *United States,* 398 U. S. 333, 371–372 (1970) (WHITE, J., dissenting); *Sherbert* v. *Verner, supra,* at 422 (Harlan, J., dissenting); *Braunfeld* v. *Brown,* 366 U. S. 599, 608 (1961) (dictum); *McGowan* v. *Maryland,* 366 U. S. 420, 520 (1961) (opinion of Frankfurter, J.).[4] If the State does not establish

[3] Because of the view I take of the facts, see Part II, *infra,* I find it unnecessary to decide how much cost an employer must bear before he incurs "undue hardship." I also leave for another day the merits of any constitutional objections that could be raised if the law were construed to require employers (or employees) to assume significant costs in accommodating.

[4] The exemption here, like those we have upheld, can be claimed by any religious practitioner, a term that the EEOC has sensibly defined to include atheists, *e. g*, CCH EEOC Decisions (1973) ¶ 6316, see also *Young* v. *Southwestern Savings & Loan Assn.,* 509 F. 2d 140 (CA5 1975), and persons not belonging to any organized sect but who hold "'[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption,'" CCH Employment Practices ¶ 6500, quoting *United States* v. *Seeger,* 380 U. S. 163, 176 (1965). The purpose and primary effect of requiring such exemptions is the wholly secular one of securing

religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does—and, consistently with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.

II

Once it is determined that the duty to accommodate sometimes requires that an employee be exempted from an otherwise valid work requirement, the only remaining question is whether this is such a case: Did TWA prove that it exhausted all reasonable accommodations, and that the only remaining alternatives would have caused undue hardship on TWA's business? To pose the question is to answer it, for all that the District Court found TWA had done to accommodate respondent's Sabbath observance was that it "held several meetings with [respondent] . . . [and] authorized the union steward to search for someone who would swap shifts." 375 F. Supp. 877, 890–891 (WD Mo. 1974). To conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense.

The Court implicitly assumes that the only means of accommodation open to TWA were to compel an unwilling employee to replace Hardison; to pay premium wages to a voluntary substitute; or to employ one less person during

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equal economic opportunity to members of minority religions. Cf., *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed, *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970).

respondent's Sabbath shift.[5] Based on this assumption, the Court seemingly finds that each alternative would have involved undue hardship not only because Hardison would have been given a special privilege, but also because either another employee would have been deprived of rights under the collective-bargaining agreement, *ante,* at 80–81, or because "more than a *de minimis* cost," *ante,* at 84, would have been imposed on TWA. But the Court's myopic view of the available options is not supported by either the District Court's findings or the evidence adduced at trial. Thus, the Court's conclusion cannot withstand analysis, even assuming that its rejection of the alternatives it does discuss is justifiable.[6]

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[5] It is true that these are the only options the Court of Appeals discussed. But that court found that TWA could have adopted these options without undue hardship; once that conclusion is rejected it is incumbent on this Court to decide whether any other alternatives were available that would not have involved such hardship.

[6] I entertain grave doubts on both factual and legal grounds about the validity of the Court's rejection of the options it considers. As a matter of fact, I do not believe the record supports the Court's suggestion that the costs to TWA of either paying overtime or not replacing respondent would have been more than *de minimis*. While the District Court did state, as the Court notes, *ante,* at 84 n. 15, that both alternatives "would have created an undue burden on the conduct of TWA's business," 375 F. Supp., at 891, the court did not explain its understanding of the phrase "undue burden," and may have believed that such a burden exists whenever any cost is incurred by the employer, no matter how slight. Thus the District Court's assertion falls far short of a factual "finding" that the costs of these accommodations would be more than *de minimis*. Moreover, the record is devoid of any evidence documenting the extent of the "efficiency loss" TWA would have incurred had it used a supervisor or an already scheduled employee to do respondent's work, and while the stipulations make clear what overtime would have cost, the price is far from staggering: $150 for three months, at which time respondent would have been eligible to transfer back to his previous department. The Court's suggestion that the cost of accommodation must be evaluated in light of the "likelihood that . . . TWA may have many employees whose religious observances . . . prohibit them from working on Satur-

To begin with, the record simply does not support the Court's assertion, made without accompanying citations, that "[t]here were no volunteers to relieve Hardison on Saturdays," *ante,* at 81. Everett Kussman, the manager of the department in which respondent worked, testified that he had made no effort to find volunteers, App. 136,[7] and the union stipulated that its steward had not done so either, *id.,* at 158.[8] Thus, contrary to the Court's assumption, there may have been one or more employees who, for reasons of either sympathy or personal convenience, willingly would have substi-

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days or Sundays," *ante* at 84 n. 15, is not only contrary to the record, which indicates that only one other case involving a conflict between work schedules and Sabbath observance had arisen at TWA since 1945, Tr. 312–314, but also irrelevant, since the real question is not whether such employees exist but whether they could be accommodated without significant expense. Indeed, to the extent that TWA employed Sunday as well as Saturday Sabbatarians, the likelihood of accommodation being costly would diminish, since trades would be more feasible.

As a matter of law, I seriously question whether simple English usage permits "undue hardship" to be interpreted to mean "more than *de minimis* cost," especially when the examples the guidelines give of possible undue hardship is the absence of a qualified substitute, *supra,* at 85–86. I therefore believe that in the appropriate case we would be compelled to confront the constitutionality of requiring employers to bear more than *de minimis* costs. The issue need not be faced here, however, since an almost cost-free accommodation was possible.

[7] Wilbur Stone, Director of Industrial Relations, Technical Service, at TWA confirmed Kussman's testimony. App. 157–158. In its Response to Plaintiff's Suggested Findings of Fact, TWA conceded that it "did not attempt to find a replacement for plaintiff." App. in No. 74–1424 (CA6), p. 191, ¶ 3 (1).

[8] The Court relies, *ante,* at 78, on the District Court's conclusory assertion that "[a]ny shift or change was impossible within the seniority framework." 375 F. Supp., at 889. But the District Court also found that "TWA did not take part in the search for employees willing to swap shifts . . . and it was admitted at trial that the Union made no real effort." *Id.,* at 888. Thus, the District Court's statement concerning the impact of "the seniority framework" lends no support to the Court's assertion that there were no volunteers. See also n. 10, *infra.*

tuted for respondent on Saturdays until respondent could either regain the non-Saturday shift he had held for the three preceding months [9] or transfer back to his old department where he had sufficient seniority to avoid Saturday work. Alternatively, there may have been an employee who preferred respondent's Thursday-Monday daytime shift to his own; in fact, respondent testified that he had informed Kussman and the union steward that the clerk on the Sunday-Thursday night shift (the "graveyard" shift) was dissatisfied with his hours. *Id.*, at 70. Thus, respondent's religious observance might have been accommodated by a simple trade of days or shifts without necessarily depriving any employee of his or her contractual rights [10] and without

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[9] Respondent lost the non-Sabbath shift when an employee junior to him went on vacation. The vacation was to last only two weeks, however, and the record does not explain why respondent did not regain his shift at the end of that time.

[10] If, as appears likely, no one senior to the substitute employee desired respondent's Sabbath assignment or his Thursday-Monday shift, then the substitute could have transferred to respondent's position without depriving anyone of his or her seniority expectations. Similarly, if, as also appears probable, no one senior to respondent desired the substitute's spot, respondent could have assumed it. Such a trade would not have deprived any employee of seniority expectations. The trade apparently still would have violated the collective-bargaining agreement, however, since the agreement authorized transfers only to vacant jobs. This is undoubtedly what the District Court meant when it found that "the seniority framework" precluded shift changes. See n. 8, *supra*. Indeed, the first time in the District Court's opinion that such a finding appears, it is preceded by the finding that "there were no jobs open for bid." 375 F. Supp., at 884.

Even if a trade could not have been arranged without disrupting seniority expectations TWA could have requested the Union Relief Committee to approve an exemption. The record reveals that the Committee's function was to ameliorate the rigidity of the system, App. 130, and that on at least one occasion it had approved a permanent transfer apparently outside the seniority system, *id.*, at 144.

imposing significant costs on TWA. Of course, it is also possible that no trade—or none consistent with the seniority system—could have been arranged. But the burden under the EEOC regulation is on TWA to establish that a reasonable accommodation was not possible. 29 CFR § 1605.1 (c) (1976). Because it failed either to explore the possibility of a voluntary trade or to assure that its delegate, the union steward, did so, TWA was unable to meet its burden.

Nor was a voluntary trade the only option open to TWA that the Court ignores; to the contrary, at least two other options are apparent from the record. First, TWA could have paid overtime to a voluntary replacement for respondent—assuming that someone would have been willing to work Saturdays for premium pay—and passed on the cost to respondent. In fact, one accommodation Hardison suggested would have done just that by requiring Hardison to work overtime when needed at regular pay. Under this plan, the total overtime cost to the employer—and the total number of overtime hours available for other employees—would not have reflected Hardison's Sabbath absences. Alternatively, TWA could have transferred respondent back to his previous department where he had accumulated substantial seniority, as respondent also suggested.[11] Admittedly, both options would have violated the collective-bargaining agreement; the former because the agreement required that employees working over 40 hours per week receive premium pay, and the latter because the agreement prohibited employees from trans-

[11] The Court states, *ante*, at 83 n. 14, that because of TWA's departmental seniority system, such a transfer "would not have solved Hardison's problems." But respondent testified without contradiction that had he returned to his previous department he would have regained his seniority in that department, and thereby could have avoided work on his Sabbath. App. 70–71. According to respondent, the only objection that was raised to this solution was that it violated the rule prohibiting transfers twice within six months. *Ibid.*

ferring departments more than once every six months. But neither accommodation would have deprived any other employee of rights under the contract or violated the seniority system in any way.[12] Plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations; even the Court appears to concede as much, *ante,* at 79. Thus I do not believe it can be even seriously argued that TWA would have suffered "undue hardship" to its business had it required respondent to pay the extra costs of his replacement, or had it transferred respondent to his former department.[13]

What makes today's decision most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for

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[12] The accommodations would have disadvantaged respondent to some extent, but since he suggested both options I do not consider whether an employer would satisfy his duty to accommodate by offering these choices to an unwilling employee. Cf. *Draper* v. *United States Pipe & Foundry Co.,* 527 F. 2d 515 (CA6 1975) (employer does not discharge his duty to accommodate by offering to transfer an electrician to an unskilled position).

[13] Of course, the accommodations discussed in the text would have imposed some administrative inconvenience on TWA. Petitioners do not seriously argue, however, that this consequence of accommodation makes the statute violative of the Establishment Clause. Were such an argument to be made, our prior decision upholding exemptions from state-created duties, see *supra,* at 90, would provide a complete answer, since the exemptions we have sustained have placed not inconsiderable burdens on private parties. For example, the effect of excusing conscientious objectors from military conscription is to require a nonobjector to serve instead, yet we have repeatedly upheld this exemption. *E. g., Selective Draft Law Cases,* 245 U. S. 366, 389–390 (1918). See also *Gallagher* v. *Crown Kosher Market,* 366 U. S. 617, 627 (1961) (upholding law prohibiting private citizens from engaging in specified activities within a fixed distance from places of public worship).

worshiping their God.[14] The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased.

I respectfully dissent.

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[14] Ironically, the fiscal costs to society of today's decision may exceed the costs that would accrue if employers were required to make all accommodations without regard to hardship, since it is clear that persons on welfare cannot be denied benefits because they refuse to take jobs that would prevent them from observing religious holy days, see *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

MANSON, CORRECTION COMMISSIONER *v.* BRATHWAITE

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

No. 75–871. Argued November 29, 1976—Decided June 16, 1977

Glover, a trained Negro undercover state police officer, purchased heroin from a seller through the open doorway of an apartment while standing for two or three minutes within two feet of the seller in a hallway illuminated by natural light. A few minutes later Glover described the seller to another police officer as being "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build." The other police officer, suspecting from the description that respondent might be the seller, left a police photograph of respondent at the office of Glover, who viewed it two days later and identified it as the picture of the seller. In a Connecticut court, respondent was charged with, and convicted of, possession and sale of heroin, and at his trial, held some eight months after the crime, the photograph was received in evidence without objection and Glover testified that there was no doubt that the person shown in the photograph was respondent and also made a positive in-court identification without objection. After the Connecticut Supreme Court affirmed the conviction, respondent filed a petition for habeas corpus in Federal District Court, alleging that the admission of the identification testimony at his state trial deprived him of due process of law in violation of the Fourteenth Amendment. The District Court dismissed the petition, but the Court of Appeals reversed, holding that evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive, and that the identification was unreliable in any event. *Held:* The Due Process Clause of the Fourteenth Amendment does not compel the exclusion of the identification evidence. Pp. 109–117.

(a) Reliability is the linchpin in determining the admissibility of identification testimony for confrontations occurring both prior to and after *Stovall* v. *Denno,* 388 U. S. 293, wherein it was held that the determination depends on the "totality of the circumstances." *Id.,* at 302. The factors to be weighed against the corrupting effect of the suggestive procedure in assessing reliability are set out in *Neil* v. *Biggers,* 409 U. S. 188, and include the witness' opportunity to view the criminal

at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Pp. 109–114.

(b) Under the totality of the circumstances in this case, there does not exist "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U. S. 377, 384. Glover, no casual observer but a trained police officer, had a sufficient opportunity to view the suspect, accurately described him, positively identified respondent's photograph as that of the suspect, and made the photograph identification only two days after the crime. Pp. 114–117.

527 F. 2d 363, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 117. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 118.

Bernard D. Gaffney argued the cause for petitioner. With him on the brief was *George D. Stoughton.*

David S. Golub argued the cause for respondent. With him on the brief were *Frederick H. Weisberg, Richard A. Silver,* and *Jay H. Sandak.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno,* 388 U. S. 293 (1967), and *Neil* v. *Biggers,* 409 U. S. 188 (1972), are particularly implicated.

I

Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to the Narcotics Division in an undercover capacity. On May 5 of that year, about

7:45 p. m., e. d. t., and while there was still daylight, Glover and Henry Alton Brown, an informant, went to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer. Cicero, it was thought, lived on the third floor of that apartment building. Tr. 45–46, 68.[1] Glover and Brown entered the building, observed by backup Officers D'Onofrio and Gaffey, and proceeded by stairs to the third floor. Glover knocked at the door of one of the two apartments served by the stairway.[2] The area was illuminated by natural light from a window in the third floor hallway. *Id.*, at 27–28. The door was opened 12 to 18 inches in response to the knock. Glover observed a man standing at the door and, behind him, a woman. Brown identified himself. Glover then asked for "two things" of narcotics. *Id.*, at 29. The man at the door held out his hand, and Glover gave him two $10 bills. The door closed. Soon the man returned and handed Glover two glassine bags.[3] While the door was open, Glover stood within two feet of the person from whom he made the purchase and observed his face. Five to seven minutes elapsed from the

[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. The United States District Court, on federal habeas, pursuant to agreement of the parties, Tr. of Oral Arg. 23, conducted no evidentiary hearing.

[2] It appears that the door on which Glover knocked may not have been that of the Cicero apartment. Petitioner concedes, in any event, that the transaction effected "was with some other person than had been intended." *Id.*, at 4.

[3] This was Glover's testimony. Brown later was called as a witness for the prosecution. He testified on direct examination that, due to his then use of heroin, he had no clear recollection of the details of the incident. Tr. 81–82. On cross-examination, as in an interview with defense counsel the preceding day, he said that it was a woman who opened the door, received the money, and thereafter produced the narcotics. *Id.*, at 84, 86–87. On redirect, he acknowledged that he was using heroin daily at the time, that he had had some that day, and that there was "an inability to recall and remember events." *Id.*, at 88–89.

time the door first opened until it closed the second time. *Id.*, at 30–33.

Glover and Brown then left the building. This was about eight minutes after their arrival. Glover drove to headquarters where he described the seller to D'Onofrio and Gaffey. Glover at that time did not know the identity of the seller. *Id.*, at 36. He described him as being "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." *Id.*, at 36–37. D'Onofrio, suspecting from this description that respondent might be the seller, obtained a photograph of respondent from the Records Division of the Hartford Police Department. He left it at Glover's office. D'Onofrio was not acquainted with respondent personally, but did know him by sight and had seen him "[s]everal times" prior to May 5. *Id.*, at 63–65. Glover, when alone, viewed the photograph for the first time upon his return to headquarters on May 7; he identified the person shown as the one from whom he had purchased the narcotics. *Id.*, at 36–38.

The toxicological report on the contents of the glassine bags revealed the presence of heroin. The report was dated July 16, 1970. *Id.*, at 75–76.

Respondent was arrested on July 27 while visiting at the apartment of a Mrs. Ramsey on the third floor of 201 Westland. This was the apartment at which the narcotics sale had taken place on May 5.[4]

Respondent was charged, in a two-count information, with possession and sale of heroin, in violation of Conn. Gen. Stat. (Rev. of 1958, as amended in 1969), §§ 19–481a and 19–480a

[4] Respondent testified: "Lots of times I have been there before in that building." He also testified that Mrs. Ramsey was a friend of his wife, that her apartment was the only one in the building he ever visited, and that he and his family, consisting of his wife and five children, did not live there but at 453 Albany Avenue, Hartford. *Id.*, at 111–113.

(1977).[5] At his trial in January 1971, the photograph from which Glover had identified respondent was received in evidence without objection on the part of the defense. Tr. 38. Glover also testified that, although he had not seen respondent in the eight months that had elapsed since the sale, "there [was] no doubt whatsoever" in his mind that the person shown on the photograph was respondent. *Id.*, at 41–42. Glover also made a positive in-court identification without objection. *Id.*, at 37–38.

No explanation was offered by the prosecution for the failure to utilize a photographic array or to conduct a lineup.

Respondent, who took the stand in his own defense, testified that on May 5, the day in question, he had been ill at his Albany Avenue apartment ("a lot of back pains, muscle spasms . . . a bad heart . . . high blood pressure . . . neuralgia in my face, and sinus," *id.*, at 106), and that at no time on that particular day had he been at 201 Westland. *Id.*, at 106, 113–114. His wife testified that she recalled, after her husband had refreshed her memory, that he was home all day on May 5. *Id.*, at 164–165. Doctor Wesley M. Vietzke, an internist and assistant professor of medicine at the University of Connecticut, testified that respondent had consulted him on April 15, 1970, and that he took a medical history from him, heard his complaints about his back and facial pain, and discovered that he had high blood pressure. *Id.*, at 129–131. The physician found respondent, subjectively, "in great discomfort." *Id.*, at 135. Respondent in fact underwent surgery for a herniated disc at L5 and S1 on August 17. *Id.*, at 157.

The jury found respondent guilty on both counts of the information. He received a sentence of not less than six nor

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[5] These statutes have since been amended in ways that do not affect the present litigation. See 1971 Conn. Pub. Acts 812, § 1; 1972 Conn. Pub. Acts 278, §§ 25 and 26; Conn. Pub. Acts 73–137, § 10; Conn. Pub. Acts 74–332, §§ 1 and 3; Conn. Pub. Acts 75–567, § 65.

more than nine years. His conviction was affirmed *per curiam* by the Supreme Court of Connecticut. *State* v. *Brathwaite,* 164 Conn. 617, 325 A. 2d 284 (1973). That court noted the absence of an objection to Glover's in-court identification and concluded that respondent "has not shown that substantial injustice resulted from the admission of this evidence." *Id.,* at 619, 325 A. 2d, at 285. Under Connecticut law, substantial injustice must be shown before a claim of error not made or passed on by the trial court will be considered on appeal. *Ibid.*

Fourteen months later, respondent filed a petition for habeas corpus in the United States District Court for the District of Connecticut. He alleged that the admission of the identification testimony at his state trial deprived him of due process of law to which he was entitled under the Fourteenth Amendment. The District Court, by an unreported written opinion based on the court's review of the state trial transcript,[6] dismissed respondent's petition. On appeal, the United States Court of Appeals for the Second Circuit reversed, with instructions to issue the writ unless the State gave notice of a desire to retry respondent and the new trial occurred within a reasonable time to be fixed by the District Judge.[7] 527 F. 2d 363 (1975).

In brief summary, the court felt that evidence as to the photograph should have been excluded, regardless of relia-

[6] Neither party submitted a request to the District Court for an independent factual hearing on respondent's claims. See n. 1, *supra.*

[7] Although no objection was made in the state trial to the admission of the identification testimony and the photograph, the issue of their propriety as evidence was raised on the appeal to the Supreme Court of Connecticut. Petitioner has asserted no claims related to the failure of the respondent either to exhaust state remedies or to make contemporaneous objections. The District Court and the Court of Appeals, each for a somewhat different reason, App. to Pet. for Cert. 7a–8a; 527 F. 2d, at 366, concluded that the merits were properly before them. We are not inclined now to rule otherwise.

bility, because the examination of the single photograph was unnecessary and suggestive. And, in the court's view, the evidence was unreliable in any event. We granted certiorari. 425 U. S. 957 (1976).

II

Stovall v. *Denno, supra,* decided in 1967, concerned a petitioner who had been convicted in a New York court of murder. He was arrested the day following the crime and was taken by the police to a hospital where the victim's wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. On federal habeas, Stovall claimed the identification testimony violated his Fifth, Sixth, and Fourteenth Amendment rights. The District Court dismissed the petition, and the Court of Appeals, en banc, affirmed. This Court also affirmed. On the identification issue, the Court reviewed the practice of showing a suspect singly for purposes of identification, and the claim that this was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice "has been widely condemned," 388 U. S., at 302, but it concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Ibid.* In that case, showing Stovall to the victim's spouse "was imperative." The Court then quoted the observations of the Court of Appeals, 355 F. 2d 731, 735 (CA2 1966), to the effect that the spouse was the only person who could possibly exonerate the accused; that the hospital was not far from the courthouse and jail; that no one knew how long she might live; that she was not able to visit the jail; and that taking Stovall to the hospital room was the only feasible procedure, and, under the circumstances, " 'the usual police station line-up . . . was out of the question.' " 388 U. S., at 302.

Neil v. *Biggers, supra,* decided in 1972, concerned a respondent who had been convicted in a Tennessee court of rape, on evidence consisting in part of the victim's visual and voice identification of Biggers at a station-house showup seven months after the crime. The victim had been in her assailant's presence for some time and had directly observed him indoors and under a full moon outdoors. She testified that she had "no doubt" that Biggers was her assailant. She previously had given the police a description of the assailant. She had made no identification of others presented at previous showups, lineups, or through photographs. On federal habeas, the District Court held that the confrontation was so suggestive as to violate due process. The Court of Appeals affirmed. This Court reversed on that issue, and held that the evidence properly had been allowed to go to the jury. The Court reviewed *Stovall* and certain later cases where it had considered the scope of due process protection against the admission of evidence derived from suggestive identification procedures, namely, *Simmons* v. *United States,* 390 U. S. 377 (1968); *Foster* v. *California,* 394 U. S. 440 (1969); and *Coleman* v. *Alabama,* 399 U. S. 1 (1970).[8] The Court concluded that

[8] *Simmons* involved photographs, mostly group ones, shown to bank-teller victims who made in-court identifications. The Court discussed the "chance of misidentification," 390 U. S., at 383; declined to prohibit the procedure "either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement," *id.,* at 384; and held that each case must be considered on its facts and that a conviction would be set aside only if the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Ibid.* The out-of-court identification was not offered. Mr. Justice Black would have denied Simmons' due process claim as frivolous. *Id.,* at 395–396.

Foster concerned repeated confrontations between a suspect and the manager of an office that had been robbed. At a second lineup, but not at the first and not at a personal one-to-one confrontation, the manager identified the suspect. At trial he testified as to this and made an in-court identification. The Court reaffirmed the *Stovall* standard and then con-

general guidelines emerged from these cases "as to the relationship between suggestiveness and misidentification." The "admission of evidence of a showup without more does not violate due process." 409 U. S., at 198. The Court expressed concern about the lapse of seven months between the crime and the confrontation and observed that this "would be a seriously negative factor in most cases." *Id.*, at 201. The "central question," however, was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.*, at 199. Applying that test, the Court found "no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury." *Id.*, at 201.

Biggers well might be seen to provide an unambiguous answer to the question before us: The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.[9] In one passage,

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cluded that the repeated confrontations were so suggestive as to violate due process. The case was remanded for the state courts to consider the question of harmless error.

In *Coleman* a plurality of the Court was of the view that the trial court did not err when it found that the victim's in-court identifications did not stem from a lineup procedure so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. 399 U. S., at 5–6.

[9] Mr. Justice Marshall argues in dissent that our cases have "established two different due process tests for two very different situations." *Post*, at 122. Pretrial identifications are to be covered by *Stovall*, which is said to require exclusion of evidence concerning unnecessarily suggestive pretrial identifications without regard to reliability. In-court identifications, on the other hand, are to be governed by *Simmons* and admissibility turns on reliability. The Court's cases are sorted into one category or the other. *Biggers*, which clearly adopts the reliability of the identification as the guiding factor in the admissibility of both pretrial and in-court identifications, is condemned for mixing the two lines and for adopting a uniform rule.

Although it must be acknowledged that our cases are not uniform in their emphasis, they hardly suggest the formal structure the dissent

however, the Court observed that the challenged procedure occurred pre-*Stovall* and that a strict rule would make little sense with regard to a confrontation that preceded the Court's first indication that a suggestive procedure might lead to the exclusion of evidence. *Id.*, at 199. One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-*Stovall*. The question before us, then, is simply whether the *Biggers* analysis applies to post-*Stovall* confrontations as well to those pre-*Stovall*.

III

In the present case the District Court observed that the "sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover." App. to Pet. for Cert. 6a. On the constitutional issue, the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification. If so, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Id.*, at 9a. *Biggers* and *Simmons* were cited. The court noted that in the Second Circuit, its controlling court, it was clear that "this type of identification procedure [display of a single photograph] is impermissibly

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would impose on them. If our cases truly established two different rules, one might expect at some point at least passing reference to the fact. There is none. And if *Biggers* departed so grievously from the past cases, it is surprising that there was not at least some mention of the point in MR. JUSTICE BRENNAN's dissent. In fact, the cases are not so readily sorted as the dissent suggests. Although *Foster* involved both in-court and out-of-court identifications, the Court seemed to apply only a single standard for both. And although *Coleman* involved only an in-court identification, the plurality cited *Stovall* for the guiding rule that the claim was to be assessed on the "totality of the surrounding circumstances." 399 U. S., at 4. Thus, *Biggers* is not properly seen as a departure from the past cases, but as a synthesis of them.

suggestive," and turned to the second inquiry. App. to Pet. for Cert. 9a. The factors *Biggers* specified for consideration were recited and applied. The court concluded that there was no substantial likelihood of irreparable misidentification. It referred to the facts: Glover was within two feet of the seller. The duration of the confrontation was at least a "couple of minutes." There was natural light from a window or skylight and there was adequate light to see clearly in the hall. Glover "certainly was paying attention to identify the seller." *Id.*, at 10a. He was a trained police officer who realized that later he would have to find and arrest the person with whom he was dealing. He gave a detailed description to D'Onofrio. The reliability of this description was supported by the fact that it enabled D'Onofrio to pick out a single photograph that was thereafter positively identified by Glover. Only two days elapsed between the crime and the photographic identification. Despite the fact that another eight months passed before the in-court identification, Glover had "no doubt" that Brathwaite was the person who had sold him heroin.

The Court of Appeals confirmed that the exhibition of the single photograph to Glover was "impermissibly suggestive," 527 F. 2d, at 366, and felt that, in addition, "it was unnecessarily so." *Id.*, at 367. There was no emergency and little urgency. The court said that prior to the decision in *Biggers*, except in cases of harmless error, "a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand." *Ibid.* It noted what it felt might be opposing inferences to be drawn from passages in *Biggers*, but concluded that the case preserved the principle "requiring the exclusion of identifications resulting from 'unnecessarily suggestive confrontation'" in post-*Stovall* situations. 527 F. 2d, at 368. The court also concluded that for post-*Stovall* identifications, *Biggers* had not changed the existing rule. Thus: "Evidence of an identification unnecessarily obtained by impermissibly

suggestive means must be excluded under *Stovall* . . . . No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification." 527 F. 2d, at 371. Finally, the court said, even if this conclusion were wrong, the writ, nevertheless, should issue. It took judicial notice that on May 5, 1970, sunset at Hartford was at 7:53 p. m. It characterized Glover's duty as an undercover agent as one "to cause arrests to be made," and his description of the suspect as one that "could have applied to hundreds of Hartford black males." *Ibid.* The in-court identification had "little meaning," for Brathwaite was at the counsel table. The fact that respondent was arrested in the very apartment where the sale was made was subject to a "not implausible" explanation from the respondent, "although evidently not credited by the jury." And the court was troubled by "the long and unexplained delay" in the arrest. It was too great a danger that the respondent was convicted because he was a man D'Onofrio had previously observed near the scene, was thought to be a likely offender, and was arrested when he was known to be in Mrs. Ramsey's apartment, rather than because Glover "really remembered him as the seller." *Id.*, at 371–372.

IV

Petitioner at the outset acknowledges that "the procedure in the instant case was suggestive [because only one photograph was used] and unnecessary" [because there was no emergency or exigent circumstance]. Brief for Petitioner 10; Tr. of Oral Arg. 7. The respondent, in agreement with the Court of Appeals, proposes a *per se* rule of exclusion that he claims is dictated by the demands of the Fourteenth Amendment's guarantee of due process. He rightly observes that this is the first case in which this Court has had occasion to rule upon strictly post-*Stovall* out-of-court identification evidence of the challenged kind.

Since the decision in *Biggers,* the Courts of Appeals appear to have developed at least two approaches to such evidence. See Pulaski, *Neil* v. *Biggers:* The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection, 26 Stan. L. Rev. 1097, 1111–1114 (1974). The first, or *per se* approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures.[10] The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification." 527 F. 2d, at 371. See *Smith* v. *Coiner,* 473 F. 2d 877, 882 (CA4), cert. denied *sub nom. Wallace* v. *Smith,* 414 U. S. 1115 (1973).

The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the *per se* approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact. See *United States ex rel. Kirby* v. *Sturges,* 510 F. 2d 397, 407–408 (CA7) (opinion by Judge, now Mr. Justice, Stevens), cert. denied, 421 U. S. 1016 (1975); *Stanley* v. *Cox,* 486 F. 2d 48

[10] Although the *per se* approach demands the exclusion of testimony concerning unnecessarily suggestive identifications, it does permit the admission of testimony concerning a subsequent identification, including an in-court identification, if the subsequent identification is determined to be reliable. 527 F. 2d, at 367. The totality approach, in contrast, is simpler: if the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible.

(CA4 1973), cert. denied *sub nom. Stanley* v. *Slayton,* 416 U. S. 958 (1974).[11]

Mr. Justice Stevens, in writing for the Seventh Circuit in *Kirby, supra,* observed: "There is surprising unanimity among scholars in regarding such a rule [the *per se* approach] as essential to avoid serious risk of miscarriage of justice." 510 F. 2d, at 405. He pointed out that well-known federal judges have taken the position that "evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure." *Id.,* at 406. Indeed, the ALI Model Code of Pre-Arraignment Procedure §§ 160.1 and 160.2 (1975) (hereafter Model Code) frowns upon the use of a showup or the display of only a single photograph.

The respondent here stresses the same theme and the need for deterrence of improper identification practice, a factor he regards as pre-eminent. Photographic identification, it is said, continues to be needlessly employed. He notes that the legislative regulation "the Court had hoped [*United States* v.] *Wade*[, 388 U. S. 218, 239 (1967),] would engender," Brief for Respondent 15, has not been forthcoming. He argues that a totality rule cannot be expected to have a significant deterrent impact; only a strict rule of exclusion will have direct and immediate impact on law enforcement agents. Identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate.

There are, of course, several interests to be considered and taken into account. The driving force behind *United States* v. *Wade,* 388 U. S. 218 (1967), *Gilbert* v. *California,* 388

[11] The Fourth Circuit's then very recent decision in *Smith* v. *Coiner,* 473 F. 2d 877 (1973), was described as one applying the second, or totality, test. 486 F. 2d, at 55.

U. S. 263 (1967) (right to counsel at a post-indictment lineup), and *Stovall,* all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The *per se* rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the *per se* approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable.[12]

The third factor is the effect on the administration of justice. Here the *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach—

[12] The interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate. Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence. Cf. McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L. Rev. 235, 241 (1970).

cases in which the identification is reliable despite an unnecessarily suggestive identification procedure—reversal is a Draconian sanction.[13] Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm. See, for example, the several opinions in *Brewer* v. *Williams,* 430 U. S. 387 (1977). See also *United States* v. *Janis,* 428 U. S. 433 (1976).

It is true, as has been noted, that the Court in *Biggers* referred to the pre-*Stovall* character of the confrontation in that case. 409 U. S., at 199. But that observation was only one factor in the judgmental process. It does not translate into a holding that post-*Stovall* confrontation evidence automatically is to be excluded.

The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment. See *United States* v. *Lovasco,* 431 U. S. 783, 790 (1977); *Rochin* v. *California,* 342 U. S. 165, 170–172 (1952). *Stovall,* with its reference to "the totality of the circumstances," 388 U. S., at 302, and *Biggers,* with its continuing stress on the same totality, 409 U. S., at 199, did not, singly or together, establish a strict exclusionary rule or new standard of due process. Judge Leventhal, although speaking pre-*Biggers* and of a pre-*Wade* situation, correctly has described *Stovall* as protecting an *evidentiary* interest and, at the same time, as recognizing the limited extent of that interest in our adversary system.[14]

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[13] Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem. See *United States ex rel. Kirby* v. *Sturges,* 510 F. 2d 397, 406 (CA7 1975).

[14] "In essence what the *Stovall* due process right protects is an evidentiary interest. . . .

"It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. 409 U. S., at 199–200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

V

We turn, then, to the facts of this case and apply the analysis:

1. The opportunity to view. Glover testified that for two to three minutes he stood at the apartment door, within two feet of the respondent. The door opened twice, and each time the man stood at the door. The moments passed, the conversation took place, and payment was made. Glover looked directly at his vendor. It was near sunset, to be sure, but the sun had not yet set, so it was not dark or even dusk or twilight. Natural light from outside entered the hallway through a window. There was natural light, as well, from inside the apartment.

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being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.

"Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi." *Clemons* v. *United States,* 133 U. S. App. D. C. 27, 48, 408 F. 2d 1230, 1251 (1968) (concurring opinion) (footnote omitted), cert. denied, 394 U. S. 964 (1969).

2. The degree of attention. Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty—and specialized and dangerous duty—when he called at the third floor of 201 Westland in Hartford on May 5, 1970. Glover himself was a Negro and unlikely to perceive only general features of "hundreds of Hartford black males," as the Court of Appeals stated. 527 F. 2d, at 371. It is true that Glover's duty was that of ferreting out narcotics offenders and that he would be expected in his work to produce results. But it is also true that, as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.

3. The accuracy of the description. Glover's description was given to D'Onofrio within minutes after the transaction. It included the vendor's race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that respondent did not possess the physical characteristics so described. D'Onofrio reacted positively at once. Two days later, when Glover was alone, he viewed the photograph D'Onofrio produced and identified its subject as the narcotics seller.

4. The witness' level of certainty. There is no dispute that the photograph in question was that of respondent. Glover, in response to a question whether the photograph was that of the person from whom he made the purchase, testified: "There is no question whatsoever." Tr. 38. This positive assurance was repeated. *Id.*, at 41–42.

5. The time between the crime and the confrontation. Glover's description of his vendor was given to D'Onofrio

within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph.

These indicators of Glover's ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself. Although identifications arising from single-photograph displays may be viewed in general with suspicion, see *Simmons* v. *United States,* 390 U. S., at 383, we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D'Onofrio had left the photograph at Glover's office and was not present when Glover first viewed it two days after the event. There thus was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.[15]

Surely, we cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." *Id.,* at 384. Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

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[15] Mrs. Ramsey was not a witness at the trial.

Of course, it would have been better had D'Onofrio presented Glover with a photographic array including "so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array." Model Code § 160.2 (2). The use of that procedure would have enhanced the force of the identification at trial and would have avoided the risk that the evidence would be excluded as unreliable. But we are not disposed to view D'Onofrio's failure as one of constitutional dimension to be enforced by a rigorous and unbending exclusionary rule. The defect, if there be one, goes to weight and not to substance.[16]

We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification, and that those criteria are satisfactorily met and complied with here.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE STEVENS, concurring.

While I join the Court's opinion, I would emphasize two points.

First, as I indicated in my opinion in *United States ex rel. Kirby* v. *Sturges,* 510 F. 2d 397, 405–406 (CA7 1975), the arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force. Nevertheless,

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[16] We are not troubled, as was the Court of Appeals, by the "long and unexplained delay" in respondent's arrest. 527 F. 2d, at 372. That arrest took place on July 27. The toxicological report verifying the substance sold as heroin had issued only 11 days earlier, on July 16. Those 11 days after verification of the contents of the glassine bags do not constitute, for us, a "long" period. And with the positive toxicological report having been received within a fortnight, the arrest's delay perhaps is not "unexplained."

for the reasons stated in that opinion, as well as those stated by the Court today, I am persuaded that this rulemaking function can be performed "more effectively by the legislative process than by a somewhat clumsy judicial fiat," *id.*, at 408, and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules.

Second, in evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side.* MR. JUSTICE BLACKMUN's opinion for the Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself. Although I consider the factual question in this case extremely close, I am persuaded that the Court has resolved it properly.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967); and *Stovall* v. *Denno,* 388 U. S. 293 (1967). But it is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

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*In this case, for example, the fact that the defendant was a regular visitor to the apartment where the drug transaction occurred tends to confirm his guilt. In the *Kirby* case, where the conviction was for robbery, the fact that papers from the victim's wallet were found in the possession of the defendant made it difficult to question the reliability of the identification. These facts should not, however, be considered to support the admissibility of eyewitness testimony when applying the criteria identified in *Neil* v. *Biggers,* 409 U. S. 188. Properly analyzed, however, such facts would be relevant to a question whether error, if any, in admitting identification testimony was harmless.

I

The magnitude of the Court's error can be seen by analyzing the cases in the *Wade* trilogy and the decisions following it. The foundation of the *Wade* trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. *United States* v. *Wade, supra,* at 228. Relying on numerous studies made over many years by such scholars as Professor Wigmore and Mr. Justice Frankfurter, the Court concluded that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Ibid.* It is, of course, impossible to control one source of such errors—the faulty perceptions and unreliable memories of witnesses—except through vigorously contested trials conducted by diligent counsel and judges. The Court in the *Wade* cases acted, however, to minimize the more preventable threat posed to accurate identification by "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Ibid.*

The Court did so in *Wade* and *Gilbert* v. *California* by prohibiting the admission at trial of evidence of pretrial confrontations at which an accused was not represented by counsel. Further protection was afforded by holding that an in-court identification following an uncounseled lineup was allowable only if the prosecution could clearly and convincingly demonstrate that it was not tainted by the constitutional violation. Only in this way, the Court held, could confrontations fraught with the danger of misidentification be made fairer, and could Sixth Amendment rights to assistance of counsel and confrontation of witnesses at trial be effectively preserved. The crux of the *Wade* decisions, however, was the unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification

testimony. This, combined with the fact that juries unfortunately are often unduly receptive to such evidence,[1] is the fundamental fact of judicial experience ignored by the Court today.

Stovall v. *Denno,* while holding that the *Wade* prophylactic rules were not retroactive, was decided at the same time and reflects the same concerns about the reliability of identification testimony. *Stovall* recognized that, regardless of Sixth Amendment principles, "the conduct of a confrontation" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. 388 U. S., at 301–302. The pretrial confrontation in *Stovall* was plainly suggestive,[2] and evidence of it was introduced at trial along with the witness' in-court identification. The Court ruled that there had been no violation of due process, however, because the unusual necessity for the procedure [3] outweighed the danger of suggestion.

Stovall thus established a due proceess right of criminal suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. The right was enforceable by exclusion at trial of evidence of the constitutionally invalid identification. Comparison with *Wade* and *Gilbert* confirms this interpretation. Where their Sixth

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[1] See, *e. g.,* P. Wall, Eye-Witness Identification in Criminal Cases 19–23 (1965); N. Sobel, Eye-Witness Identification: Legal and Practical Problems, §§ 3.01, 3.02, 30 (1972); Hammelmann & Williams, Identification Parades—II, Crim. L. Rev. 545, 550 (1963).

[2] The accused, a Negro, was brought handcuffed by seven white police officers and employees of the District Attorney to the hospital room of the only witness to a murder. As the Court said of this encounter: "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed to be guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31–32." *United States* v. *Wade,* 388 U. S. 218, 234 (1967).

[3] The police reasonably feared that the witness might die before any less suggestive confrontation could be arranged.

Amendment holding did not apply, *Stovall* found an analogous Fourteenth Amendment right to a lineup conducted in a fundamentally fair manner. This interpretation is reinforced by the Court's statement that "a claimed violation of due process of law *in the conduct of a confrontation* depends on the totality of the circumstances surrounding it." 388 U. S., at 302 (emphasis added). Significantly, several years later, *Stovall* was viewed in precisely the same way, even as the Court limited *Wade* and *Gilbert* to post-indictment confrontations: "The Due Process Clause . . . *forbids a lineup* that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* v. *Denno,* 388 U. S. 293; *Foster* v. *California,* 394 U. S. 440." *Kirby* v. *Illinois,* 406 U. S. 682, 691 (1972) (emphasis added).[4]

The development of due process protections against mistaken identification evidence, begun in *Stovall,* was continued in *Simmons* v. *United States,* 390 U. S. 377 (1968). There, the Court developed a different rule to deal with the admission of in-court identification testimony that the accused claimed had been fatally tainted by a previous suggestive confrontation. In *Simmons,* the exclusionary effect of *Stovall* had already been accomplished, since the prosecution made no use of the suggestive confrontation. *Simmons,* therefore, did not deal with the constitutionality of the pretrial identification procedure. The only question was the impact of the

[4] See also, McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L. Rev. 235, 240 (1970).

If the test enunciated in *Stovall* permitted any consideration of the witness' opportunity to observe the offender at the time of the crime, it was only in the narrowly circumscribed context of ascertaining the extent to which the challenged procedure was "conducive to irreparable mistaken identification." It is noteworthy, however, that in applying its test in *Stovall,* the Court did not advert to the significant circumstantial evidence of guilt, see *United States ex rel. Stovall* v. *Denno,* 355 F. 2d 731, 733–734 (CA2 1966), nor discuss any factors bearing on the witness' opportunity to view the assailant.

Due Process Clause on an in-court identification that was not itself unnecessarily suggestive. *Simmons* held that due process was violated by the later identification if the pretrial procedure had been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U. S., at 384. This test focused, not on the necessity for the challenged pretrial procedure, but on the degree of suggestiveness that it entailed. In applying this test, the Court understandably considered the circumstances surrounding the witnesses' initial opportunity to view the crime. Finding that any suggestion in the pretrial confrontation had not affected the fairness of the in-court identification, *Simmons* rejected petitioner's due process attack on his conviction.

Again, comparison with the *Wade* cases is instructive. The inquiry mandated by *Simmons* is similar to the independent-source test used in *Wade* where an in-court identification is sought following an uncounseled lineup. In both cases, the issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure. Accordingly, in both situations, the relevant inquiry includes factors bearing on the accuracy of the witness' identification, including his opportunity to view the crime.

Thus, *Stovall* and *Simmons* established two different due process tests for two very different situations. Where the prosecution sought to use evidence of a questionable pretrial identification, *Stovall* required its exclusion, because due process had been violated by the confrontation, unless the necessity for the unduly suggestive procedure outweighed its potential for generating an irreparably mistaken identification. The *Simmons* test, on the other hand, was directed to ascertaining due process violations in the introduction of in-court identification testimony that the defendant claimed was tainted by pretrial procedures. In the latter situation, a

court could consider the reliability of the identification under all the circumstances.[5]

This distinction between *Stovall* and *Simmons* was preserved in two succeeding cases. *Foster* v. *California,* 394 U. S. 440 (1969), like *Stovall,* involved both unduly suggestive pretrial procedures, evidence of which was introduced at trial, and a tainted in-court identification. Accordingly, *Foster* applied the *Stovall* test, 394 U. S., at 442, and held that the police "*procedure* so undermined the reliability of the eyewitness identification as to violate due process." *Id.,* at 443 (emphasis added). In contrast, in *Coleman* v. *Alabama,* 399 U. S. 1 (1970), where the witness' pretrial identification was not used to bolster his in-court identification, the plurality opinion applied the test enunciated in *Simmons.* It concluded that an in-court identification did not violate due process because it did not stem from an allegedly suggestive lineup.

The Court inexplicably seemed to erase the distinction between *Stovall* and *Simmons* situations in *Neil* v. *Biggers,* 409 U. S. 188 (1972). In *Biggers* there was a pretrial confrontation that was clearly both suggestive and unnecessary.[6] Evidence of this, together with an in-court identification, was admitted at trial. *Biggers* was, in short, a case plainly cast in the *Stovall* mold. Yet the Court, without explanation or apparent recognition of the distinction, applied the *Simmons*

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[5] Mr. Justice Harlan, writing for the Court in *Simmons,* acknowledged that there was a distinction between that case and *Stovall.* After describing the factual setting and the applicable due process test, he noted that "[t]his standard accords with our resolution of a similar issue in *Stovall.*" 390 U. S., at 384. He pointedly did not say that the cases were the same, nor did he rely on *Stovall* to set the standard.

[6] "The showup itself consisted of two detectives walking respondent past the victim." 409 U. S., at 195. The police also ordered respondent to repeat the words used by the criminal. Inadequate efforts were made to secure participants for a lineup, and there was no pressing need to use a showup.

test. The Court stated: "[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons* v. *United States,* 390 U. S., at 384. . . . It is the likelihood of misidentification which violates a defendant's right to due process . . . ." 409 U. S., at 198. While this statement accurately describes the lesson of *Simmons,* it plainly ignores the teaching of *Stovall* and *Foster* that an unnecessarily suggestive pretrial confrontation itself violates due process.

But the Court did not simply disregard the due process analysis of *Stovall.* It went on to take the *Simmons* standard for assessing the constitutionality of an in-court identification—"'a very substantial likelihood of irreparable misidentification'"—and transform it into the "standard for the admissibility of testimony concerning [an] out-of-court identification." 409 U. S., at 198. It did so by deleting the word "irreparable" from the *Simmons* formulation. This metamorphosis could be accomplished, however, only by ignoring the fact that *Stovall,* fortified only months earlier by *Kirby* v. *Illinois,* see *supra,* at 121, had established a test for precisely the same situation that focused on the need for the suggestive procedure. It is not surprising that commentators almost unanimously mourned the demise of *Stovall* in the *Biggers* decision.[7]

II

Apparently, the Court does not consider *Biggers* controlling in this case. I entirely agree, since I believe that *Biggers*

[7] See, *e. g.,* N. Sobel, *supra,* n. 1, §§ 37, 38 (Supp. 1977); Grano, *Kirby, Biggers,* and *Ash:* Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent? 72 Mich. L. Rev. 717 (1974); M. Hartman & N. Goldberg, The Death of the Warren Court, The Doctrine of Suggestive Identification, 32 NLADA Briefcase 78 (1974); Pulaski, *Neil* v. *Biggers:* The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection, 26 Stan. L. Rev. 1097 (1974); Recent Developments, Identification: Unnecessary Suggestiveness May Not Violate Due Process, 73 Colum. L. Rev. 1168 (1973).

was wrongly decided. The Court, however, concludes that *Biggers* is distinguishable because it, like the identification decisions that preceded it, involved a pre-*Stovall* confrontation, and because a paragraph in *Biggers* itself, 409 U. S., at 198–199, seems to distinguish between pre- and post-*Stovall* confrontations. Accordingly, in determining the admissibility of the post-*Stovall* identification in this case, the Court considers two alternatives, a *per se* exclusionary rule and a totality-of-the-circumstances approach. *Ante,* at 110–111. The Court weighs three factors in deciding that the totality approach, which is essentially the test used in *Biggers,* should be applied. *Ante,* at 111–113. In my view, the Court wrongly evaluates the impact of these factors.

First, the Court acknowledges that one of the factors, deterrence of police use of unnecessarily suggestive identification procedures, favors the *per se* rule. Indeed, it does so heavily, for such a rule would make it unquestionably clear to the police they must never use a suggestive procedure when a fairer alternative is available. I have no doubt that conduct would quickly conform to the rule.

Second, the Court gives passing consideration to the dangers of eyewitness identification recognized in the *Wade* trilogy. It concludes, however, that the grave risk of error does not justify adoption of the *per se* approach because that would too often result in exclusion of relevant evidence. In my view, this conclusion totally ignores the lessons of *Wade.* The dangers of mistaken identification are, as *Stovall* held, simply too great to permit unnecessarily suggestive identifications. Neither *Biggers* nor the Court's opinion today points to any contrary empirical evidence. Studies since *Wade* have only reinforced the validity of its assessment of the dangers of identification testimony.[8] While the Court is "content to

[8] See, *e. g., People* v. *Anderson,* 389 Mich. 155, 172–180, 192–220, 205 N. W. 2d 461, 468–472, 479–494, 485 (1973); Levine & Tapp, The Psychology of Criminal Identification: The Gap From *Wade* to *Kirby,* 121

rely on the good sense and judgment of American juries," *ante,* at 116, the impetus for *Stovall* and *Wade* was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony.

Finally, the Court errs in its assessment of the relative impact of the two approaches on the administration of justice. The Court relies most heavily on this factor, finding that "reversal is a Draconian sanction" in cases where the identification is reliable despite an unnecessarily suggestive procedure used to obtain it. Relying on little more than a strong distaste for "inflexible rules of exclusion," the Court rejects the *per se* test. *Ante,* at 113. In so doing, the Court disregards two significant distinctions between the *per se* rule advocated in this case and the exclusionary remedies for certain other constitutional violations.

First, the *per se* rule here is not "inflexible." Where evidence is suppressed, for example, as the fruit of an unlawful search, it may well be forever lost to the prosecution. Identification evidence, however, can by its very nature be readily and effectively reproduced. The in-court identification, permitted under *Wade* and *Simmons* if it has a source independent of an uncounseled or suggestive procedure, is one example. Similarly, when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another

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U. Pa. L. Rev. 1079 (1973); O'Connor, "That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph, 49 St. John's L. Rev. 1 (1974); McGowan, *supra,* n. 4, at 238–239; Grano, *supra,* n. 7, at 723–724, 768–770; Recent Developments, *supra,* n. 7, at 1169 n. 11.

Moreover, as the exhaustive opinion of the Michigan Supreme Court in *People* v. *Anderson, supra,* noted:

"For a number of obvious reasons, however, including the fact that there is no on-going systematic study of the problem, the reported cases of misidentification are in every likelihood only the top of the iceberg. The writer of this opinion, for example, was able to turn up three very recent unreported cases right here in Michigan in the course of a few hours' inquiry." 389 Mich., at 179–180, 205 N. W. 2d, at 472.

lineup conducted under scrupulously fair conditions. Since the same factors are evaluated in applying both the Court's totality test and the *Wade-Simmons* independent-source inquiry, any identification which is "reliable" under the Court's test will support admission of evidence concerning such a fairly conducted lineup. The evidence of an additional, properly conducted confrontation will be more persuasive to a jury, thereby increasing the chance of a justified conviction where a reliable identification was tainted by a suggestive confrontation. At the same time, however, the effect of an unnecessarily suggestive identification—which has no value whatsoever in the law enforcement process—will be completely eliminated.

Second, other exclusionary rules have been criticized for preventing jury consideration of relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence, such as discouraging illegal searches or denial of counsel. Suggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods.

Indeed, impermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law, see *Olmstead* v. *United States,* 277 U. S. 438, 471, 485 (1928) (Brandeis, J., dissenting). For if the police and the public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

For these reasons, I conclude that adoption of the *per se* rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection. According to my calculus, all three of the factors upon which the Court relies point to acceptance of the *per se* approach.

Even more disturbing than the Court's reliance on the totality test, however, is the analysis it uses, which suggests a reinterpretation of the concept of due process of law in criminal cases. The decision suggests that due process violations in identification procedures may not be measured by whether the government employed procedures violating standards of fundamental fairness. By relying on the probable accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty. Until today, I had thought that "Equal justice under law" meant that the existence of constitutional violations did not depend on the race, sex, religion, nationality, or likely guilt of the accused. The Due Process Clause requires adherence to the same high standard of fundamental fairness in dealing with every criminal defendant, whatever his personal characteristics and irrespective of the strength of the State's case against him. Strong evidence that the defendant is guilty should be relevant only to the determination whether an error of constitutional magnitude was nevertheless harmless beyond a reasonable doubt. See *Chapman* v. *California,* 386 U. S. 18 (1967). By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause. "It is therefore important to note that the state courts remain free, in interpreting state constitutions, to

guard against the evil clearly identified by this case." *Oregon* v. *Mathiason,* 429 U. S. 492, 499 (1977) (MARSHALL, J., dissenting).[9]

III

Despite my strong disagreement with the Court over the proper standards to be applied in this case, I am pleased that its application of the totality test does recognize the continuing vitality of *Stovall.* In assessing the reliability of the identification, the Court mandates weighing "the corrupting effect of the suggestive identification itself" against the "indicators of [a witness'] ability to make an accurate identification." *Ante,* at 114, 116. The Court holds, as *Neil* v. *Biggers* failed to, that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade.* Thus, even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render his testimony inadmissible. Indeed, it is my view that, assuming applicability of the totality test enunciated by the Court, the facts of the present case require that result.

I consider first the opportunity that Officer Glover had to view the suspect. Careful review of the record shows that he could see the heroin seller only for the time it took to speak three sentences of four or five short words, to hand over some money, Tr. 29–30, and later after the door reopened, to receive the drugs in return, *id.,* at 30, 31–32. The entire face-to-face transaction could have taken as little as 15 or 20 seconds. But during this time, Glover's attention was not focused exclusively on the seller's face. He observed that the door

[9] See also 429 U. S., at 499 n. 6; *United States* v. *Washington,* 431 U. S. 181, 193–194 (1977) (BRENNAN, J., dissenting); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). Cf. *People* v. *Anderson, supra; Commonwealth* v. *Botelho,* —— Mass. ——, 343 N. E. 2d 876 (1976).

was opened 12 to 18 inches, *id.*, at 29, that there was a window in the room behind the door, *id.*, at 33, and, most importantly, that there was a woman standing behind the man, *id.*, at 29, 30. Glover was, of course, also concentrating on the details of the transaction—he must have looked away from the seller's face to hand him the money and receive the drugs. The observation during the conversation thus may have been as brief as 5 or 10 seconds.

As the Court notes, Glover was a police officer trained in and attentive to the need for making accurate identifications. Nevertheless, both common sense and scholarly study indicate that while a trained observer such as a police officer "is somewhat less likely to make an erroneous identification than the average untrained observer, the mere fact that he has been so trained is no guarantee that he is correct in a specific case. His identification testimony should be scrutinized just as carefully as that of the normal witness." Wall, *supra,* n. 1, at 14; see also Levine & Tapp, *supra,* n. 8, at 1088. Moreover, "identifications made by policemen in highly competitive activities, such as undercover narcotic agents . . . , should be scrutinized with special care." Wall, *supra,* n. 1, at 14. Yet it is just such a searching inquiry that the Court fails to make here.

Another factor on which the Court relies—the witness' degree of certainty in making the identification—is worthless as an indicator that he is correct.[10] Even if Glover had been unsure initially about his identification of respondent's picture, by the time he was called at trial to present a key piece of evidence for the State that paid his salary, it is impossible to imagine his responding negatively to such questions as "is there any doubt in your mind whatsoever" that the identification was correct. Tr. 34, 41–42. As the Court noted in *Wade:* " 'It is a matter of common experience that, once a

[10] See, *e. g.,* Wall, *supra,* n. 1, at 15–16; *People* v. *Anderson,* 389 Mich., at 217–220, 205 N. W. 2d, at 493–494; O'Connor, *supra,* n. 8, at 4–6.

witness has picked out the accused at the [pretrial confrontation], he is not likely to go back on his word later on.'" 388 U. S., at 229, quoting Williams & Hammelmann, Identification Parades—I, Crim. L. Rev. 479, 482 (1963).

Next, the Court finds that because the identification procedure took place two days after the crime, its reliability is enhanced. While such temporal proximity makes the identification more reliable than one occurring months later, the fact is that the greatest memory loss occurs within hours after an event. After that, the dropoff continues much more slowly.[11] Thus, the reliability of an identification is increased only if it was made within several hours of the crime. If the time gap is any greater, reliability necessarily decreases.

Finally, the Court makes much of the fact that Glover gave a description of the seller to D'Onofrio shortly after the incident. Despite the Court's assertion that because "Glover himself was a Negro and unlikely to perceive only general features of 'hundreds of Hartford black males,' as the Court of Appeals stated," *ante,* at 115, the description given by Glover was actually no more than a general summary of the seller's appearance. See *ante,* at 101. We may discount entirely the seller's clothing, for that was of no significance later in the proceeding. Indeed, to the extent that Glover noticed clothes, his attention was diverted from the seller's face. Otherwise, Glover merely described vaguely the seller's height, skin color, hairstyle, and build. He did say that the

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[11] See, *e .g.,* Levine & Tapp, *supra,* n. 8, at 1100–1101; Note, Pretrial Identification Procedures—Wade to Gilbert to Stovall: Lower Courts Bobble the Ball, 55 Minn. L. Rev. 779, 789 (1971); *People* v. *Anderson, supra,* at 214–215, 205 N. W. 2d, at 491. Reviewing a number of its cases, the Court of Appeals for the District of Columbia Circuit concluded several years ago that while showups occurring up to perhaps 30 minutes after a crime are generally permissible, one taking place four hours later, far removed from the crime scene, was not. *McRae* v. *United States,* 137 U. S. App. D. C. 80, 87, 420 F. 2d 1283, 1290 (1969).

seller had "high cheekbones," but there is no other mention of facial features, nor even an estimate of age. Conspicuously absent is any indication that the seller was a native of the West Indies, certainly something which a member of the black community could immediately recognize from both appearance and accent.[12]

From all of this, I must conclude that the evidence of Glover's ability to make an accurate identification is far weaker than the Court finds it. In contrast, the procedure used to identify respondent was both extraordinarily suggestive and strongly conducive to error. In dismissing "the corrupting effect of the suggestive identification" procedure here, *ante,* at 116, the Court virtually grants the police license to convict the innocent. By displaying a single photograph of respondent to the witness Glover under the circumstances in this record almost everything that could have been done wrong was done wrong.

In the first place, there was no need to use a photograph at all. Because photos are static, two-dimensional, and often outdated, they are "clearly inferior in reliability" to corporeal procedures. Wall, *supra,* n. 1, at 70; *People* v. *Gould,* 54 Cal. 2d 621, 631, 354 P. 2d 865, 870 (1960). While the use of photographs is justifiable and often essential where the police have no knowledge of an offender's identity, the poor reliability of photos makes their use inexcusable where any other means of identification is available. Here, since Detective D'Onofrio believed that he knew the seller's identity, see *ante,* at 101, 115, further investigation without resort to a photographic showup was easily possible. With little inconvenience, a corporeal

[12] Brathwaite had come to the United States from his native Barbados as an adult. Tr. 99. It is also noteworthy that the informant who witnessed the transaction and was described by Glover as "trustworthy," *id.,* at 47, disagreed with Glover's recollection of the event. The informant testified that it was a woman in the apartment who took the money from Glover and gave him the drugs in return. *Id.,* at 86–87.

lineup including Brathwaite might have been arranged.[13] Properly conducted, such a procedure would have gone far to remove any doubt about the fairness and accuracy of the identification.[14]

Worse still than the failure to use an easily available corporeal identification was the display to Glover of only a single picture, rather than a photo array. With good reason, such single-suspect procedures have "been widely condemned." *Stovall* v. *Denno,* 388 U. S., at 302. They give no assurance that the witness can identify the criminal from among a number of persons of similar appearance, surely the strongest evidence that there was no misidentification. In *Simmons* v. *United States,* our first decision involving photographic identification, we recognized the danger that a witness seeing a suggestively displayed picture will "retain in his memory the image of the photograph rather than of the person actually seen." 390 U. S., at 383–384. "Subsequent identification of the accused then shows nothing except that the picture was a good likeness." Williams & Hammelmann, *supra,* n. 1, at 484. As *Simmons* warned, the danger of error is at its greatest when "the police display to the witness only the picture of a single individual . . . [and] is also heightened if the police indicate to the witness that they have other evidence that . . . the perso[n] pictured committed the crime." 390 U. S., at 383.

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[13] Indeed, the police carefully staged Brathwaite's arrest in the same apartment that was used for the sale, see *ante,* at 101, 116, indicating that they were fully capable of keeping track of his whereabouts and using this information in their investigation.

[14] It should be noted that this was not a case where the witness knew the person whom he saw committing a crime, or had an unusually long time to observe the criminal, so that the identification procedure was merely used to confirm the suspect's identity. Cf. *United States* v. *Wade,* 388 U. S. 218, 250, 251 (1967) (WHITE, J., dissenting). For example, had this been an ongoing narcotics investigation in which Glover had met the seller a number of times, the procedure would have been less objectionable.

See also ALI, Model Code of Pre-Arraignment Procedure §§ 160.2 (2), (5) (1975).

The use of a single picture (or the display of a single live suspect, for that matter) is a grave error, of course, because it dramatically suggests to the witness that the person shown must be the culprit. Why else would the police choose the person? And it is deeply ingrained in human nature to agree with the expressed opinions of others—particularly others who should be more knowledgeable—when making a difficult decision.[15] In this case, moreover, the pressure was not limited to that inherent in the display of a single photograph. Glover, the identifying witness, was a state police officer on special assignment. He knew that D'Onofrio, an experienced Hartford narcotics detective, presumably familiar with local drug operations, believed respondent to be the seller. There was at work, then, both loyalty to another police officer and deference to a better-informed colleague.[16] Finally, of course, there was Glover's knowledge that without an identifi-

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[15] See, *e. g.*, *United States* v. *Wade*, *supra*, at 228–229; *People* v. *Anderson*, 389 Mich., at 173–177, 215–217, 205 N. W. 2d, at 468–471, 491–493; Wall, *supra*, n. 1, at 26–40; O'Connor, *supra*, n. 8, at 9–10; Levine & Tapp, *supra*, n. 8.

[16] In fact, the trial record indicates that D'Onofrio was remarkably ill-informed, although it does not appear that Glover knew this at the time of the identification. While the Court is impressed by D'Onofrio's immediate response to Glover's description, *ante*, at 108, 115, that cannot alter the fact that the detective, who had not witnessed the transaction, acted on a wild guess that respondent was the seller. D'Onofrio's hunch rested solely on Glover's vague description, yet D'Onofrio had seen respondent only "[s]everal times, mostly in his vehicle." Tr. 64. There was no evidence that respondent was even a suspected narcotics dealer, and D'Onofrio thought that the drugs had been purchased at a different apartment from the one Glover actually went to. *Id.*, at 47, 68, 69. The identification of respondent provides a perfect example of the investigator and the witness bolstering each other's inadequate knowledge to produce a seemingly accurate but actually worthless identification. See Sobel, *supra*, n. 1, § 3.02, at 12.

cation and arrest, government funds used to buy heroin had been wasted.

The Court discounts this overwhelming evidence of suggestiveness, however. It reasons that because D'Onofrio was not present when Glover viewed the photograph, there was "little pressure on the witness to acquiesce in the suggestion." *Ante,* at 116. That conclusion blinks psychological reality.[17] There is no doubt in my mind that even in D'Onofrio's absence, a clear and powerful message was telegraphed to Glover as he looked at respondent's photograph. He was emphatically told that *"this* is the man," and he responded by identifying respondent then and at trial "whether or not he was in fact 'the man.' " *Foster* v. *California,* 394 U. S., at 443.[18]

I must conclude that this record presents compelling evidence that there was "a very substantial likelihood of misidentification" of respondent Brathwaite. The suggestive

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[17] That the "identification was made in circumstances allowing care and reflection," *ante,* at 116, is hardly an unequivocal sign of accuracy. Time for reflection can just as easily be time for reconstructing an image only dimly remembered to coincide with the powerful suggestion before the viewer.

[18] This discussion does not imply any lack of respect for the honesty and dedication of the police. We all share the frailties of human nature that create the problem. Justice Frank O'Connor of the New York Supreme Court decried the dangers of eyewitness testimony in a recent article that began with this caveat:

"From the vantage point of ten years as District Attorney of Queens County (1956–66) and six years on the trial bench (1969 to [1974]), the writer holds in high regard the professional competence and personal integrity of most policemen. Laudable instances of police efforts to clear a doubtful suspect are legion. Deliberate, willful efforts to frame or railroad an innocent man are totally unknown, at least to me. Yet, once the best-intentioned officer becomes honestly convinced that he has the right man, human nature being what it is, corners may be cut, some of the niceties forgotten, and serious error committed." O'Connor, *supra,* n. 8, at 1 n. 1.

display of respondent's photograph to the witness Glover likely erased any independent memory that Glover had retained of the seller from his barely adequate opportunity to observe the criminal.

IV

Since I agree with the distinguished panel of the Court of Appeals that the legal standard of *Stovall* should govern this case, but that even if it does not, the facts here reveal a substantial likelihood of misidentification in violation of respondent's right to due process of law, I would affirm the grant of habeas corpus relief. Accordingly, I dissent from the Court's reinstatement of respondent's conviction.

JEFFERS *v.* UNITED STATES

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

No. 75–1805. Argued March 21, 1977—Decided June 16, 1977

A federal grand jury returned two indictments against petitioner for offenses under 21 U. S. C. One charged him and nine others with violating § 846 by conspiring to distribute heroin and cocaine during a specified period in violation of § 841 (a)(1), the indictment specifying, *inter alia*, that the conspiracy was to be accomplished by petitioner's assumption of leadership of a certain organization, by distribution of controlled substances, and by acquisition of substantial sums of money through such distribution. The other charged petitioner alone with violating § 848, which prohibits conducting a continuing criminal enterprise to violate the drug laws, by his distributing and possessing with intent to distribute heroin and cocaine, in violation of § 841 (a)(1) during the same specified period, the indictment alleging that he had undertaken the distribution "in concert" with five or more others, with respect to whom he occupied the position of organizer and supervisor, and that as a result of the distribution he had obtained a substantial income. The court denied a motion by the Government to consolidate the indictments for trial, which the petitioner and his codefendants had opposed on the grounds that neither the parties nor the charges were the same and that, based on the overt acts charged, much of the § 846 evidence would not inculpate petitioner and would therefore be inadmissible against him on the § 848 charge. Petitioner and six codefendants were first tried and found guilty on the § 846 indictment, petitioner receiving the maximum sentence applicable to him of 15 years in prison, a $25,000 fine, and three-year special parole term, and the conviction was affirmed on appeal. Petitioner then moved to dismiss the § 848 indictment on the ground that in the § 846 trial he had already been placed in jeopardy for the same offense and that the "same evidence" rule of *Blockburger* v. *United States*, 284 U. S. 299, barred the second prosecution since a § 846 conspiracy was a lesser included offense of a § 848 continuing criminal enterprise. Following denial of petitioner's motion on the ground that the offenses were separate, petitioner was tried and found guilty of the § 848 offense, and was given the maximum sentence for a first offender, *viz.*, life imprisonment and a $100,000 fine, to run consecutively with the § 846 sentence. The Court of Ap-

peals, although concluding that § 846 was a lesser included offense of § 848 and that the earlier conviction would normally under *Blockburger* bar the subsequent prosecution, held that *Iannelli* v. *United States*, 420 U. S. 770, created a new double jeopardy rule applicable only to complex statutory crimes, where greater and lesser offenses could be separately punished if, as here, Congress so intended. Petitioner challenged the *Iannelli* interpretation and also contended that the Double Jeopardy Clause was violated by the prosecution on the greater offense and conviction of the lesser and that he had not waived the double jeopardy issue. *Held:* The judgment is affirmed in part, vacated in part, and remanded. Pp. 147–158; 160.

532 F. 2d 1101, affirmed in part, vacated in part, and remanded.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, concluded:

1. Petitioner's action in opposing the Government's motion to consolidate the indictments for trial deprived him of any right he might have had against consecutive trials and the Government was therefore entitled to prosecute petitioner for the § 848 offense. This result is an exception to the rule established in *Brown* v. *Ohio*, *post*, p. 161, that the Double Jeopardy Clause prohibits the trial of a defendant for a greater offense after he has been convicted of a lesser included offense, being no different from other situations where a defendant enjoys protection under the Double Jeopardy Clause but for one reason or another may be retried. Here petitioner, who could have been tried in one proceeding, chose not to adopt that course and therefore was solely responsible for the separate prosecutions. Pp. 147–154.

2. It cannot be assumed that Congress intended to impose cumulative penalties under §§ 846 and 848, and petitioner is therefore entitled to have the fine imposed at the second trial reduced so that the two fines together do not exceed $100,000. Pp. 154–158.

MR. JUSTICE WHITE concluded that *Iannelli* v. *United States*, *supra*, controls this case and therefore concurs in the judgment with respect to petitioner's conviction. P. 158.

MR. JUSTICE STEVENS, joined by MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL, concurs in the judgment to the extent that it vacates the cumulative fines. P. 160.

BLACKMUN, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in part in the judgment and dissenting in part, *post*, p. 158. STEVENS, J., filed an opinion dissenting in part

and concurring in the judgment in part, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 158.

Stephen C. Bower, by appointment of the Court, 429 U. S. 916, argued the cause and filed briefs for petitioner.

William F. Sheehan III argued the cause for the United States. With him on the brief were *Acting Solicitor General Friedman* and *Assistant Attorney General Thornburgh.*

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

This case involves the extent of the protection against multiple prosecutions afforded by the Double Jeopardy Clause of the Fifth Amendment, under circumstances in which the defendant *opposes* the Government's efforts to try charges under 21 U. S. C. §§ 846 and 848 in one proceeding. It also raises the question whether § 846 is a lesser included offense of § 848. Finally, it requires further explication of the Court's decision in *Iannelli* v. *United States,* 420 U. S. 770 (1975).

I

A. According to evidence presented at trial, petitioner Garland Jeffers was the head of a highly sophisticated narcotics distribution network that operated in Gary, Ind., from January 1972 to March 1974. The "Family," as the organization was known, originally was formed by Jeffers and five others and was designed to control the local drug traffic in the city of Gary. Petitioner soon became the dominant figure in the organization. He exercised ultimate authority over the substantial revenues derived from the Family's drug sales, extortionate practices, and robberies. He disbursed funds to pay salaries of Family members, commissions of street workers, and incidental expenditures for items such as apartment rental fees, bail bond fees, and automobiles for certain

members. Finally, he maintained a strict and ruthless discipline within the group, beating and shooting members on occasion. The Family typically distributed daily between 1,000 and 2,000 capsules of heroin. This resulted in net daily receipts of about $5,000, exclusive of street commissions. According to what the Court of Appeals stated was "an extremely conservative estimate," [1] petitioner's personal share from the operations exceeded a million dollars over the two-year period.

On March 18, 1974, a federal grand jury for the Northern District of Indiana returned two indictments against petitioner in connection with his role in the Family's operations. The first, No. H–CR–74–56, charged petitioner and nine others with an offense under 21 U. S. C. § 846,[2] by conspiring to distribute both heroin and cocaine during the period between November 1, 1971, and the date of the indictment, in violation of 21 U. S. C. § 841 (a)(1).[3] App. 5–11. The indictment specified, among other things, that the conspiracy was to be accomplished by petitioner's assumption of leadership of the Family organization, by distribution of controlled substances, and by acquisition of substantial sums of money through the distribution of the controlled substances. *Id.*, at 6. The

[1] 532 F. 2d 1101, 1105 (CA7 1976).

[2] Section 846 provides:

"Any person who attempts or conspires to commit any offense defined in this subchapter [Control and Enforcement] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[3] Section 841 (a)(1) provides:

"(a) . . . Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

Heroin is classified as a Schedule I narcotic drug controlled substance. 21 U. S. C. § 812 (c) (Sch. I)(b)(10); 21 CFR § 1308.11 (c)(11) (1976). Cocaine is a Schedule II narcotic drug controlled substance. 21 U. S. C. § 812 (c)(Sch. II)(a)(4); 21 CFR § 1308.12 (b)(4) (1976).

second indictment, No. H–CR–74–57, charged petitioner alone with a violation of 21 U. S. C. § 848, which prohibits conducting a continuing criminal enterprise to violate the drug laws.[4] Like the first, or conspiracy, indictment, this second indictment charged that petitioner had distributed and possessed with intent to distribute both heroin and cocaine, in violation of § 841 (a)(1), again between November 1, 1971, and the date of the indictment. As required by the statute, the indictment alleged that petitioner had undertaken the distribution "in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and

[4] Section 848 provides, in relevant part:

"(a) . . . (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2) . . . .

"(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

"(A) the profits obtained by him in such enterprise, and

"(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

"(b) . . . For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this subchapter or subchapter II of this chapter [Import and Export] the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and,

"(B) from which such person obtains substantial income or resources.

"(c) . . . In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 [repealed March 15, 1976, by Pub. L. 94–233, 90 Stat. 219, and replaced by a new § 4205, each relating to eligibility of prisoners for parole] . . . shall not apply."

manager," and that as a result of the distribution and other activity he had obtained substantial income. App. 3–4.

Shortly after the indictments were returned, the Government filed a motion for trial together, requesting that the continuing-criminal-enterprise charge be tried with the general conspiracy charges against petitioner and his nine codefendants. *Id.*, at 12–14. The motion alleged that joinder would be proper under Fed. Rule Crim. Proc. 8, since the offenses charged were of the same or similar character and they were based on the same acts or transactions constituting parts of a common scheme or plan. It also represented that much of the evidence planned for the § 848 trial was based on the same transactions as those involved in the § 846 case. Consequently, it argued that joinder was appropriate and within the court's power pursuant to Fed. Rule Crim. Proc. 13.

The defendants in the § 846 case filed a joint objection to the Government's motion. App. 15–24. Petitioner and his nine codefendants argued generally that joinder would be improper under Fed. Rules Crim. Proc. 8 and 14, since neither the parties nor the charges were the same. The codefendants were particularly concerned about the probable effect of the evidence that would be introduced to support the continuing-criminal-enterprise charge and about the jury's ability to avoid confusing the two cases. Another argument in the objection focused directly on petitioner.[5] It noted that the § 846 indict-

[5] The dissenters attempt to undercut the force of petitioner's opposition to trial together by asserting that the motion "gave relatively little emphasis to arguments relating to petitioner alone." *Post*, at 159 n. 4. On the contrary, the memorandum supporting the defendants' motion took pains to point out which objections to trial together were relevant to Jeffers alone. See App. 18, 22–23. Indeed, the last argument before the conclusion stated:

"[I]t is likely that much of the evidence which will be presented in the conspiracy trial does not 'directly' inculpate the defendant, GARLAND JEFFERS, and would, therefore, be inadmissible against him in the 'continuing criminal enterprise' indictment unless a direct link could be established. All of the said overt acts would, however, be

ment charged 17 overt acts, but that petitioner was named in only 10 of them, and was alleged to have participated actively in only 9. Thus, the argument went, it was likely that much of the evidence in the conspiracy trial would not inculpate petitioner and would therefore be inadmissible against him in the continuing-criminal-enterprise trial. Although a severance of the conspiracy charges against petitioner from those against the nine codefendants might have alleviated this problem, petitioner never made such a motion under Rule 14. On May 7, the court denied the Government's motion for trial together and thereby set the stage for petitioner's first trial on the conspiracy charges.

B. The trial on the § 846 indictment took place in June 1974. A jury found petitioner and six of his codefendants guilty. Petitioner received the maximum punishment applicable to him under the statute—15 years in prison, a fine of $25,000, and a 3-year special parole term.[6] The Court of Appeals affirmed the conviction, 520 F. 2d 1256 (CA7 1975), and this Court denied certiorari, 423 U. S. 1066 (1976).[7]

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admissible, or at least arguably so, in the conspiracy trial. The prejudice to the defendant, JEFFERS, is therefore, imminent and clear." *Id.*, at 22.

In addition to the arguments relating specifically to Jeffers, the memorandum contained a number of points designed to apply equally to all defendants. We see no reason to read it as implicitly excluding Jeffers.

[6] As indicated in n. 2, *supra*, § 846 provides that the sentence for the conspiracy offense shall not exceed the maximum punishment prescribed for the substantive offense the commission of which was the object of the conspiracy. The maximum punishment for a first offender for a violation of § 841 (a)(1), in which a Schedule I or II narcotic drug is the controlled substance in question, is a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. § 841 (b)(1)(A).

[7] After this Court's refusal to review the decision on certiorari, petitioner filed a motion under 28 U. S. C. § 2255 for postconviction relief. The District Court denied the motion, the Court of Appeals affirmed, 544 F. 2d 523, and this Court again denied certiorari. 430 U. S. 935 (1977).

While the conspiracy trial and appeal were proceeding, petitioner was filing a series of pretrial motions in the pending criminal-enterprise case. When it appeared that trial was imminent, petitioner filed a motion to dismiss the indictment on the ground that in the conspiracy trial he already had been placed in jeopardy once for the same offense. He argued both that the two indictments arose out of the same transaction, and therefore the second trial should be barred under that theory of double jeopardy, and that the "same evidence" rule of *Blockburger* v. *United States,* 284 U. S. 299 (1932), should bar the second prosecution, since a § 846 conspiracy was a lesser included offense of a § 848 continuing criminal enterprise.[8] To forestall the Government's anticipated waiver argument, petitioner asserted that waiver was impossible, since his objection to trying the two counts together was based on his Sixth Amendment right to a fair trial, and his opposition to the § 848 trial was based on his Fifth Amendment double jeopardy right. A finding of waiver, according to his argument, would amount to penalizing the exercise of one constitutional right by denying another. App. 25–27.

The Government, in its response to the motion to dismiss, asserted that §§ 846 and 848 were separate offenses, and for this reason petitioner would not be placed twice in jeopardy by the second trial.[9] The District Court agreed with this analysis and denied petitioner's motion shortly before the second trial began.

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[8] In his opposition to the Government's motion for trial together, however, when he joined the argument that the jury would be confused by consolidation, petitioner apparently had argued in favor of construing the statutes to create separate offenses. App. 19. He also joined the argument that "identity of charges" was lacking. *Id.*, at 15.

[9] Language in the Government's memorandum appears to concede that § 846 is a lesser included offense: "Title 21, United States Code, Section 848, requires proof of the elements previously set out in Section 846 but additional elements are required." App. 34. It is unnecessary for present purposes to rely on any such concession.

At the second trial, the jury found petitioner guilty of engaging in a continuing criminal enterprise. Again, he received the maximum sentence for a first offender: life imprisonment and a fine of $100,000. See n. 4, *supra*. The judgment specified that the prison sentence and the fine were "to run consecutive with sentence imposed in H–CR–74–56 [the conspiracy case]." Record, Doc. 105. Thus, at the conclusion of the second trial, petitioner found himself with a life sentence without possibility of probation, parole, or suspension of sentence, and with fines totaling $125,000.[10]

On appeal, the conviction and sentence were upheld. 532 F. 2d 1101 (CA7 1976). The Court of Appeals concluded that § 846 was a lesser included offense of § 848, since the continuing-criminal-enterprise statute expressly required proof that the accused had acted in concert with five or more other persons. In the court's view, this requirement was tantamount to a proof of conspiracy requirement.[11] Construing § 848 to require proof of agreement meant that all the elements of the § 846 offense had to be proved for § 848, in addition to the elements of a supervisory position and the obtaining of substantial income or resources; [12] thus, §§ 846

[10] Nothing in the record of Case No. H–CR–74–56 suggests that the $25,000 fine was credited against the $100,000 fine. The record of Case No. H–CR–74–57 expressly indicates that the contrary was true, and we proceed on that assumption.

[11] The District Court actually instructed the jury that the Government might prove that the object of the continuing criminal enterprise was to commit a violation under § 846, the conspiracy statute, rather than to violate § 841 (a)(1). App. 45. The court therefore gave a complete conspiracy charge to the jury. *Id.*, at 46–48. The Government argues that this instruction was erroneous. Without resolving that issue or exploring the implications of the Government's position, we merely note that the District Court's decision to give the instruction reflects the conceptual closeness of the two statutes.

[12] Section 848 by its terms covers violations of both subchapter I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and

and 848 satisfied the general test for lesser included offenses. Although the court stated that ordinarily conviction of a lesser included offense would bar a subsequent prosecution for the greater offense, relying on *Gavieres* v. *United States,* 220 U. S. 338 (1911); *Blockburger* v. *United States, supra;* and *Waller* v. *Florida,* 397 U. S. 387 (1970), it read *Iannelli* v. *United States,* 420 U. S. 770 (1975), to create a new double jeopardy rule applicable only to complex statutory crimes.

The two statutes at issue in *Iannelli* were 18 U. S. C. § 371, the general federal conspiracy statute, and 18 U. S. C. § 1955, the statute prohibiting illegal gambling businesses involving five or more persons. Despite language in *Iannelli* seemingly to the contrary, 420 U. S., at 785 n. 17, the Court of Appeals stated that § 371 is a lesser included offense of § 1955. 532 F. 2d, at 1109. The court attached no significance to the fact that § 1955 contains no requirement of action "in concert." It believed that *Iannelli* held that greater and lesser offenses could be punished separately if Congress so intended, and it adopted the same approach to the multiple-prosecution question before it. Finding that Congress, in enacting § 848, was interested in punishing severely those who made a substantial living from drug dealing, and that Congress intended to make § 848 an independent crime, the court concluded that §§ 846 and 848 were not the "same offense" for double jeopardy purposes. It therefore held that the conviction on the first indictment did not bar the prosecution on the second.

In his petition for certiorari, petitioner challenged the Court of Appeals' reading of *Iannelli* and suggested again that § 846 was a lesser included offense of § 848. He also contended that the Double Jeopardy Clause was violated by the prosecution on the greater offense after conviction for the lesser. Finally, he argued that he had not waived the double jeopardy

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subchapter II of the Act, while § 846 deals only with subchapter I. The exact counterpart to § 846, however, is § 963 in subchapter II. In this case, no one disputes the fact that only subchapter I is involved.

issue. In addition to these issues, it appears that cumulative fines were imposed on petitioner, which creates a multiple-punishment problem. We granted certiorari. 429 U. S. 815 (1976). We consider first the multiple prosecution, lesser included offense, and waiver points, and then we address the multiple-punishment problem.

II

A. The Government's principal argument for affirming the judgment of the Court of Appeals is that *Iannelli* controls this case. Like the conspiracy and gambling statutes at issue in *Iannelli,* the conspiracy and continuing-criminal-enterprise statutes at issue here, in the Government's view, create two separate offenses under the "same evidence" test of *Blockburger.* The Government's position is premised on its contention that agreement is not an essential element of the § 848 offense, despite the presence in § 848 (b)(2)(A) of the phrase "in concert with." If five "innocent dupes" each separately acted "in concert with" the ringleader of the continuing criminal enterprise, the Government asserts, the statutory requirement would be satisfied. Brief for United States 23.

If the Government's position were right, this would be a simple case. In our opinion, however, it is not so easy to transfer the *Iannelli* result, reached in the context of two other and different statutes, to this case. In *Iannelli,* the Court specifically noted: "Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents." 420 U. S., at 785 (emphasis in original). Elaborating on that point, the Court stated: "The essence of the crime of conspiracy is agreement, . . . an element not contained in the statutory definition of the § 1955 offense." *Id.,* at 785 n. 17. Because of the silence of § 1955 with regard to the necessity of concerted activity, the Court felt constrained to construe the statute to permit the possibility that

the five persons "involved" in the gambling operation might not be acting together.[13] See also *Pinkerton* v. *United States*, 328 U. S. 640, 643 (1946).

The same flexibility does not exist with respect to the continuing-criminal-enterprise statute. Section 848 (b)(2)(A) restricts the definition of the crime to a continuing series of violations undertaken by the accused "in concert with five or more other persons." Clearly, then, a conviction would be impossible unless concerted activity were present. The express "in concert" language in the statutory definition quite plausibly may be read to provide the necessary element of "agreement" found wanting in § 1955. Even if § 848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy. It would be unreasonable to assume that Congress did not mean anything at all when it inserted these critical words in § 848.[14] In the

[13] The Court's use of the term "concerted activity" to describe § 1955's requirement that five or more persons must be involved in the gambling business, 420 U. S., at 790, does not indicate a contrary understanding. At that point in the opinion the Court simply was addressing its attention to the reason why § 1955 requires the participation of a significant number of persons in the business. As a practical matter, the group involved often will act in concert. This, however, is not necessarily the case—a fact the Court acknowledged in its *Blockburger* analysis, 420 U. S., at 785 n. 17.

[14] The legislative history, the use that Congress has made of the phrase "in concert" in other statutes, and the plain meaning of that term all support the interpretation suggested for § 848. The House Report on H. R. 18583, which eventually became Pub. L. 91–513, the Comprehensive Drug Abuse Prevention and Control Act of 1970, assumed that the meaning of "in concert" was clear, since it never defined the phrase further. See, *e. g.*, H. R. Rep. No. 91–1444, Pt. 1, p. 50 (1970). Even the writers of additional views did not include an objection to the nondefinition of the term in their criticisms of other aspects of the continuing-criminal-enterprise section of the law. The Senate Report on S. 3246, the Senate version of the same law, did shed some light on the problem. See S. Rep. No. 91–613 (1969). In the Section-by-Section Analysis of the bill, the report states:

"Subsection (f) of this section sets out the criteria which must be met

absence of any indication from the legislative history or elsewhere to the contrary, the far more likely explanation is that Congress intended the word "concert" to have its common meaning of agreement in a design or plan. For the purposes of this case, therefore, we assume, *arguendo,* that § 848 does

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before a defendant can be deemed involved in a continuing criminal enterprise. The court must find by a preponderance of evidence that the defendant acted *in concert with or conspired with* at least five other persons engaged in a continuing criminal enterprise involving violations of the act." *Id.,* at 28 (emphasis added).

The actual language of the bill, however, used the words "in concert with" to cover both concerted action and conspiracy. *Id.,* at 121. Thus, it is apparent that the Senate understood the term "in concert" to encompass the concept of agreement.

The debates reveal that Congress was concerned with providing severe penalties for professional criminals when it included the continuing-criminal-enterprise section in the statute. See, *e. g.,* 116 Cong. Rec. 995 (1970) (remarks of Sen. Dodd); *id.,* at 1181 (remarks of Sen. Thurmond); *id.,* at 33631 (remarks of Cong. Weicker); *id.,* at 33314 (remarks of Cong. Bush). This concern undercuts the Government's argument that one professional criminal might have "conned" five innocent dupes into working for him, all of them being unaware that the purpose of the work was to conduct an illegal drug business, and none agreeing to do so.

When the phrase "in concert" has been used in other statutes, it has generally connoted cooperative action and agreement. See, *e. g.,* 2 U. S. C. §§ 434 (b)(13), 441a (a)(7)(B)(i) (1976 ed.) (Federal Election Campaign Act Amendments of 1976); 7 U. S. C. § 13c (a) (1970 ed., Supp. V) (Commodity Futures Trading Commission Act of 1974—liability as principal); 10 U. S. C. § 894 (a) (Code of Military Justice—mutiny or sedition); 29 U. S. C. §§ 52, 104, 105 (Norris-LaGuardia Act); 46 U. S. C. § 1227 (Merchant Marine Act—agreements with other carriers forbidden); 49 U. S. C. § 322 (b)(1) (Interstate Commerce Act, Part II—unlawful operation of motor carriers). This suggests that Congress intended the same words to have the same meaning in § 848. Even *Iannelli* did not require the word "conspiracy" to be spelled out in the statutory definition, as long as the concept of agreement was included therein. 420 U. S., at 785 n. 17. Since the word "concert" commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned.

require proof of an agreement among the persons involved in the continuing criminal enterprise.[15] So construed, § 846 is a lesser included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846 as well as proof of several additional elements.[16]

B. *Brown* v. *Ohio, post,* p. 161, decided today, establishes the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense. *Post,* at 168–169. What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for "the same offense." See *United States* v. *Wilson,* 420 U. S. 332, 343 (1975). *Brown* reaffirms the rule that one convicted of the greater offense may not be

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[15] In connection with this assumption, we note that until the Court of Appeals in this case found that § 846 was a lesser included offense of § 848, no other appellate court had considered the issue. Indeed, after *Iannelli* it would have been fair to assume that the question was open. The dissenting opinion here is based on the premise that it was beyond dispute that §§ 846 and 848 were so related. From there, it is easy to reason that the prosecutor should be held accountable for the presumed error that occurred. Because the premise fails, however, this case cannot be fit so neatly into the niche that would be fashioned by the dissent. Unless it is plain that two offenses are "the same" for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option. This assumption would only be reinforced if the defendant affirmatively asked the court to require two proceedings, and in connection with his request he actively sought postponement of the second trial, as Jeffers did. Under the circumstances, it is hardly accurate to say, as the dissent does, that Jeffers was being required to give legal advice to the prosecution. On the contrary, he was simply under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue.

[16] The two indictments in this case are remarkably similar in detail. It is clear that the identical agreement and transactions over the identical time period were involved in the two cases. It is also quite clear that none of the participants were "innocent dupes."

subjected to a second prosecution on the lesser offense, since that would be the equivalent of two trials for "the same offense." *Post,* at 168. See *In re Nielsen,* 131 U. S. 176, 187 (1889). Because two offenses are "the same" for double jeopardy purposes unless each requires proof of an additional fact that the other does not, *post,* at 168, it follows that the sequence of the two trials for the greater and the lesser offense is immaterial,[17] and trial on a greater offense after conviction on a lesser ordinarily is just as objectionable under the Double Jeopardy Clause as the reverse order of proceeding.[18] Cf. *Waller* v. *Florida,* 397 U. S., at 390. Contrary to the suggestion of the Court of Appeals, *Iannelli* created no exception to these general jeopardy principles for complex statutory crimes.[19]

The rule established in *Brown,* however, does have some exceptions. One commonly recognized exception is when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun. See *Brown* v. *Ohio, post,* at 169 n. 7; *Blackledge* v. *Perry,* 417 U. S. 21, 28–29, and n. 7 (1974); *Diaz* v. *United States,* 223 U. S. 442 (1912). See also *Ashe* v. *Swenson,* 397 U. S. 436,

[17] It is also possible to argue that a second trial on a greater offense is prohibited by the Double Jeopardy Clause because the defendant is necessarily placed twice in jeopardy on the lesser offense. The risk of conviction on the greater means nothing more than a risk of conviction upon proof of all the elements of the lesser plus proof of the additional elements needed for the greater. *Brown* v. *Ohio, post,* at 167 n. 6, leaves consideration of the implications of this theory for another day.

[18] Any adjustment in punishment for the fact that the defendant already has been punished for the lesser offense is not adequate to cure the injury suffered because of multiple prosecutions, since the double jeopardy problem inheres in the very fact of a second trial for the "same" offense. See *Blackledge* v. *Perry,* 417 U. S. 21, 30–31 (1974); *Price* v. *Georgia,* 398 U. S. 323, 329 (1970).

[19] The Government makes no attempt to defend the Court of Appeals' reading of *Iannelli;* indeed, it states that that court misconstrued *Iannelli.* Brief for United States 22 n. 10.

453 n. 7 (1970) (BRENNAN, J., concurring). This exception may also apply when the facts necessary to the greater were not discovered despite the exercise of due diligence before the first trial. *Ibid.*

If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the *Brown* rule emerges. This situation is no different from others in which a defendant enjoys protection under the Double Jeopardy Clause, but for one reason or another retrial is not barred. Thus, for example, in the case of a retrial after a successful appeal from a conviction, the concept of continuing jeopardy on the offense for which the defendant was convicted applies, thereby making retrial on that offense permissible. See *Price* v. *Georgia,* 398 U. S. 323 (1970); *Green* v. *United States,* 355 U. S. 184 (1957); *United States* v. *Ball,* 163 U. S. 662 (1896). In a slightly different context, the defendant's right to have the need for a retrial measured by the strict "manifest necessity" standard of *United States* v. *Perez,* 9 Wheat. 579 (1824), does not exist if the mistrial was granted at the defendant's request. *United States* v. *Dinitz,* 424 U. S. 600 (1976). Both the trial after the appeal and the trial after the mistrial are, in a sense, a second prosecution for the same offense, but, in both situations, the policy behind the Double Jeopardy Clause does not require prohibition of the second trial. Similarly, although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election.[20]

[20] The considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. No hint

C. In this case, trial together of the conspiracy and continuing-criminal-enterprise charges could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial.[21] If the two charges had been tried in one proceeding, it appears that petitioner would have been entitled to a lesser-included-offense instruction. See Fed. Rule Crim. Proc. 31 (c); *Keeble* v. *United States,* 412 U. S. 205 (1973); cf. *Sansone* v. *United States,* 380 U. S. 343, 349–350

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of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together.

Unlike the dissenters, we are unwilling to attach any significance to the fact that the grand jury elected to return two indictments against petitioner for the two statutory offenses. As the Court of Appeals' opinion made clear, before this case it was by no means settled law that § 846 was a lesser included offense of § 848. See 532 F. 2d, at 1106–1111. See also Brief for United States 18–32; n. 15, *supra.* Even now, it has not been necessary to settle that issue definitively. See *supra,* at 149–150. If the position reasonably could have been taken that the two statutes described different offenses, it is difficult to ascribe any improper motive to the act of requesting two separate indictments. Furthermore, as noted *supra,* at 142, it was the Government itself that requested a joint trial on the two indictments, which also indicates that no sinister purpose was behind the formal method of proceeding.

[21] Petitioner argues that a finding of waiver is inconsistent with the decision in *Simmons* v. *United States,* 390 U. S. 377, 389–394 (1968), where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a Rule 14 severance from the other defendants, the case might be different. In that event, he would have given the court an opportunity to ensure that prejudicial evidence relating only to other defendants would not have been introduced in his trial. Assuming that a valid Fifth Amendment point was in the background, due to the relationship between §§ 846 and 848, petitioner could have had no complaint about a trial of the two charges together. No such motion, however, was made. Under the circumstances of this case, therefore, no dilemma akin to that in *Simmons* arose.

(1965). If such an instruction had been denied on the ground that § 846 was not a lesser included offense of § 848, petitioner could have preserved his point by proper objection. Nevertheless, petitioner did not adopt that course. Instead, he was solely responsible for the successive prosecutions for the conspiracy offense and the continuing-criminal-enterprise offense.[22] Under the circumstances, we hold that his action deprived him of any right that he might have had against consecutive trials. It follows, therefore, that the Government was entitled to prosecute petitioner for the § 848 offense, and the only issue remaining is that of cumulative punishments upon such prosecution and conviction.

III

Although both parties, throughout the proceedings, appear to have assumed that no cumulative-punishment problem is present in this case,[23] the imposition of the separate fines

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[22] Petitioner's position is not strengthened merely because no one raised the multiple-prosecution point during the first proceeding. Since the Government's posture throughout this case has been that §§ 846 and 848 are separate offenses, it could not have been expected on its own to elect between them when its motion for trial together was denied. The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention.

[23] Brief for Petitioner 21; Brief for United States 9. See, however, the Government's statement, Tr. of Oral Arg. 36: "[W]e submit, the Double Jeopardy Clause does not bar prosecution for the greater offense, provided, of course, that there was a conviction on the lesser included offense and provided that any punishment that he has suffered on the lesser offense be credited." Different considerations govern the propriety of addressing the cumulative-punishment issue, since petitioner, for obvious reasons, never affirmatively argued that the difference in the two statutes was so great as to authorize separate punishments, and he did argue implicitly that separate trials would be permissible. Even if the two indictments had been tried together, the cumulative-punishment issue would remain.

seems squarely to contradict that assumption.[24] Fines, of course, are treated in the same way as prison sentences for purposes of double jeopardy and multiple-punishment analysis. See *North Carolina* v. *Pearce,* 395 U. S. 711, 718 n. 12 (1969). In this case, since petitioner received the maximum fine applicable to him under § 848, it is necessary to decide whether cumulative punishments are permissible for violations of §§ 846 and 848.

The critical inquiry is whether Congress intended to punish each statutory violation separately. See, *e. g., Prince* v. *United States,* 352 U. S. 322, 327 (1957); *Callanan* v. *United States,* 364 U. S. 587, 594 (1961); *Milanovich* v. *United States,* 365 U. S. 551, 554 (1961). Cf. *Bell* v. *United States,* 349 U. S. 81, 82 (1955). In *Iannelli* v. *United States,* the Court concluded that Congress did intend to punish violations of § 1955 separately from § 371 conspiracy violations. Since the two offenses were different, there was no need to go further. See 420 U. S., at 785–786, nn. 17–18. See also *Gore* v. *United States,* 357 U. S. 386 (1958). If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple-punishment difficulties. See *North Carolina* v. *Pearce,* 395 U. S., at 717; *United States* v. *Wilson,* 420 U. S., at 343.[25]

As petitioner concedes, Reply Brief for Petitioner 3, the first issue to be considered is whether Congress intended to allow cumulative punishment for violations of §§ 846 and 848. We have concluded that it did not, and this again makes it unnecessary to reach the lesser-included-offense issue.

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[24] For present purposes, since petitioner is not eligible for parole at any time, there is no need to examine the Government's argument that the prison sentences do not present any possibility of cumulative punishment.

[25] Cf. *United States* v. *Gaddis,* 424 U. S. 544, 549 n. 12 (1976) (vacating convictions and sentences under 18 U. S. C. § 2113 (a) in light of conviction under § 2113 (d)).

Section 848 itself reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Even for a first offender, the statute authorizes a maximum prison sentence of life, a fine of $100,000, and a forfeiture of all profits obtained in the enterprise and of any interest in, claim against, or property or contractual rights of any kind affording a source of influence over, the enterprise. §§ 848 (a)(1), (2). The statute forbids suspension of the imposition or execution of any sentence imposed, the granting of probation, and eligibility for parole. § 848 (c). In addition, § 848 is the only section in the statutes controlling drug abuse that provides for a mandatory minimum sentence. For a first offender, that minimum is 10 years. § 848 (a)(1). A second or subsequent offender must receive a minimum sentence of 20 years, and he is subject to a fine of up to $200,000, as well as the forfeiture described above and the maximum of lifetime imprisonment. *Ibid.* Since every § 848 violation by definition also will involve a series of other felony violations of the Act, see §§ 848 (b)(1), (2), there would have been no point in specifying maximum fines for the § 848 violation if cumulative punishment was to be permitted.

The legislative history of § 848 is inconclusive on the question of cumulative punishment.[26] The policy reasons usually offered to justify separate punishment of conspiracies and

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[26] The Congress was plainly interested in punishing the professional criminal severely when it passed § 848. See, *e. g.*, S. Rep. No. 91–613, pp. 2, 7 (1969); 116 Cong. Rec. 995, 1181, 1664 (1970) (remarks in Senate debate); *id.*, at 33300–33301, 33304, 33314 (remarks in House debate). Taken alone, this might support an argument for cumulative penalties. The House Report, however, indicates that the penalty scheme of the continuing-criminal-enterprise section was to be separate from the rest of the penalties. H. R. Rep. No. 91–1444, pt. 1, pp. 10–11 (1970). In light of these arguably conflicting conclusions from the legislative history, we see no reason to deviate from the result suggested by the structure of the statute itself.

underlying substantive offenses, however, are inapplicable to §§ 846 and 848. In *Callanan* v. *United States,* 364 U. S., at 593–594, the Court summarized these reasons:

> "[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."

Accord, *Iannelli* v. *United States,* 420 U. S., at 778.

As this discussion makes clear, the reason for separate penalties for conspiracies lies in the additional dangers posed by concerted activity. Section 848, however, already expressly prohibits this kind of conduct. Thus, there is little legislative need to further this admittedly important interest by authorizing consecutive penalties from the conspiracy statute.

Our conclusion that Congress did not intend to impose cumulative penalties under §§ 846 and 848 is of minor significance in this particular case. Since the Government had the right to try petitioner on the § 848 indictment, the court had the power to sentence him to whatever penalty was authorized by that statute. It had no power, however, to impose on him a fine greater than the maximum permitted by § 848. Thus, if petitioner received a total of $125,000 in fines

on the two convictions, as the record indicates, he is entitled to have the fine imposed at the second trial reduced so that the two fines together do not exceed $100,000.

The judgment of the Court of Appeals, accordingly, is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring in the judgment in part and dissenting in part.

Because I agree with the United States that *Iannelli* v. *United States*, 420 U. S. 770 (1975), controls this case, I for that reason concur in the judgment of the Court with respect to petitioner's conviction. For the same reason and because the conspiracy proved was not used to establish the continuing criminal enterprise charged, I dissent from the Court's judgment with respect to the fines and from Part III of the plurality's opinion.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting in part, and concurring in the judgment in part.

There is nothing novel about the rule that a defendant may not be tried for a greater offense after conviction of a lesser included offense. It can be traced back to Blackstone, and "has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen*[, 131 U. S. 176,] was decided in 1889," *Brown* v. *Ohio*, *post*, at 168.[1] I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.

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[1] As the Court notes in *Brown*, *Nielsen* cites an 1833 New Jersey case; that case in turn quotes Blackstone. *State* v. *Cooper*, 13 N. J. L. 361, 375. See 4 W. Blackstone, Commentaries *336.

The defendant surely cannot be held responsible for the fact that two separate indictments were returned,[2] or for the fact that other defendants were named in the earlier indictment, or for the fact that the Government elected to proceed to trial first on the lesser charge.[3] The other defendants had valid objections to the Government's motion to consolidate the two cases for trial.[4] Most trial lawyers will be startled to learn that a rather routine joint opposition to that motion to consolidate has resulted in the loss[5] of what this Court used to regard as "a vital safeguard in our society, one that

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[2] The plurality implies that the result in this case would be different "if any action by the Government contributed to the separate prosecutions on the lesser and greater charges." *Ante,* at 152 n. 20. I wonder how the grand jury happened to return two separate indictments.

[3] The Government retained the alternative of trying petitioner on both charges at once, while trying the other defendants separately for conspiracy. The prosecutor never attempted this course, and defense counsel—not having had an opportunity to read today's plurality opinion—had no reason to believe he had a duty to suggest it. Until today it has never been the function of the defense to give legal advice to the prosecutor.

[4] When the Government attempted to obtain a joint trial on all the charges against all the defendants, the attorney representing all the defendants resisted the Government motion. He did so largely because of the possible prejudice to petitioner's codefendants, and gave relatively little emphasis to arguments relating to petitioner alone. See *ante,* at 142–143, n. 5.

[5] It is quite clear from the plurality opinion that petitioner has been denied his constitutional rights. As that opinion states, it is "the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense." *Ante,* at 150. And, as the plurality also demonstrates, that is precisely what happened here. *Ante,* at 147–150. Two additional facts, also noted by the plurality, clinch the double jeopardy claim: (1) petitioner was not only twice tried, but also twice punished for the same offense, *ante,* at 154–158; and (2) the instructions at the second trial required petitioner to defend against the lesser charge for a second time, *ante,* at 145 n. 11.

was dearly won and one that should continue to be highly valued," *Green* v. *United States,* 355 U. S. 184, 198.[6] See *United States* v. *Alford,* 516 F. 2d 941, 945 n. 1 (CA5 1975).

It is ironic that, while the State's duty to give advice to an accused is contracting, see, *e. g., Oregon* v. *Mathiason,* 429 U. S. 492, a new requirement is emerging that the accused, in order to preserve a constitutional right, must inform the prosecution about the legal consequences of its acts. Even the desirability of extending Mr. Jeffers' incarceration does not justify this unique decision.[7]

While I concur in the judgment to the extent that it vacates the cumulative fines, I respectfully dissent from the affirmance of the conviction.

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[6] The following sentence by Mr. Justice Black is also worth remembering: "If such great constitutional protections are given a narrow, grudging application, they are deprived of much of their significance." *Green,* 355 U. S., at 198.

[7] The Court's disposition is especially troubling because eight Justices agree that petitioner's constitutional right was violated and only four are persuaded that he waived his double jeopardy objection.

BROWN *v.* OHIO

CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

No. 75–6933. Argued March 21, 1977—Decided June 16, 1977

The Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth, *held* to bar prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent. Pp. 164–170.

(a) "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not," *Blockburger* v. *United States,* 284 U. S. 299, 304. In line with that test, the Double Jeopardy Clause generally forbids successive prosecution and cumulative punishment for a greater and lesser included offense. Pp. 166–169.

(b) Here, though the Ohio Court of Appeals properly held that under state law joyriding (taking or operating a vehicle without the owner's consent) and auto theft (joyriding with the intent permanently to deprive the owner of possession) constitute "the same statutory offense" within the meaning of the Double Jeopardy Clause, it erroneously concluded that petitioner could be convicted of both crimes because the charges against him had focused on different parts of the 9-day interval between petitioner's taking of the car and his apprehension. There was still only one offense under Ohio law, and the specification of different dates in the two charges against petitioner cannot alter the fact that he was twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments. Pp. 169–170.

Reversed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post,* p. 170. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 170.

Robert Plautz, by appointment of the Court, 429 U. S. 997,

argued the cause for petitioner. With him on the briefs was *Glenn Billington.*

George J. Sadd argued the cause for respondent. With him on the briefs was *John T. Corrigan.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent.

I

On November 29, 1973, the petitioner, Nathaniel Brown, stole a 1965 Chevrolet from a parking lot in East Cleveland, Ohio. Nine days later, on December 8, 1973, Brown was caught driving the car in Wickliffe, Ohio. The Wickliffe police charged him with "joyriding"—taking or operating the car without the owner's consent—in violation of Ohio Rev. Code Ann. § 4549.04 (D) (1973, App. 342).[1] The complaint charged that "on or about December 8, 1973, . . . Nathaniel H. Brown did unlawfully and purposely take, drive or operate a certain motor vehicle to wit; a 1965 Chevrolet . . . without the consent of the owner one Gloria Ingram . . . ." App. 3. Brown pleaded guilty to this charge and was sentenced to 30 days in jail and a $100 fine.

Upon his release from jail on January 8, 1974, Brown was returned to East Cleveland to face further charges, and on February 5 he was indicted by the Cuyahoga County grand jury. The indictment was in two counts, the first charging

[1] Section 4549.04 (D) provided at the time: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." A violation was punishable as a misdemeanor. Section 4549.04 was repealed effective January 1, 1974.

the theft of the car "on or about the 29th day of November 1973," in violation of Ohio Rev. Code Ann. § 4549.04 (A) (1973, App. 342),[2] and the second charging joyriding on the same date in violation of § 4549.04 (D). A bill of particulars filed by the prosecuting attorney specified that

> "on or about the 29th day of November, 1973, . . . Nathaniel Brown unlawfully did steal a Chevrolet motor vehicle, and take, drive or operate such vehicle without the consent of the owner, Gloria Ingram . . . ." App. 10.

Brown objected to both counts of the indictment on the basis of former jeopardy.

On March 18, 1974, at a pretrial hearing in the Cuyahoga County Court of Common Pleas, Brown pleaded guilty to the auto theft charge on the understanding that the court would consider his claim of former jeopardy on a motion to withdraw the plea.[3] Upon submission of the motion, the court overruled Brown's double jeopardy objections. The court sentenced Brown to six months in jail but suspended the sentence and placed Brown on probation for one year.

The Ohio Court of Appeals affirmed. It held that under Ohio law the misdemeanor of joyriding was included in the felony of auto theft:

> "Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft. 'The difference between the crime of stealing a motor vehicle, and operating a motor vehicle without the consent of the owner is that conviction for stealing requires proof of an intent on the part of the thief to *permanently* deprive the owner of possession.' . . . [T]he crime of operating a motor vehicle without the

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[2] Section 4549.04 (A) provided: "No person shall steal any motor vehicle." A violation was punishable as a felony.

[3] The joyriding count of the indictment was nol prossed.

consent of the owner is a lesser included offense of auto theft . . . ." *Id.*, at 22.

Although this analysis led the court to agree with Brown that "for purposes of double jeopardy the two prosecutions involve the same statutory offense," *id.*, at 23,[4] it nonetheless held the second prosecution permissible:

> "The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th. Since appellant has not shown that both prosecutions are based on the same act or transaction, the second prosecution is not barred by the double jeopardy clause." *Ibid.*

The Ohio Supreme Court denied leave to appeal.

We granted certiorari to consider Brown's double jeopardy claim, 429 U. S. 893 (1976), and we now reverse.

II

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition. 1 J. Bishop, New Criminal Law § 1051 (8th ed. 1892); Comment, Twice in Jeopardy, 75 Yale L. J. 262, 268–269 (1965). The principal question in this case is whether auto theft and joyriding, a greater and lesser included offense under Ohio law, constitute the "same offence" under the Double Jeopardy Clause.

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[4] As the Ohio Court of Appeals recognized, the Wickliffe and Cuyahoga County prosecutions must be viewed as the acts of a single sovereign under the Double Jeopardy Clause. *Waller* v. *Florida*, 397 U. S. 387 (1970).

Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, see *United States* v. *Wilson,* 420 U. S. 332, 339–340 (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.[5]

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969) (footnotes omitted). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. See *Gore* v. *United States,* 357 U. S. 386 (1958); *Bell* v. *United States,* 349 U. S. 81 (1955); *Ex parte Lange,* 18 Wall. 163 (1874). Where successive prosecutions are at stake, the guarantee serves "a constitutional policy of finality for the defendant's benefit." *United States* v. *Jorn,* 400 U. S. 470, 479 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe* v. *Swenson,* 397 U. S.

[5] We are not concerned here with the double jeopardy questions that may arise when a defendant is retried on the same charge after a mistrial, *e. g., United States* v. *Jorn,* 400 U. S. 470 (1971), or dismissal of the indictment or information, *e. g., United States* v. *Jenkins,* 420 U. S. 358 (1975), or after a conviction is reversed on appeal, *e. g., United States* v. *Ball,* 163 U. S. 662 (1896). Nor are we concerned with the permissibility of separate prosecutions on closely related criminal charges when the accused opposes a consolidated trial, *e. g., Jeffers* v. *United States, ante,* p. 137.

436 (1970); cf. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), and from attempts to secure additional punishment after a prior conviction and sentence, see *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); cf. *North Carolina* v. *Pearce*, *supra*.

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ."

This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." *Iannelli* v. *United States*, 420 U. S. 770, 785 n. 17 (1975).

If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. See *In re Nielsen*, 131 U. S. 176, 187–188 (1889); cf. *Gavieres* v. *United States*, 220 U. S. 338 (1911). Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless "each statute requires proof of an additional fact which the other does not," *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871), the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.[6]

[6] The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of con-

We are mindful that the Ohio courts "have the final authority to interpret . . . that State's legislation." *Garner* v. *Louisiana,* 368 U. S. 157, 169 (1961). Here the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio crimes: Joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession. App. 22. Joyriding is the lesser included offense. The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft;

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secutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in *Ashe* v. *Swenson,* 397 U. S. 436 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims. And in *In re Nielsen,* 131 U. S. 176 (1889), the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a 2½-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.

In both cases, strict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe,* separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See *Ebeling* v. *Morgan,* 237 U. S. 625 (1915). In *Nielsen,* conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to "'run the gantlet' a second time." *Ashe, supra,* at 446, quoting from *Green* v. *United States,* 355 U. S. 184, 190 (1957).

Because we conclude today that a lesser included and a greater offense are the same under *Blockburger,* we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by *Ashe* and *Nielsen.*

the prosecutor who has established auto theft necessarily has established joyriding as well.

Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute "the same statutory offense" within the meaning of the Double Jeopardy Clause. App. 23. For it is clearly *not* the case that "each [statute] requires proof of a fact which the other does not." 284 U. S., at 304. As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889. In that case the Court endorsed the rule that

> "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." 131 U. S., at 188.

Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial. Thus, the Court treated the formulation as just one application of the rule that two offenses are the same unless each requires proof that the other does not. *Id.*, at 188, 190, citing *Morey* v. *Commonwealth, supra,* at 434. And as another application of the same rule, the Court cited, 131 U. S., at 190, with approval the decision of *State* v. *Cooper,* 13 N. J. L. 361 (1833), where the New Jersey Supreme Court held that a conviction for arson barred a subsequent felony-murder indictment based on the death of a man killed in the fire. Cf. *Waller* v. *Florida,* 397 U. S.

387, 390 (1970). Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.[7]

III

After correctly holding that joyriding and auto theft are the same offense under the Double Jeopardy Clause, the Ohio Court of Appeals nevertheless concluded that Nathaniel Brown could be convicted of both crimes because the charges against him focused on different parts of his 9-day joyride. App. 23. We hold a different view. The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. Cf. *Braverman* v. *United States,* 317 U. S. 49, 52 (1942). The applicable Ohio statutes, as written and as construed in this case, make the theft and operation of a single car a single offense. Although the Wickliffe and East Cleveland authorities may have had different perspectives on Brown's offense, it was still only one offense under Ohio law.[8] Accordingly, the specification of

[7] An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See *Diaz* v. *United States,* 223 U. S. 442, 448–449 (1912); *Ashe* v. *Swenson, supra,* at 453 n. 7 (BRENNAN, J., concurring).

[8] We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent. Cf. *Blockburger* v. *United States,* 284 U. S., at 302. We also would have a different case if in sustaining Brown's second conviction the Ohio courts had construed the joyriding statute to have that effect. We then would have to decide whether the state courts' construction, applied retroactively in this case, was such "an unforeseeable judicial enlargement of a criminal statute" as to violate due process. See *Bouie* v. *City of Columbia,* 378 U. S. 347, 353 (1964); cf. *In re Snow,* 120 U. S. 274, 283–286 (1887); *Crepps* v. *Durden,* 2 Cowper 640 (K. B. 1777).

different dates in the two charges on which Brown was convicted cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion, but in any event would reverse on the ground, not addressed by the Court, that the State did not prosecute petitioner in a single proceeding. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454, and n. 7 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting from denial of certiorari), and cases collected therein. In my view the Court's suggestion, *ante,* at 169 n. 8, that the Ohio Legislature might be free to make joyriding a separate and distinct offense for each day a motor vehicle is operated without the owner's consent would not affect the applicability of the single-transaction test. Though under some circumstances a legislature may divide a continuing course of conduct into discrete offenses, I would nevertheless hold that all charges growing out of conduct constituting a "single criminal act, occurrence, episode, or transaction" must be tried in a single proceeding.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court reverses the judgment of the Ohio Court of Appeals because the Court does not wish this case to slip by

without taking advantage of the opportunity to pronounce some acceptable but hitherto unenunciated (at this level) double jeopardy law. I dissent because, in my view, this case does not deserve that treatment.

I, of course, have no quarrel with the Court's general double jeopardy analysis. See *Jeffers* v. *United States, ante,* p. 137. I am unable to ignore as easily as the Court does, however, the specific finding of the Ohio Court of Appeals that the two prosecutions at issue here were based on petitioner's separate and distinct acts committed, respectively, on November 29 and on December 8, 1973.

Petitioner was convicted of operating a motor vehicle on December 8 without the owner's consent. He subsequently was convicted of taking and operating the same motor vehicle on November 29 without the owner's consent and with the intent permanently to deprive the owner of possession. It is possible, of course, that at some point the two acts would be so closely connected in time that the Double Jeopardy Clause would require treating them as one offense. This surely would be so with respect to the theft and any simultaneous unlawful operation. Furthermore, as a matter of statutory construction, the allowable unit of prosecution may be a course of conduct rather than the separate segments of such a course. See, *e. g., United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218 (1952). I feel that neither of these approaches justifies the Court's result in the present case.

Nine days elapsed between the two incidents that are the basis of petitioner's convictions. During that time the automobile moved from East Cleveland to Wickliffe. It strains credulity to believe that petitioner was operating the vehicle every minute of those nine days. A time must have come when he stopped driving the car. When he operated it again nine days later in a different community, the Ohio courts could properly find, consistently with the Double Jeopardy Clause, that the acts were sufficiently distinct to justify a

second prosecution. Only if the Clause requires the Ohio courts to hold that the allowable unit of prosecution is the course of conduct would the Court's result here be correct. On the facts of this case, no such requirement should be inferred, and the state courts should be free to construe Ohio's statute as they did.

This Court, I fear, gives undeserved emphasis, *ante,* at 163–164, to the Ohio Court of Appeals' passing observation that the Ohio misdemeanor of joyriding is an element of the Ohio felony of auto theft. That observation was merely a preliminary statement, indicating that the theft and any simultaneous unlawful operation were one and the same. But the Ohio Court of Appeals then went on flatly to hold that such simultaneity was not present here. Thus, it seems to me, the Ohio courts did precisely what this Court, *ante,* at 169 n. 8, professes to say they did not do.

In my view, we should not so willingly circumvent an authoritative Ohio holding as to Ohio law. I would affirm the judgment of the Court of Appeals.

MANDEL, GOVERNOR OF MARYLAND, ET AL. *v.* BRADLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 76–128. Argued February 23, 1977—Decided June 16, 1977

In appellees' action challenging the constitutionality of a Maryland statute requiring an independent candidate for statewide or federal office, in order to qualify for a position on the general election ballot, to file 70 days before the date of party primaries, nominating petitions signed by at least 3% of the State's registered voters, the three-judge District Court was not warranted in holding, on the basis of this Court's summary affirmance in *Tucker* v. *Salera*, 424 U. S. 959, that the Maryland statute's early filing deadline was an unconstitutional burden on an independent candidate's access to the ballot. Rather than relying on *Salera* as controlling precedent, the District Court should have conducted an independent examination of the merits under the constitutional standards set forth in *Storer* v. *Brown*, 415 U. S. 724, 742, for determining the extent of the burden imposed on independent candidates.

Vacated and remanded.

George A. Nilson, Deputy Attorney General of Maryland, argued the cause for appellants. With him on the briefs were *Francis B. Burch*, Attorney General, and *Robert A. Zarnoch*, Assistant Attorney General.

Jon T. Brown argued the cause and filed a brief for appellees.

PER CURIAM.

Candidates for statewide or federal office in Maryland may obtain a place on the general election ballot by filing with the State Administrative Board of Election Laws a certificate of candidacy 70 days before a political party's primary election and then by winning the primary. Alternatively, under provisions of the Maryland Election Code, a candidate

for statewide or federal office may qualify for a position on the general election ballot as an independent by filing, 70 days before the date on which party primaries are held, nominating petitions signed by at least 3% of the State's registered voters and a certificate of candidacy. Md. Elec. Code Ann. § 7–1 (1976 and Supp. 1976). In Presidential election years this filing date occurs approximately 230 to 240 days before the general election. In other years it occurs about 120 days before the general election. §§ 1–1 (a)(8), 5–2, 7–1.

Appellee Bruce Bradley decided in the spring of 1975 to run as an independent candidate for the United States Senate in 1976, a Presidential election year. Starting in the fall of 1975 Bradley collected signatures on nominating petitions. The requisite number was 51,155. On March 8, 1976, the deadline for filing, Bradley submitted 53,239 signatures and filed a certificate of candidacy for the Senate seat. However, on April 15, 1976, the State Administrative Board of Election Laws determined that only 42,049 of the signatures were valid and denied him a place on the ballot.

Two weeks later, Bradley and the other appellees—petition signers and other voter supporters of Bradley—filed the instant suit, alleging that the procedures mandated by § 7–1 of the Md. Elec. Code (1976 and Supp. 1976) constitute an unconstitutional infringement of their associational and voting rights under the First and Fourteenth Amendments. They complained that Maryland's early filing date made it more difficult for Bradley to obtain the requisite number of signatures than for a party member to win a primary and sought, *inter alia,* an injunction against future enforcement of the offending provision of Maryland's election procedures. A three-judge District Court agreed with the appellees that the early filing deadline of § 7–1 (i) (Supp. 1976) was an unconstitutional burden on an independent candidate's access to the ballot and ordered the appellants to give Bradley 53

days after the party primaries to gather the requisite number of signatures.[1]

The court based its holding on our summary affirmance in *Tucker* v. *Salera,* 424 U. S. 959 (1976), aff'g 399 F. Supp. 1258 (ED Pa. 1975). In *Salera,* a three-judge court declared unconstitutional a Pennsylvania law setting the deadline for an independent candidate to gather signatures to obtain a place on the ballot 244 days before the general election in a Presidential election year. Under the Pennsylvania law, independents had to submit signatures of only 2% of the largest vote cast for any candidate in the preceding statewide general election, but they had to gather the required signatures within a 21-day period prior to the filing deadline. In declaring the Pennsylvania statute invalid, the three-judge court relied, not on the short period for signature gathering (which it thought was valid under *Storer* v. *Brown,* 415 U. S. 724 (1974)), but solely on the early deadline for submission of the necessary signatures. The court found that the deadline substantially burdened ballot access of independents by requiring them to obtain the necessary signatures at a time when the election issues were undefined and the voters were apathetic. It also rejected various countervailing state interests that had been urged. This Court summarily affirmed the judgment of the three-judge court in *Salera.*

The three-judge court in this case viewed this Court's summary affirmance in *Salera* as controlling precedent for the proposition that early filing dates, such as that employed in Maryland, are unconstitutionally burdensome on the independent candidate's access to the ballot, and therefore decided in favor of the appellees. We noted probable jurisdiction, 429 U. S. 813 (1976).

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[1] Bradley successfully gathered the requisite number of signatures, obtained a place on the ballot, ran, and lost. This case is nonetheless not moot. *Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974).

The District Court erred in believing that our affirmance in *Salera* adopted the reasoning as well as the judgment of the three-judge court in that case and thus required the District Court to conclude that the early filing date is impermissibly burdensome. *Hicks* v. *Miranda,* 422 U. S. 332 (1975), held that lower courts are bound by summary actions on the merits by this Court, but we noted that "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Id.,* at 345 n. 14. Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.

> "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." (Footnote omitted.) *Fusari* v. *Steinberg,* 419 U. S. 379, 391–392 (1975) (BURGER, C. J., concurring).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After *Salera,* for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including *Salera,* should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Here, the District Court ruled that legally "*Salera* decides the issue before us, and as the latest expression of the Supreme

Court, we are bound to follow it." App. to Jurisdictional Statement 12a. The precedential significance of the summary action in *Salera,* however, is to be assessed in the light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case. There, in addition to the early filing date, signatures had to be gathered within a 21-day period. This limited time enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate.[2]

This combination of an early filing deadline and the 21-day limitation on signature gathering is sufficient to distinguish *Salera* from the case now before us, where there is no limitation on the period within which such signatures must be gathered. In short, *Salera* did not mandate the result reached by the District Court in this case.

Because of its preoccupation with *Salera,* the District Court failed to undertake an independent examination of the merits. The appropriate inquiry was set out in *Storer* v. *Brown, supra,* at 742:

> "[I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. We note here that the State mentions only one instance of

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[2] In *Storer* v. *Brown, supra,* as the District Court noted, the 24-day limitation was not by itself enough to invalidate the statute, but we clearly recognized that the limitation, when combined with other provisions of the election law, might invalidate the statutory scheme. 415 U. S., at 742–743. The District Court in this case erred in reading *Storer* v. *Brown* as holding irrelevant the limited period of time in which signatures must be gathered.

an independent candidate's qualifying . . . but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter."

In *Storer* itself, because the District Court had not applied these standards in adjudicating the constitutional issues before it, we remanded the case "to permit further findings with respect to the extent of the burden imposed on independent candidates." 415 U. S., at 740. There is no reason here for doing any less. The District Court did not sift through the conflicting evidence and make findings of fact as to the difficulty of obtaining signatures in time to meet the early filing deadline. It did not consider the extent to which other features of the Maryland electoral system—such as the unlimited period during which signatures may be collected, or the unrestricted pool of potential petition signers—moderate whatever burden the deadline creates. See Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1142–1143 (1975). It did not analyze what the past experience of independent candidates for statewide office might indicate about the burden imposed on those seeking ballot access. Instead, the District Court's assumption that the filing deadline by itself was *per se* illegal—as well as the expedited basis upon which the case necessarily was decided [3]—resulted in a failure to apply the constitutional standards announced in *Storer* to the statutory provisions here at issue.[4]

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[3] The appellees filed this action on April 30, 1976. The three-judge court was convened and heard argument on May 12, and it announced its decision on May 17.

[4] There is evidence in the record that in both 1972 and 1976—the only years in which the early deadline was effective—no candidate for statewide office succeeded in qualifying for the ballot. There is also evidence tending to substantiate the appellees' contention that there existed a variety of obstacles in the way of obtaining support for an independent candidate far in advance of the general election. Without

The application of those standards to the evidence in the record is, in the first instance, a task for the District Court. We therefore vacate the judgment, and remand the case for further proceedings consistent with this opinion.[5]

It is so ordered.

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

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court but write to emphasize the Court's treatment of the rule announced in *Hicks* v. *Miranda,* 422 U. S. 332 (1975).

In a dissent from the denial of certiorari in *Colorado Springs Amusements, Ltd.* v. *Rizzo,* 428 U. S. 913 (1976), I stated why, in my view, the federal and state courts should give "appropriate, but not necessarily conclusive, weight to our summary dispositions," *id.,* at 923, rather than be required, as the Court held in *Hicks,* "to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances." 428 U. S., at 913.

The Court by not relying on our summary affirmance in *Tucker* v. *Salera,* 424 U. S. 959 (1976), and *Auerbach* v. *Mandel,* 409 U. S. 808 (1972), effectively embraces that view, and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is

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intimating any ultimate view on the merits of the appellees' challenge, we have no doubt that it has sufficient substance to warrant a remand for further proceedings.

[5] The District Court will be free on remand to consider the appellees' argument that the "technical and administrative requirements of the petition signing process" are an unconstitutional burden on ballot access—a question never reached in view of the decision for the appellees and Bradley's ultimate success in qualifying for the ballot.

essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL joins, concurring.

Although there are many indications in the District Court's opinion that it not only considered *Tucker* v. *Salera,* 424 U. S. 959 (1976), controlling, but also independently invalidated the Maryland law on grounds similar to or the same as those employed in *Salera*—in which event, a remand would be inappropriate—it is fairly arguable that the District Court should unmistakably record its opinion as to the validity of the Maryland law. A number of my Brethren are of this view, and I defer to their judgment.

MR. JUSTICE STEVENS, dissenting.

In my judgment the Maryland statute unfairly discriminates against independent candidates in one respect. It requires the independent to make his decision to become a candidate much sooner than a member of a national political party.

A party member is merely required to file a certificate of candidacy 70 days before the primary election. That pro-

cedure is so simple that he may postpone his decision until that very day and still satisfy all legal requirements for candidacy. In contrast, the independent must *complete* the signature gathering process by the 70th day preceding the primary election. Since the task of obtaining the signatures of 3% of the registered voters inevitably will require a significant amount of time, the independent must make his decision to run well in advance of the filing deadline.

In my opinion, the State has not put forward any justification for this disparate treatment. Moreover, it is potentially a matter of great significance. The decision to become a candidate may be prompted by a sudden, unanticipated event of great national or local importance. If such an event should occur on the 71st day before a primary, national party members could make a timely decision to run but independents could not.

The statute should be evenhanded in its impact on the timing of the most important decision any candidate must make. The burdens that an independent must shoulder are heavy enough without requiring him to make that decision before his most formidable opponents must do so.*

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*In *Jenness* v. *Fortson,* 403 U. S. 431, this Court upheld the Georgia filing procedures applicable to independent candidates seeking a place on the general election ballot. These procedures required the independent candidate to collect signatures of at least 5% of the number of registered voters at the last general election for the office in question. *Id.,* at 432. The independent candidate had 180 days in which to accomplish this task and had to file the completed petitions by the same deadline which a party candidate had to meet. *Id.,* at 433–434. Thus, the procedures for filing by independents under the Georgia statute are similar to those aspects of the Maryland procedures in issue here which I find place such a handicap on independent candidates. However, the question I find decisive in this case was neither raised nor decided by the Court in *Jenness,* see *id.,* at 434. Thus, that decision is not controlling on this point, *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 279, quoting *Webster* v. *Fall,* 266 U. S. 507, 511 (" 'Questions which merely lurk in the

On the basis of the record developed in the District Court, and the full argument on the merits in this Court, I would therefore affirm the judgment.

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record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents' ").

For the reasons stated in *Edelman* v. *Jordan,* 415 U. S. 651, 670–671, I do not regard the summary affirmance in *Auerbach* v. *Mandel,* 409 U. S. 808, as controlling.

JONES *v.* HILDEBRANT ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 76–5416. Argued April 26, 1977—Decided June 16, 1977

Where petitioner's counsel informed this Court at oral argument that petitioner's sole claim of constitutional deprivation resulting from her minor son's being shot and killed by respondent police officer was one based on *her* personal liberty and not one of pecuniary loss such as would be covered by Colorado's wrongful-death statute, but that contention was neither alleged in her complaint (which included claims based on the state wrongful-death statute and a claim under 42 U. S. C. §1983), presented in her petition for certiorari, nor fairly subsumed in the question that was presented as to whether the wrongful-death statute's limitation on damages controlled in a § 1983 action, the writ of certiorari is dismissed as improvidently granted.

Certiorari dismissed. Reported below: 191 Colo. 1, 550 P. 2d 339.

David K. Rees argued the cause for petitioner. With him on the briefs was *Walter L. Gerash.*

Wesley H. Doan argued the cause for respondents. With him on the brief was *Robert E. Goodwin.**

PER CURIAM.

Petitioner is the mother of a 15-year-old boy who was shot and killed by respondent Hildebrant, while respondent was acting in his capacity as a Denver police officer. Petitioner brought suit in her own behalf in state court. Respondent defended on the ground that he shot petitioner's son as a fleeing felon using no more force than was reasonably necessary. The amended complaint asserted three claims for relief: battery; negligence; and intentional deprivation of federal con-

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**Robert A. Murphy, Richard S. Kohn, Norman J. Chachkin, William E. Caldwell, Vilma S. Martinez, Morris J. Baller,* and *Nathaniel R. Jones* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging reversal.

stitutional rights. Although not specifically pleaded, the first two claims were admittedly based on the Colorado wrongful-death statute, Colo. Rev. Stat. Ann. § 13–21–202 (1973),[1] and the third, on 42 U. S. C. § 1983. While petitioner alleged damages of $1,500,000, she stipulated to a reduction of her prayer for relief with respect to the first two claims, since the Colorado wrongful-death statute admittedly limited her maximum recovery to $45,000, Colo. Rev. Stat. Ann. § 13–21–203 (1973). The trial court also ruled that petitioner's § 1983 claim was "merged" into her first claim and, accordingly, dismissed her § 1983 claim. The remaining claims went to the jury, which returned a verdict for $1,500.[2]

On petitioner's appeal, the Supreme Court of Colorado affirmed. 191 Colo. 1, 550 P. 2d 339 (1976). Her petition for certiorari presented a single question for review here:

> "Where the black mother of a 15-year-old child who was intentionally shot and killed by a white policeman acting under the color of state law brings a suit in state

[1] Section 13–21–202:

"When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

[2] The jury had been instructed that damages in a wrongful-death action were limited to net pecuniary loss, see *Herbertson* v. *Russell,* 150 Colo. 110, 371 P. 2d 422 (1962). This loss is the financial loss sustained by petitioner as a result of the death of her son, and would include the value of any services that he might have rendered and earnings he might have made while a minor, as well as any support he might have provided after becoming an adult, less the expenses petitioner would have incurred in raising him. The award apparently included, in this case, funeral expenses. The Supreme Court of Colorado upheld the instructions and the award, 191 Colo., at 3 n. 1, 550 P. 2d, at 341 n. 1. These issues, of course, are not before us except as they might bear on petitioner's § 1983 claim.

> court pursuant to 42 U. S. C. § 1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U. S. C. § 1983?"

We granted certiorari to consider what was thus explicitly presented as a question of whether a State's limitation on damages in a wrongful-death statute would control in an action brought pursuant to § 1983. 429 U. S. 1061 (1977).

The majority opinion in the Supreme Court of Colorado proceeds on the assumption that if the Colorado wrongful-death statute applied to petitioner's claim, her recovery would be limited to $45,000. It held that this limitation did apply even to the one count of petitioner's complaint based on 42 U. S. C. § 1983.

A necessary assumption for this position would seem to be that petitioner was suing to recover damages for injuries under § 1983 which were the same injuries as are covered by the state wrongful-death action. The question presented in the petition for certiorari is at the very least susceptible of that interpretation. But at oral argument, we were advised by counsel for petitioner that her sole claim of constitutional deprivation was not one of pecuniary loss resulting from her *son's* wrongful death, such as would be covered by the wrongful-death statute, but one based on *her* personal liberty. Her claim was described at oral argument as a constitutional right to raise her child without interference from the State; it has nothing to do with an action for "wrongful death" as defined by the state law. Tr. of Oral Arg. 4–5; see also *id.*, at 8–13.

An action for wrongful death, under Colorado law, is an action which may be brought by certain named survivors of a decedent who sustain a direct pecuniary loss upon the death of the decedent. It is "classified as a property tort action and cannot be classified as a tort action 'for injuries done to the person,' " *Fish* v. *Liley,* 120 Colo. 156, 163, 208 P. 2d 930,

933 (1949).[3] Petitioner, however, articulates here a quite different constitutional claim which does not fit into the Colorado wrongful-death mold. While petitioner's constitutional claim is based on an alleged deprivation of her own rights, and not on deprivation of those of her son's,[4] the asserted deprivation is not for any "property loss," but, rather, for the right of a child's mother to raise the child as she sees fit.[5]

This claim was not set forth in the complaint,[6] was not even hinted at in petitioner's briefs to the Supreme Court of Colorado, and is only casually referred to in the opinion of that court. The majority opinion held that insofar as a claim for actual pecuniary loss was a property right conferred upon petitioner by the State's wrongful-death statute, the damages recoverable under it were limited by the terms of

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[3] See n. 2, *supra*.

[4] Petitioner explicitly acknowledged at oral argument that she had not brought a claim for vindication of her son's rights; in essence, an action on his behalf. See Tr. of Oral Arg. 6, 17–18, 20. This is clear, as well, from the manner in which the complaint is drafted, as well as the parties' perception that the closest available state statute is the Colorado wrongful-death statute, rather than the Colorado survivorship statute, Colo. Rev. Stat. Ann. § 13–20–101 (1973). See Tr. of Oral Arg. 17–18, 20. See generally C. McCormick, Law of Damages 336 (1935); 2 F. Harper & F. James, The Law of Torts §§ 24.1–24.3 (1956). Petitioner sued individually as the mother of the decedent and not as the administratrix of the decedent's estate.

[5] Petitioner apparently relies on *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and its progeny as the basis for her asserted constitutional deprivation. As articulated at oral argument, petitioner's contention appears to be: "[T]his Court has held on several occasions that a parent has a constitutional right to raise their child, and that that child cannot be taken from them without the due process of law." Tr. of Oral Arg. 4–5.

[6] Her complaint alleged that *she* was deprived of

"a. Her child's right to life;

"b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

"c. Her right to her children's equal protection of the laws." App. 3.

Nowhere does she allege her asserted constitutional right to raise her child.

that statute. The majority opinion also refers in passing to a constitutional liberty right in petitioner herself, but its principal thrust is that petitioner's liberty claims, as presented to that court, are "really those of her son," and not claims personal to her.[7] This discussion, which occurs subsequent to that portion of the opinion in which the Supreme Court of Colorado concluded that state wrongful-death remedies were incorporated into § 1983 to vindicate civil rights violations "that result in death," does not intimate that similar limitations would exist in a § 1983 action where the alleged deprivation was that of liberty to a living plaintiff suing for a wrong done to her. We do not know how the Supreme Court of Colorado would have ruled on the damages limitation question had it found the § 1983 claim to be that of the deprivation of the mother's right to raise the child.

We have here then a shift in the posture of the case such that the question presented in the petition for certiorari is all but mooted by petitioner's oral argument. The question of whether a limitation on recovery of damages imposed by a state wrongful-death statute may be applied where death is said to have resulted from a violation of 42 U. S. C. § 1983 would appear to make sense only where the § 1983 damages claim is based upon the same injuries.[8] This is the assump-

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[7] The court was referring to the assertions in the complaint, quoted in n. 6, *supra*. It then raised, and rejected, another argument in the following passage:

"Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold* v. *Connecticut*, 381 U. S. 479 . . . (1965), and *Meyer* v. *Nebraska*, 262 U. S. 390 . . . (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that § 1983 was not designed to compensate for these collateral losses resulting from injuries to others." 191 Colo., at 9, 550 P. 2d, at 345.

[8] Petitioner rejects the view that the claims are based on the same injuries: "The key is that the remedy . . . is for the deprivation of

tion on which the Supreme Court of Colorado proceeded in discussing whether the § 1983 claim "merged" in the wrongful-death claim. The court does not intimate, or decide, that a § 1983 claim based on an alleged deprivation such as petitioner asserts here—if the claim were otherwise cognizable—would require remedial assistance from the state wrongful-death statute or that recovery on such a claim would be limited by that statute.

Petitioner's question presented assumes that the underlying constitutional violation necessary to support a § 1983 claim on her behalf is undisputed, and that the only question upon which petitioner takes issue with the majority of the Supreme Court of Colorado is the limitation on the amount of recovery. But it would seem possible, if not probable, that if petitioner had presented to the Supreme Court of Colorado the same claim she presented here in oral argument, that court's opinion would not have turned on the application of the state wrongful-death statute as a limitation on recovery of damages, since the underlying § 1983 claim—deprivation of a right to raise children—is not at all the same underlying claim for which the wrongful-death action provides recompense. Whatever the merits of her constitutional liberty claim in her own right, a question on which we do not intimate an opinion, it would not seem logically to be subject to a damages limitation contained in the statute permitting survivors to recover for wrongs done to a property interest of theirs. In presenting to this Court in her petition for certiorari solely a damages issue of this nature, petitioner has wholly pretermitted the underlying question of whether she has been deprived of any constitutional liberty interest as a result of respondent's shooting of her son.

In sum, the damages question which petitioner presents in her petition for certiorari is only the tip of the iceberg.

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civil rights—not for wrongful death." Reply Brief for Plaintiff-Appellant in the Supreme Court of Colorado 7.

The question of whether she was deprived of a constitutional liberty interest of her own was neither alleged in her complaint in the Colorado trial court, presented in the petition for certiorari in this Court, nor fairly subsumed in the question that was presented. See this Court's Rule 23 (1)(c). The writ of certiorari is therefore dismissed as improvidently granted. *Belcher* v. *Stengel,* 429 U. S. 118 (1976).

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Physical abuses by police under color of state law may in some circumstances constitute a constitutional deprivation giving rise to criminal liability under the civil rights laws, even if the abuses result in the death of the victim, *Screws* v. *United States,* 325 U. S. 91 (1945); and if the victim survives such abuses, it is now clear that he may recover damages under 42 U. S. C. § 1983 for the injuries that he has sustained. See *Monroe* v. *Pape,* 365 U. S. 167 (1961); *Johnson* v. *Glick,* 481 F. 2d 1028 (CA2), cert. denied *sub nom. John* v. *Johnson,* 414 U. S. 1033 (1973); *Howell* v. *Cataldi,* 464 F. 2d 272 (CA3 1972); *Tolbert* v. *Bragan,* 451 F. 2d 1020 (CA5 1971); *Jenkins* v. *Averett,* 424 F. 2d 1228 (CA4 1970); *Collum* v. *Butler,* 421 F. 2d 1257 (CA7 1970); *Allison* v. *California Adult Authority,* 419 F. 2d 822 (CA9 1969). There remains the question whether, independently or in conjunction with state law, § 1983 affords parents a cause of action for a wrongful killing of their child by a state law enforcement officer and, if it does, the further question as to the measure of damages in such case.

This Court has never addressed these issues.[1] Beginning

[1] At least one case in this Court has involved such an action. In *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), personal representatives of students killed in the 1970 slayings at Kent State University brought a § 1983 action alleging the wrongful killing of the victims. The Court held

with *Brazier* v. *Cherry,* 293 F. 2d 401 (CA5), cert. denied, 368 U. S. 921 (1961), however, the Courts of Appeals have permitted survivor suits under § 1983, at least where such actions are maintainable under state law. See, *e. g., Spence* v. *Staras,* 507 F. 2d 554 (CA7 1974); *Hall* v. *Wooten,* 506 F. 2d 564 (CA6 1974). See also *Hampton* v. *Chicago,* 484 F. 2d 602, 607 (CA7 1973) (Stevens, J.), cert. denied, 415 U. S. 917 (1974). In *Brazier* the Fifth Circuit held that an action by a widow against a police officer for the wrongful killing of her husband was maintainable under § 1983. There the Court of Appeals found that in enacting 42 U. S. C. § 1988, "Congress adopted as federal law the currently effective state law on the general right of survival." 293 F. 2d, at 405. The same court has now ruled that a § 1983 action survives the death of the victim, despite state law to the contrary. *Shaw* v. *Garrison,* 545 F. 2d 980 (1977).

It is thus apparent that the availability of § 1983 in wrongful-death actions is a recurring issue and that it is far from evident that the Colorado Supreme Court was correct in ruling that a § 1983 death action is tied to state law. It is clear that by enacting § 1983, Congress intended to create a federal right of action separate and independent from any remedies afforded under state law. See *Monroe* v. *Pape, supra.* State law may be relevant where a trial court is seeking to fix a remedy under § 1983, cf. *Moor* v. *County of Alameda,* 411 U. S. 693, 702–703 (1973), but it is by no means clear that state law may serve as a limitation on recovery where the remedy provided under state law is inadequate to implement the purposes of § 1983. Thus, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier* v.

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that state officials were not absolutely immune from such suits. Although the question whether the personal representatives' action could be maintained under § 1983 was not before the Court, it did not disapprove of such actions in remanding the case to the lower courts.

Cherry, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 240 (1969). The Courts of Appeals have taken a similar approach by allowing recovery of punitive damages in suits brought under § 1983 even if state law would not have permitted them. See *Caperci* v. *Huntoon,* 397 F. 2d 799 (CA1), cert. denied, 393 U. S. 940 (1968); *Basista* v. *Weir,* 340 F. 2d 74, 84–88 (CA3 1965). See also *Spence* v. *Staras, supra,* at 558; *Gill* v. *Manuel,* 488 F. 2d 799, 801–802 (CA9 1973); Annot., 14 A. L. R. Fed. 608 (1973).

Despite the importance of the question whether § 1983 is available when a state officer wrongfully takes a life, the Court dismisses the writ of certiorari as improvidently granted because in its view the critical issues are not properly before us. I disagree.

Petitioner included in her complaint filed in the trial court a claim for relief under 42 U. S. C. § 1983.[2] That cause of action was dismissed on the ground that it was merged in the state wrongful-death action also included in the complaint. The Colorado Supreme Court rejected petitioner's claim that "her § 1983 claim should not have been dismissed," 191 Colo. 1, 5, 550 P. 2d 339, 342 (1976), and in so doing rejected each of the "four distinct theories [advanced] to support her" § 1983 cause of action. 191 Colo., at 5, 550 P. 2d, at 342.

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[2] Petitioner's first two claims for relief were grounded on state law. The third claim for relief stated:

"During all times mentioned in this Complaint, Douglas Hildebrant while acting under color of law, intentionally deprived the Plaintiff of her rights, security and liberty secured to her by the Constitution of the United States, including but not limited to:

"a. Her child's right to life;

"b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

"c. Her right to her children's equal protection of the laws." App. 3.

One of petitioner's arguments was that §§ 1983 and 1988 together permit suits under § 1983 in reliance on state wrongful-death statutes but authorize recovery of damages free from the limitations of state law. The Colorado Supreme Court agreed that "§ 1988 permits the incorporation of the states' non-abatement statutes and wrongful death statutes into § 1983 actions in order to effectually implement the policies of that legislation," 191 Colo., at 6, 550 P. 2d, at 343–344 (footnotes omitted), and that in a federal suit "Colorado's wrongful death remedy would be engrafted into a § 1983 action." *Id.*, at 7, 550 P. 2d, at 344. But it disagreed with petitioner on the question of remedy, holding that any such § 1983 action was subject to the damages limitations of state law—here the Colorado rule limiting recovery for wrongful death to direct pecuniary loss to the survivors; and because suit was brought in state court, the § 1983 case merged with the state wrongful-death action and was properly dismissed. Chief Justice Pringle and Justice Groves dissented, saying that they did not "believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U. S. C. § 1983 . . . ." 191 Colo., at 9, 550 P. 2d, at 345–346.

In the course of arriving at this conclusion, the Colorado Supreme Court expressly rejected the other grounds offered by petitioner to sustain her § 1983 claim. First, because the Colorado statute permitted petitioner to bring her suit, she was not deprived of any civil right "without due process of law." 191 Colo., at 6, 550 P. 2d, at 343. Second, the Colorado court rejected as contrary to congressional intent, the "theory . . . that a federal wrongful death remedy impliedly exists in § 1983, independent of state wrongful death remedies." *Id.*, at 8, 550 P. 2d, at 345.[3]

[3] The Colorado Supreme Court was emphatic: "Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas of the law, we do not believe that such

Petitioner also claimed that she was entitled to a "separate recovery under her § 1983 claim" because "she was deprived of her own constitutional rights" in that "her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated." *Ibid.* In rejecting this claim, the court held that "[t]hese deprivations . . . are really those of her son" and that a § 1983 action did not lie for injuries to another. Petitioner could not "sue in her own right for the deprivations of her son's rights," such as his right to life. *Ibid.* The Colorado court thus treated petitioner's claim as a survivor's suit based on the deceased's cause of action, holding that § 1983 does not provide for such an action independently of state law.

Finally, the Colorado Supreme Court expressly rejected any notion that the State "directly attempt[ed] to restrict [petitioner's] own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold* v. *Connecticut,* 381 U. S. 479 . . . (1965), and *Meyer* v. *Nebraska,* 262 U. S. 390 . . . (1923)." 191 Colo., at 9, 550 P. 2d, at 345. While conceding that "the death of a family member represents a loss" to petitioner, the court held that the State had not interfered with her right to child rearing, and "§ 1983 was not designed to compensate for these collateral losses resulting from injuries to others." *Ibid.* Accordingly, the rights of parents were sufficiently vindicated by the state statutory recovery of direct pecuniary losses resulting from the death of their children.

It is obvious from the proceedings in the Colorado courts that the dismissal of petitioner's § 1983 claim and the associ-

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a remedy exists with § 1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts." 191 Colo., at 8, 550 P. 2d, at 345 (footnotes omitted).

ated damages limitation ruling were unsuccessfully challenged in the Colorado Supreme Court on the grounds just mentioned. It also seems to me that these grounds were preserved by the petition for certiorari, which we granted and which presented the following questions:

> "Where the black mother of a 15-year-old child who was intentionally shot and killed by a white policeman acting under the color of state law brings a suit in state court pursuant to 42 U. S. C. § 1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U. S. C. § 1983?"

The questions "what is the measure of damages" in a § 1983 suit and "can a state measure of damages cancel and displace an action brought pursuant to § 1983" fairly pose the correctness of the Colorado Supreme Court rulings that (1) no § 1983 action exists independently of state law; (2) a survivor may not sue under § 1983 for injuries suffered by the deceased; and (3) the damages recoverable under § 1983 are limited by Colorado law to direct pecuniary loss and do not reach "collateral" injuries. These issues were addressed directly by the Colorado Supreme Court, and I doubt that that court misunderstood the scope of the litigation before it or reached and decided issues not fairly presented by the appeal.

Nor do I think that the oral argument, even when read in the majority's common-law pleading style, ineluctably supports any conclusion that petitioner has abandoned any of these claims. At oral argument, petitioner's claim as a parent was articulated several times: "a right to not have her child taken"; she was deprived of the "liberty to raise children"; she had the right "[t]o raise her child"; and the "constitutional violation was the infringement of her rights as a parent." Tr. of Oral Arg. 8–10. In light of these statements and similar ones throughout the oral argument it cannot

be said that petitioner has abandoned her claim, expressly rejected by the Colorado Supreme Court, that § 1983 affords a remedy to petitioner in her capacity as a parent wholly independent of state law.

Similarly, petitioner's counsel made his view clear that even if the § 1983 action for the death of petitioner's child was dependent on state law, it was error to restrict petitioner's recovery to her direct pecuniary losses pursuant to the Colorado rule. Recovery should include, it was urged, damages for loss of a parent's own "civil rights" as well as punitive damages for the wrongful killing. Tr. of Oral Arg. 45.

Finally, it appears to me that petitioner has preserved her claim that § 1983 affords a survivor's action for the invasion of her child's right to life. Although petitioner's counsel seems to have characterized his claims in the state courts as being related solely to the mother's rights as a parent, the Colorado Supreme Court understood them to consist in part of claims on behalf of the son and, as I have indicated, expressly held these claims not cognizable under § 1983. 191 Colo., at 8, 550 P. 2d, at 345. At oral argument, counsel for petitioner conceded that he had not pressed his client's survivorship claim, apparently because he felt constrained by certain lower court opinions, since reversed or overruled, to articulate petitioner's claims in the Colorado courts in terms of the mother's rights alone. But he made it clear that "in hindsight" he would assert the survivorship claim, citing *Shaw* v. *Garrison,* 545 F. 2d 980 (CA5 1977), for the proposition that independently of state law a § 1983 action survives the death of the victim. Tr. of Oral Arg. 17–18, 20, 22. Because the Colorado Supreme Court understood petitioner's submission as including a survivorship claim based on injury to the son and because the issue is fairly presented by petitioner's petition for certiorari, it is hypertechnical to hold that the survivorship issue is not here. Of course, the Court is not bound by concessions of counsel in oral argument as to whether a legal issue is open

in this Court. Cf. *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 368 n. 3 (1977).

In any event, in light of the record, I am at a loss to understand the basis for dismissing the writ of certiorari with respect to the other questions expressly raised or fairly subsumed in the questions presented in the petition. These issues are important and we should decide them. I respectfully dissent from the judgment of dismissal.

PATTERSON *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 75–1861. Argued March 1, 1977—Decided June 17, 1977

New York law requiring that the defendant in a prosecution for second-degree murder prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter *held* not to violate the Due Process Clause of the Fourteenth Amendment. *Mullaney* v. *Wilbur*, 421 U. S. 684, distinguished. Pp. 201–216.

(a) Such affirmative defense does not serve to negative any facts of the crime which the State must prove in order to convict, but constitutes a separate issue on which the defendant is required to carry the burden of persuasion. Pp. 206–207.

(b) The Due Process Clause does not put New York to the choice of abandoning such an affirmative defense or undertaking to disprove its existence in order to convict for a crime which is otherwise within the State's constitutional powers to sanction by substantial punishment. If the State chooses to recognize a factor that mitigates the degree of criminality or punishment, it may assure itself that the fact has been established with reasonable certainty, and to recognize at all a mitigating circumstance does not require the State to prove beyond a reasonable doubt its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, expensive, and inaccurate. Pp. 207–209.

39 N. Y. 2d 288, 347 N. E. 2d 898, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 216. REHNQUIST, J., took no part in the consideration or decision of the case.

Victor J. Rubino argued the cause for appellant. With him on the briefs was *Betty D. Friedlander*.

John M. Finnerty argued the cause for appellee. With him on the brief was *Alan D. Marrus*.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is the constitutionality under the Fourteenth Amendment's Due Process Clause of burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law.

I

After a brief and unstable marriage, the appellant, Gordon Patterson, Jr., became estranged from his wife, Roberta. Roberta resumed an association with John Northrup, a neighbor to whom she had been engaged prior to her marriage to appellant. On December 27, 1970, Patterson borrowed a rifle from an acquaintance and went to the residence of his father-in-law. There, he observed his wife through a window in a state of semiundress in the presence of John Northrup. He entered the house and killed Northrup by shooting him twice in the head.

Patterson was charged with second-degree murder. In New York there are two elements of this crime: (1) "intent to cause the death of another person"; and (2) "caus[ing] the death of such person or of a third person." N. Y. Penal Law § 125.25 (McKinney 1975).[1] Malice aforethought is not an element of the crime. In addition, the State permits a person accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." [2]

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[1] References herein to the charge of "murder" under New York law are to this section. Cf. N. Y. Penal Law § 125.27 (McKinney 1975) (murder in the first degree).

[2] Section 125.25 provides in relevant part:

"A person is guilty of murder in the second degree when:

"1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

"(a) The defendant acted under the influence of extreme emotional

New York also recognizes the crime of manslaughter. A person is guilty of manslaughter if he intentionally kills another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." [3] Appellant confessed before trial to killing Northrup, but at trial he raised the defense of extreme emotional disturbance.[4]

The jury was instructed as to the elements of the crime of murder. Focusing on the element of intent, the trial court charged:

> "Before you, considering all of the evidence, can convict this defendant or anyone of murder, you must believe and decide that the People have established beyond a reasonable doubt that he intended, in firing the gun, to kill

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disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[3] Section 125.20 (2), N. Y. Penal Law § 125.20 (2) (McKinney 1975), provides:

"A person is guilty of manslaughter in the first degree when:

. . . . .

"2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision."

[4] Appellant also contended at trial that the shooting was accidental and that therefore he had no intent to kill Northrup. It is here undisputed, however, that the prosecution proved beyond a reasonable doubt that the killing was intentional.

> either the victim himself or some other human being. . . .
>
> . . . . .
>
> "Always remember that you must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt." App. A70–A71.[5]

The jury was further instructed, consistently with New York law, that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence. The jury was told that if it found beyond a reasonable doubt that appellant had intentionally killed Northrup but that appellant had demonstrated by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance, it had to find appellant guilty of manslaughter instead of murder.

The jury found appellant guilty of murder. Judgment was entered on the verdict, and the Appellate Division affirmed. While appeal to the New York Court of Appeals was pending, this Court decided *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), in which the Court declared Maine's murder statute unconstitutional. Under the Maine statute, a person accused of murder could rebut the statutory presumption that he com-

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[5] The trial court's instructions to the jury focused emphatically and repeatedly on the prosecution's burden of proving guilt beyond a reasonable doubt.

"The burden of proving the guilt of a defendant beyond a reasonable doubt rests at all times upon the prosecution. A defendant is never obliged to prove his innocence.

"Before you can find a defendant guilty, you must be convinced that each and every element of the crime charged and his guilt has been established to your satisfaction by reliable and credible evidence beyond a reasonable doubt." App. A48–A49.

mitted the offense with "malice aforethought" by proving that he acted in the heat of passion on sudden provocation. The Court held that this scheme improperly shifted the burden of persuasion from the prosecutor to the defendant and was therefore a violation of due process. In the Court of Appeals appellant urged that New York's murder statute is functionally equivalent to the one struck down in *Mullaney* and that therefore his conviction should be reversed.[6]

The Court of Appeals rejected appellant's argument, holding that the New York murder statute is consistent with due process. 39 N. Y. 2d 288, 347 N. E. 2d 898 (1976). The Court distinguished *Mullaney* on the ground that the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense charged since the New York affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder. This appeal ensued, and we noted probable jurisdiction. 429 U. S. 813 (1976). We affirm.

II

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California,* 347 U. S. 128, 134 (1954) (plurality opinion), and that 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, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription

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[6] In *Hankerson* v. *North Carolina, post,* p. 233, we hold, as did the New York Court of Appeals in the present case, that *Mullaney* is to be applied retroactively. The fact that Patterson was tried prior to our decision in *Mullaney* does not insulate this case from the principles of *Mullaney.*

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." *Speiser* v. *Randall,* 357 U. S. 513, 523 (1958); *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952); *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934).

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is therefore relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other affirmative defenses—indeed, "all . . . circumstances of justification, excuse or alleviation"—rested on the defendant. 4 W. Blackstone, Commentaries *201; M. Foster, Crown Law 255 (1762); *Mullaney* v. *Wilbur, supra,* at 693–694.[7] This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. *Commonwealth* v. *York,* 50 Mass. 93 (1845).[8]

In 1895 the common-law view was abandoned with respect to the insanity defense in federal prosecutions. *Davis* v. *United States,* 160 U. S. 469 (1895). This ruling had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses, and the prose-

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[7] See also F. Wharton, A Treatise on the Law of Evidence in Criminal Issues 240–269 (9th ed. 1884); H. Kelley, Criminal Law and Practice 124–128, 131 (1876); Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 882–884 (1968); Note, Affirmative Defenses After *Mullaney* v. *Wilbur:* New York's Extreme Emotional Disturbance, 43 Brooklyn L. Rev. 171, 190 (1976).

[8] *York,* which relied on American authorities dating back to the early 1800's, confirmed that the common-law and prevailing American view was that the burden was on the defendant to prove provocation. *York* is said to have governed a half century of American burden-of-proof decisions in provocation and self-defense cases. Fletcher, *supra,* n. 7, at 903–904.

cution in a majority of jurisdictions in this country sooner or later came to shoulder the burden of proving the sanity of the accused and of disproving the facts constituting other affirmative defenses, including provocation. *Davis* was not a constitutional ruling, however, as *Leland* v. *Oregon, supra,* made clear.[9]

[9] Meanwhile, the Court had explained that although the State could go too far in shifting the burden of proof to a defendant in a criminal case, the Due Process Clause did not invalidate every instance of burdening the defendant with proving an exculpatory fact. In *Morrison* v. *California,* 291 U. S. 82 (1934), a state law made it illegal for an alien ineligible for citizenship to own or possess land. Initially, in a summary dismissal for want of a substantial federal question, *Morrison* v. *California,* 288 U. S. 591 (1933), the Court held that it did not violate the Due Process Clause for the State to place on the defendant "the burden of proving citizenship as a defense," 291 U. S., at 88, once the State's evidence had shown that the defendant possessed the land and was a member of a race barred from citizenship. In the later *Morrison* case the Court reiterated and approved its previous summary holding, even though it struck down more drastic burden shifting permitted under another section of the statute. The Court said that its earlier *per curiam* ruling "was not novel":

"The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. Special reasons are at hand to make the change permissible when citizenship *vel non* is the issue to be determined. Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good." *Id.,* at 88–89.

In ruling that in the other section of the statute then at issue the State had gone too far, the Court said:

"For a transfer of the burden, experience must teach that the evidence

At issue in *Leland* v. *Oregon* was the constitutionality under the Due Process Clause of the Oregon rule that the defense of insanity must be proved by the defendant beyond a reasonable doubt. Noting that *Davis* "obviously establish[ed] no constitutional doctrine," 343 U. S., at 797, the Court refused to strike down the Oregon scheme, saying that the burden of proving all elements of the crime beyond reasonable doubt, including the elements of premeditation and deliberation, was placed on the State under Oregon procedures and remained there throughout the trial. To convict, the jury was required to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to the issue of insanity. Only then was the jury "to consider separately the issue of legal sanity *per se* . . . ." *Id.*, at 795. This practice did not offend the Due Process Clause even though among the 20 States then placing the burden of proving his insanity on the defendant, Oregon was alone in requiring him to convince the jury beyond a reasonable doubt.

In 1970, the Court declared that the 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.

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held to be inculpatory has at least a sinister significance (*Yee Hem* v. *United States*, [268 U. S. 178 (1925)]; *Casey* v. *United States* [276 U. S. 413 (1928)]), or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79." *Id.*, at 90–91.

The Court added that, of course, the possible situations were too variable and that too much depended on distinctions of degree to crowd them all into a simple formula. A sharper definition was to await specific cases. Of course, if the *Morrison* cases are understood as approving shifting to the defendant the burden of disproving a fact necessary to constitute the crime, the result in the first *Morrison* case could not coexist with *In re Winship*, 397 U. S. 358 (1970), and *Mullaney*.

358, 364 (1970). Five years later, in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), the Court further announced that under the Maine law of homicide, the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation. THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concurring, expressed their understanding that the *Mullaney* decision did not call into question the ruling in *Leland* v. *Oregon, supra,* with respect to the proof of insanity.

Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland* v. *Oregon.* This occurred in *Rivera* v. *Delaware,* 429 U. S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland,* had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney.* We dismissed the appeal as not presenting a substantial federal question. Cf. *Hicks* v. *Miranda,* 422 U. S. 332, 344 (1975).

III

We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred

in order to constitute the crime. The statute does provide an affirmative defense—that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances.

Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged." 397 U. S., at 364.

In convicting Patterson under its murder statute, New York did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

The New York law on extreme emotional disturbance follows this pattern. This affirmative defense, which the Court of Appeals described as permitting "the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them," 39 N. Y. 2d, at 302, 347 N. E. 2d, at 907,

does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and unless we are to overturn *Leland* and *Rivera,* New York has not violated the Due Process Clause, and Patterson's conviction must be sustained.

We are unwilling to reconsider *Leland* and *Rivera.* But even if we were to hold that a State must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative.[10] The Due Process Clause, as we see it, does not

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[10] The State of New York is not alone in this result:

"Since the Model Penal Code was completed in 1962, some 22 states have codified and reformed their criminal laws. At least 12 of these jurisdictions have used the concept of an 'affirmative defense' and have defined that phrase to require that the defendant prove the existence of an 'affirmative defense' by a preponderance of the evidence. Additionally, at least six proposed state codes and each of the four successive versions of a

put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship,* 397 U. S., at 372 (Harlan, J., concurring). The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

It is said that the common-law rule permits a State to

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revised federal code use the same procedural device. Finally, many jurisdictions that do not generally employ this concept of 'affirmative defense' nevertheless shift the burden of proof to the defendant on particular issues." Low & Jeffries, DICTA: Constitutionalizing the Criminal Law?, 29 Va. Law Weekly, No. 18, p. 1 (1977) (footnotes omitted).

Even so, the trend over the years appears to have been to require the prosecution to disprove affirmative defenses beyond a reasonable doubt. See W. LaFave & A. Scott, Criminal Law § 8, p. 50 (1972); C. McCormick, Evidence § 341, pp. 800–802 (2d ed. 1972). The split among the various jurisdictions varies for any given defense. Thus, 22 jurisdictions place the burden of proving the affirmative defense of insanity on the defendant, while 28 jurisdictions place the burden of disproving insanity on the prosecution. Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases, 56 B. U. L. Rev. 499, 503–505 (1976).

punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. But this has always been the case in those jurisdictions adhering to the traditional rule. It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.[11]

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[11] The drafters of the Model Penal Code would, as a matter of policy, place the burden of proving the nonexistence of most affirmative defenses, including the defense involved in this case, on the prosecution once the defendant has come forward with some evidence that the defense is present. The drafters recognize the need for flexibility, however, and would, in "some exceptional situations," place the burden of persuasion on the accused.

"Characteristically these are situations where the defense does not obtain at all under existing law and the Code seeks to introduce a mitigation. Resistance to the mitigation, based upon the prosecution's difficulty in obtaining evidence, ought to be lowered if the burden of persuasion is imposed on the defendant. Where that difficulty appears genuine and there is something to be said against allowing the defense at all, we consider it defensible to shift the burden in this way." ALI, Model Penal Code § 1.13, Comment, p. 113 (Tent. Draft No. 4, 1955).

Other writers have recognized the need for flexibility in allocating the burden of proof in order to enhance the potential for liberal legislative reforms. See, *e. g.*, Low & Jeffries, *supra,* n. 10; Christie & Pye, Presump-

We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the 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. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." *Tot* v. *United States,* 319 U. S. 463, 469 (1943). See also *Speiser* v. *Randall,* 357 U. S., at 523–525. *Morrison* v. *California,* 291 U. S. 82 (1934), also makes the point with sufficient clarity.

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tions and Assumptions in the Criminal Law: Another View, 1970 Duke L. J. 919, 933–938. See also Allen, *Mullaney* v. *Wilbur,* the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention, 55 Texas L. Rev. 269 (1977).

Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required.[12] This was not the problem to which *Winship* was addressed. Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States that strike a different balance are in violation of the Constitution.[13]

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[12] Whenever due process guarantees are dependent upon the law as defined by the legislative branches, some consideration must be given to the possibility that legislative discretion may be abused to the detriment of the individual. See *Mullaney* v. *Wilbur*, 421 U. S., at 698–699. The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged in any given case; yet there has been no great rush by the States to shift the burden of disproving traditional elements of the criminal offenses to the accused.

[13] As Chief Judge Breitel cogently stated in concurring in the judgment and opinion below:

"A preliminary caveat is indicated. It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf.

"Nevertheless, although one should guard against such abuses, it may be misguided, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also

IV

It is urged that *Mullaney* v. *Wilbur* necessarily invalidates Patterson's conviction. In *Mullaney* the charge was murder,[14] which the Maine statute defined as the unlawful killing of a human being "with malice aforethought, either express or implied." The trial court instructed the jury that the words "malice aforethought" were most important because "malice

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a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

"The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which should ameliorate the degree or kind of offense. The instant homicide case is a good example. Absent the affirmative defense, the crime of murder or manslaughter could legislatively be defined simply to require an intent to kill, unaffected by the spontaneity with which that intent is formed or the provocative or mitigating circumstances which should legally or morally lower the grade of crime. The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the 'element' of mitigating circumstances is generally unfair, especially since the conclusion that the negative of the circumstances is necessarily a product of definitional and therefore circular reasoning, and is easily avoided by the likely legislative practice mentioned earlier.

. . . . .

"In sum, the appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around—a shift from primitive mechanical classifications based on the bare antisocial act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology." 39 N. Y. 2d 288, 305–307, 347 N. E. 2d 898, 909–910 (1976).

[14] The defendant in *Mullaney* was convicted under Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964), which provided:

"Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

aforethought is an essential and indispensable element of the crime of murder." Malice, as the statute indicated and as the court instructed, could be implied and was to be implied from "any deliberate, cruel act committed by one person against another suddenly . . . or without a considerable provocation," in which event an intentional killing was murder unless by a preponderance of the evidence it was shown that the act was committed "in the heat of passion, on sudden provocation." The instructions emphasized that " 'malice aforethought and heat of passion on sudden provocation are two inconsistent things'; thus, by proving the latter the defendant would negate the former." 421 U. S., at 686–687 (citation omitted).

Wilbur's conviction, which followed, was affirmed. The Maine Supreme Judicial Court held that murder and manslaughter were varying degrees of the crime of felonious homicide and that the presumption of malice arising from the unlawful killing was a mere policy presumption operating to cast on the defendant the burden of proving provocation if he was to be found guilty of manslaughter rather than murder—a burden which the Maine law had allocated to him at least since the mid-1800's.

The Court of Appeals for the First Circuit then ordered that a writ of habeas corpus issue, holding that the presumption unconstitutionally shifted to the defendant the burden of proof with respect to an essential element of the crime. The Maine Supreme Judicial Court disputed this interpretation of Maine law in *State* v. *Lafferty,* 309 A. 2d 647 (1973), declaring that malice aforethought, in the sense of premeditation, was not an element of the crime of murder and that the federal court had erroneously equated the presumption of malice with a presumption of premeditation.

> "Maine law does not rely on a presumption of 'premeditation' (as Wilbur v. Mullaney assumed) to prove an essential element of unlawful homicide punishable as murder.

> Proof beyond a reasonable doubt of 'malice aforethought' (in the sense of 'premeditation') is not essential to conviction. . . . [T]he failure of the State to prove 'premeditation' in this context is not fatal to such a prosecution because, by legal definition under Maine law, a killing becomes unlawful and punishable as 'murder' on proof of 'any deliberate, cruel act, committed by one person against another, suddenly *without any, or without a considerable provocation.*' *State* v. *Neal,* 37 Me. 468, 470 (1854). *Neal* has been frequently cited with approval by our Court." *Id.,* at 664–665. (Emphasis added; footnote omitted.)

When the judgment of the First Circuit was vacated for reconsideration in the light of *Lafferty,* that court reaffirmed its view that Wilbur's conviction was unconstitutional. This Court, accepting the Maine court's interpretation of the Maine law, unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation.

Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt.[15] In our view,

[15] There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability." See, *e. g.,* Note, Affirmative Defenses After *Mullaney* v. *Wilbur:* New York's Extreme Emotional Disturbance, 43 Brooklyn L. Rev. 171 (1976); Note, Affirmative Defenses in Ohio After Mullaney v. Wilbur, 36 Ohio St. L. J. 828 (1975); Comment, Unburdening the Criminal Defendant: *Mullaney* v. *Wilbur* and the Reasonable Doubt Standard, 11 Harv. Civ. Rights–Civ. Lib. L. Rev. 390 (1976). It is said that such

the *Mullaney* holding should not be so broadly read. The concurrence of two Justices in *Mullaney* was necessarily contrary to such a reading; and a majority of the Court refused to so understand and apply *Mullaney* when *Rivera* was dismissed for want of a substantial federal question.

Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

It was unnecessary to go further in *Mullaney*. The Maine Supreme Judicial Court made it clear that malice aforethought, which was mentioned in the statutory definition of the crime, was not equivalent to premeditation and that the presumption of malice traditionally arising in intentional homicide cases carried no factual meaning insofar as premeditation was concerned. Even so, a killing became murder in Maine when it resulted from a deliberate, cruel act committed by one person against another, "suddenly without any, or without a considerable provocation." *State* v. *Lafferty, supra,* at 665. Premeditation was not within the definition of murder; but

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a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system. See Part II, *supra;* Low & Jeffries, *supra,* n. 10. Carried to its logical extreme, such a reading of *Mullaney* might also, for example, discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony. See Senate bill S. 1, 94th Cong., 1st Sess., 118 (1975). The Court did not intend *Mullaney* to have such far-reaching effect.

malice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, *i. e.*, lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held that however traditional this mode of proceeding might have been, it is contrary to the Due Process Clause as construed in *Winship*.

As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases. The judgment of the New York Court of Appeals is

Affirmed.

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

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In the name of preserving legislative flexibility, the Court today drains *In re Winship*, 397 U. S. 358 (1970), of much of its vitality. Legislatures do require broad discretion in the drafting of criminal laws, but the Court surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence.

I

An understanding of the import of today's decision requires a comparison of the statutes at issue here with the statutes and practices of Maine struck down by a unanimous Court just two years ago in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975).

A

Maine's homicide laws embodied the common-law distinctions along with the colorful common-law language. Murder

was defined in the statute as the unlawful killing of a human being "with malice aforethought, either express or implied." Manslaughter was a killing "in the heat of passion, on sudden provocation, without express or implied malice aforethought." *Id.,* at 686, and n. 3. Although "express malice" at one point may have had its own significant independent meaning, see Perkins, A Re-Examination of Malice Aforethought, 43 Yale L. J. 537, 546–552 (1934), in practice a finding that the killing was committed with malice aforethought had come to mean simply that heat of passion was absent. Indeed, the trial court in *Mullaney* expressly charged the jury that "malice aforethought and heat of passion on sudden provocation are two inconsistent things." 421 U. S., at 686–687. And the Maine Supreme Judicial Court had held that instructions concerning express malice (in the sense of premeditation) were unnecessary. The only inquiry for the jury in deciding whether a homicide amounted to murder or manslaughter was the inquiry into heat of passion on sudden provocation. *State* v. *Lafferty,* 309 A. 2d 647, 664–665 (Me. 1973). See 421 U. S., at 686 n. 4.

Our holding in *Mullaney* found no constitutional defect in these statutory provisions. Rather, the defect in Maine practice lay in its allocation of the burden of persuasion with respect to the crucial factor distinguishing murder from manslaughter. In Maine, juries were instructed that if the prosecution proved that the homicide was both intentional and unlawful, the crime was to be considered murder unless the *defendant* proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. Only if the defendant carried this burden would the offense be reduced to manslaughter.

New York's present homicide laws had their genesis in lingering dissatisfaction with certain aspects of the common-law framework that this Court confronted in *Mullaney.* Critics charged that the archaic language tended to obscure the fac-

tors of real importance in the jury's decision. Also, only a limited range of aggravations would lead to mitigation under the common-law formula, usually only those resulting from direct provocation by the victim himself. It was thought that actors whose emotions were stirred by other forms of outrageous conduct, even conduct by someone other than the ultimate victim, also should be punished as manslaughterers rather than murderers. Moreover, the common-law formula was generally applied with rather strict objectivity. Only provocations that might cause the hypothetical reasonable man to lose control could be considered. And even provocations of that sort were inadequate to reduce the crime to manslaughter if enough time had passed for the reasonable man's passions to cool, regardless of whether the actor's own thermometer had registered any decline. See generally W. LaFave & A. Scott, Criminal Law 528–530, 539–540, 571–582 (1972); Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L. Rev. 1425, 1446 (1968); ALI, Model Penal Code § 201.3, Comment (Tent. Draft No. 9, 1959); Perkins, *supra*. Cf. B. Cardozo, Law and Literature and Other Essays 99–101 (1931).

The American Law Institute took the lead in moving to remedy these difficulties. As part of its commendable undertaking to prepare a Model Penal Code, it endeavored to bring modern insights to bear on the law of homicide. The result was a proposal to replace "heat of passion" with the moderately broader concept of "extreme mental or emotional disturbance." The proposal first appeared in a tentative draft published in 1959, and it was accepted by the Institute and included as § 210.3 of the 1962 Proposed Official Draft.

At about this time the New York Legislature undertook the preparation of a new criminal code, and the Revised Penal Law of 1967 was the ultimate result. The new code adopted virtually word for word the ALI formula for distinguishing murder from manslaughter. N. Y. Penal Law §§ 125.20 (2),

125.25 (1)(a) (McKinney 1975).[1] Under current New York law,[2] those who kill intentionally are guilty of murder. But there is an affirmative defense left open to a defendant: If his act was committed "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," the crime is reduced to manslaughter. The supposed defects of a formulation like Maine's have been removed. Some of the rigid objectivity of the common law is relieved, since reasonableness is to be determined "from the viewpoint of a person in the defendant's situation under the circum-

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[1] There are also other forms of manslaughter set forth in the New York statute, not all of which conform to the ALI recommendations. Those provisions are not implicated in this case.

[2] The 1967 provisions marked a considerable departure from the prior New York statutes defining manslaughter. As we noted in *Mullaney* v. *Wilbur,* 421 U. S. 684, 694 (1975), the grounds for distinguishing murder from manslaughter developed along two distinct paths in this country. Prior to the 1967 change New York, with a handful of other jurisdictions, see ALI, Model Penal Code § 201.3, Comment, p. 43 (Tent. Draft No. 9, 1959), pursued the first path: to establish malice (and hence to convict of murder) the prosecution bore the burden of persuasion, being required to establish a substantive element of intent—that the defendant possessed "a design to effect death." See 39 N. Y. 2d 288, 299, 347 N. E. 2d 898, 905 (1976) (case below); *Stokes* v. *People,* 53 N. Y. 164 (1873). Maine, in contrast, followed the second path, marked out most prominently by Chief Justice Shaw's opinion in *Commonwealth* v. *York,* 50 Mass. 93 (1845): malice was presumed unless the defendant established that he acted in the heat of passion.

This difference between the old New York practice and the *York* approach was substantial—as noted by the Court of Appeals below. But that court placed entirely too much weight on this distinction as a basis for concluding that *Mullaney*'s holding was inapplicable. The statute at issue here is the 1967 Revised Penal Law, not the earlier formulation. In 1967, New York broke from the first branch and aligned itself with *York,* although casting its statute in more modern language. No matter how extensive the differences between the pre-1967 practice and the Maine statutes found deficient in *Mullaney,* this case must be decided on the basis of current New York law.

stances as the defendant believed them to be." § 125.25 (1) (a). The New York law also permits mitigation when emotional disturbance results from situations other than direct provocation by the victim. And the last traces of confusing archaic language have been removed. There is no mention of malice aforethought, no attempt to give a name to the state of mind that exists when extreme emotional disturbance is not present. The statute is framed in lean prose modeled after the ALI approach, giving operative descriptions of the crucial factors rather than attempting to attach the classical labels.

Despite these changes, the major factor that distinguishes murder from manslaughter in New York—"extreme emotional disturbance"—is undeniably the modern equivalent of "heat of passion." The ALI drafters made this abundantly clear. They were not rejecting the notion that some of those who kill in an emotional outburst deserve lesser punishment; they were merely refining the concept to relieve some of the problems with the classical formulation. See ALI, Model Penal Code, § 201.3, Comment, pp. 46–48 (Tent. Draft No. 9, 1959). The New York drafters left no doubt about their reliance on the ALI work. See 39 N. Y. 2d 288, 300–301, 347 N. E. 2d 898, 906 (1976). Both the majority and the dissenters in the New York Court of Appeals agreed that extreme emotional disturbance is simply "a new formulation" for the traditional language of heat of passion. *Id.*, at 301, 347 N. E. 2d, at 906; *id.*, at 312, 347 N. E. 2d, at 913–914 (Cooke, J., dissenting).

But in one important respect the New York drafters chose to parallel Maine's practice precisely, departing markedly from the ALI recommendation. Under the Model Penal Code the prosecution must prove the absence of emotional disturbance beyond a reasonable doubt once the issue is properly raised. See ALI, Model Penal Code §§ 1.12, 210.3 (Proposed Official Draft 1962); *id.*, § 1.13, Comment, pp. 108–118 (Tent. Draft No. 4, 1955). In New York, however, extreme emotional disturbance constitutes an affirmative defense rather

than a simple defense. Consequently the defendant bears not only the burden of production on this issue; he has the burden of persuasion as well. N. Y. Penal Law § 25.00 (McKinney 1975).

B

Mullaney held invalid Maine's requirement that the defendant prove heat of passion. The Court today, without disavowing the unanimous holding of *Mullaney,* approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.

This result is achieved by a narrowly literal parsing of the holding in *Winship:* "[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." 397 U. S., at 364. The only "facts" necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime.[3] Maine's statute was invalid, the Court reasons, because it "defined [murder] as the unlawful killing of a human being 'with malice aforethought, either express or implied.'" *Ante,* at 212. "[M]alice," the Court reiterates, "in the sense of the absence of provocation, was part of the definition of that crime." *Ante,* at 216. *Winship* was violated only because this "fact"—malice—was "presumed" unless the defendant persuaded the jury otherwise by showing that he acted in the heat of passion.[4] New York, in form presuming

[3] The Court holds that the prosecution must prove beyond a reasonable doubt "all of the elements *included in the definition of the offense* of which the defendant is charged." *Ante,* at 210 (emphasis added).

[4] The Court explains: "Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be

no affirmative "fact" against Patterson,[5] and blessed with a statute drafted in the leaner language of the 20th century, escapes constitutional scrutiny unscathed even though the effect on the defendant of New York's placement of the burden of persuasion is exactly the same as Maine's. See 39 N. Y. 2d, at 312–313, 347 N. E. 2d, at 913–914 (Cooke, J., dissenting).

This explanation of the *Mullaney* holding bears little re-

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either proved or presumed is impermissible under the Due Process Clause." *Ante,* at 215. I must point out, however, that this is a less than faithful reading of Maine law. The Maine Supreme Judicial Court, rejecting a recent holding to the contrary by the Court of Appeals for the First Circuit, emphatically insisted that the words "malice aforethought" appearing in the Maine statute did not connote a "fact" to be "presumed" in the sense the latter terms are customarily used:

"As we read the [First Circuit] case, the Federal Court was of the impression that [murder] includes, in addition to an intentional and unlawful killing, the independent element of 'malice aforethought.' Such is not, and never has been, the law in Maine. As we said in [*State* v. *Rollins,* 295 A. 2d 914, 920 (1972)]:

" '[T]he "malice" (said to be "presumed") is not a designation of any subjective state of mind existing *as a fact.* Similarly, the *"presumption"* (of "malice") arising from the fact of an intentional killing is not a designation of any *probative* relationship between the fact of "intention" relating to the killing and *any further facts . . . .'* " *State* v. *Lafferty,* 309 A. 2d 647, 664 (1973) (emphasis in original).

See *id.,* at 672 (concurring opinion); *Mullaney* v. *Wilbur,* 421 U. S., at 689, 699.

[5] "The crime of murder is defined by the [New York] statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . .

. . . . . .

". . . [The] affirmative defense [of extreme emotional disturbance] . . . does not serve to negative any facts of the crime which the State is to prove in order to convict of murder." *Ante,* at 205–206, 206–207.

semblance to the basic rationale of that decision.[6] But this is not the cause of greatest concern. The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.[7]

Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives. Indeed, the Court scarcely could distinguish this case from *Mullaney* without closing its eyes to the constitutional values for which *Winship* stands. As Mr. Justice Harlan observed in *Winship*, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of

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[6] In *Mullaney* we made it clear that *Winship* is not "limited to a State's definition of the elements of a crime." 421 U. S., at 699 n. 24.

[7] Although the Court never says so explicitly, its new standards appear to be designed for application to the language of a criminal statute on its face, regardless of how the state court construes the statute. The Court, in explaining *Mullaney*, persistently states that in Maine malice "was part of the definition of that crime [murder]," *ante*, at 216, even though the Maine Supreme Judicial Court, construing its own statute, had ruled squarely to the contrary. See n. 4, *supra*. In the usual case it is well established that an authoritative construction by the State's highest court "puts [appropriate] words in the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York*, 333 U. S. 507, 514 (1948). See *Mullaney*, *supra*, at 690–691; *Hebert* v. *Louisiana*, 272 U. S. 312, 316–317 (1926); *Murdock* v. *Memphis*, 20 Wall. 590, 635 (1875). Why an apparent exception should be engrafted on that doctrine today goes unexplained.

The result, under the Court's holding, is that only the legislature can remedy any defects that come to light as a result of the Court's decision. No matter how clear the legislative intent that defendants bear the burden of persuasion on an issue—an ultimate result the Court approves—state courts may not effectuate that intent until the right verbal formula appears in the statute book.

confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 397 U. S., at 370 (concurring opinion). See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing—a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the State. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal demands. According to the Court, it is because Maine happened to attach a name—"malice aforethought"—to the absence of heat of passion, whereas New York refrained from giving a name to the absence of extreme emotional disturbance. See 39 N. Y. 2d, at 313, 347 N. E. 2d, at 914 (Cooke, J., dissenting).

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.[8] It would be preferable, if the Court has found

[8] For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas.

To be sure, it is unlikely that legislatures will rewrite their criminal laws

reason to reject the rationale of *Winship* and *Mullaney,* simply and straightforwardly to overrule those precedents.

The Court understandably manifests some uneasiness that its formalistic approach will give legislatures too much latitude in shifting the burden of persuasion. And so it issues a warning that "there are obviously constitutional limits beyond which the States may not go in this regard." *Ante,* at 210. The Court thereby concedes that legislative abuses may occur and that they must be curbed by the judicial branch. But if the State is careful to conform to the drafting formulas articulated today, the constitutional limits are anything but "obvious." This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases.[9]

II

It is unnecessary for the Court to retreat to a formalistic test for applying *Winship.* Careful attention to the *Mullaney* decision reveals the principles that should control in this and like cases. *Winship* held that the prosecution must bear the burden of proving beyond a reasonable doubt " 'the existence of every fact necessary to constitute the crime charged.' " 397 U. S., at 363, quoting *Davis* v. *United States,* 160 U. S. 469, 493 (1895). In *Mullaney* we concluded that heat of passion was one of the "facts" described in *Winship*—that is, a

in this extreme form. The Court seems to think this likelihood of restraint is an added reason for limiting review largely to formalistic examination. *Ante,* at 211. But it is completely foreign to this Court's responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation—however reasonable—that legislative bodies will exercise appropriate restraint.

[9] I have no doubt that the Court would find some way to strike down a formalistically correct statute as egregious as the one hypothesized in n. 8, *supra.* Cf. *Morissette* v. *United States,* 342 U. S. 246, 250–263 (1952). But today's ruling suggests no principled basis for concluding that such a statute falls outside the "obvious" constitutional limits the Court invokes.

factor as to which the prosecution must bear the burden of persuasion beyond a reasonable doubt. 421 U. S., at 704. We reached that result only after making two careful inquiries. First, we noted that the presence or absence of heat of passion made a substantial difference in punishment of the offender and in the stigma associated with the conviction. *Id.*, at 697–701. Second, we reviewed the history, in England and this country, of the factor at issue. *Id.*, at 692–696. Central to the holding in *Mullaney* was our conclusion that heat of passion "has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Id.*, at 696.

Implicit in these two inquiries are the principles that should govern this case. The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition [10] the factor in question historically has held that level of importance.[11] If either branch

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[10] Cf. *Brinegar* v. *United States*, 338 U. S. 160, 174 (1949):

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

[11] As the Court acknowledges, *ante*, at 207–208, n. 10, the clear trend over the years has been to require the prosecutor to carry the burden of persuasion with respect to all important factors in a criminal case, including traditional affirmative defenses. See W. LaFave & A. Scott, Criminal Law 50 (1972); C. McCormick, Evidence § 341, pp. 800–802 (1972).

of the test is not met, then the legislature retains its traditional authority over matters of proof. But to permit a shift in the burden of persuasion when both branches of this test are satisfied would invite the undermining of the presumption of innocence, "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship,* 397 U. S., at 363, quoting from *Coffin* v. *United States,* 156 U. S. 432, 453 (1895). See *Cool* v. *United States,* 409 U. S. 100, 104 (1972); *Ivan V.* v. *City of New York,* 407 U. S. 203, 204 (1972); *Lego* v. *Twomey,* 404 U. S. 477, 486–487 (1972); *Morissette* v. *United States,* 342 U. S. 246, 275 (1952); *Bailey* v. *Alabama,* 219 U. S. 219, 236 (1911); *Davis* v. *United States, supra.* This is not a test that rests on empty form, for "*Winship* is concerned with substance rather than . . . formalism." *Mullaney* v. *Wilbur,* 421 U. S., at 699.

I hardly need add that New York's provisions allocating the burden of persuasion as to "extreme emotional disturbance" are unconstitutional when judged by these standards. "Extreme emotional disturbance" is, as the Court of Appeals recognized, the direct descendant of the "heat of passion" factor considered at length in *Mullaney.* I recognize, of course, that the differences between Maine and New York law are not unimportant to the defendant; there is a somewhat broader opportunity for mitigation. But none of those distinctions is relevant here. The presence or absence of extreme emotional disturbance makes a critical difference in punishment and stigma, and throughout our history the resolution of this issue of fact, although expressed in somewhat different terms, has distinguished manslaughter from murder. See 4 W. Blackstone, Commentaries *190–193, 198–201.

III

The Court beats its retreat from *Winship* apparently because of a concern that otherwise the federal judiciary will in-

trude too far into substantive choices concerning the content of a State's criminal law.[12] The concern is legitimate, see generally *Powell* v. *Texas,* 392 U. S. 514, 533–534 (1968) (plurality opinion); *Leland* v. *Oregon,* 343 U. S. 790, 803 (1952) (Frankfurter, J., dissenting), but misplaced. *Winship* and *Mullaney* are no more than what they purport to be: decisions addressing the procedural requirements that States must meet to comply with due process. They are not outposts for policing the substantive boundaries of the criminal law.

The *Winship/Mullaney* test identifies those factors of such importance, historically, in determining punishment and stigma that the Constitution forbids shifting to the defendant the burden of persuasion when such a factor is at issue. *Winship* and *Mullaney* specify only the procedure that is required when a State elects to use such a factor as part of its substantive criminal law. They do not say that the State must elect to use it. For example, where a State has chosen to retain the traditional distinction between murder and manslaughter, as have New York and Maine, the burden of persuasion must remain on the prosecution with respect to the distinguishing factor, in view of its decisive historical importance. But nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.[13] In this sig-

[12] See Low & Jeffries, DICTA: Constitutionalizing the Criminal Law?, 29 Va. Law Weekly, No. 18, p. 1 (1977); Tushnet, Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of *Mullaney* v. *Wilbur,* 55 B. U. L. Rev. 775 (1975).

[13] Perhaps under other principles of due process jurisprudence, certain factors are so fundamental that a State could not, as a substantive matter, refrain from recognizing them so long as it chooses to punish given conduct as a crime. Cf. *Bailey* v. *Alabama,* 219 U. S. 219 (1911) (holding a criminal-law presumption invalid procedurally and also finding a substantive defect under the Thirteenth Amendment and the Anti-Peonage Act). But substantive limits were not at issue in *Winship* or *Mullaney,* and they are not at issue here.

Even if there are no constitutional limits preventing the State, for

nificant respect, neither *Winship* nor *Mullaney* eliminates the substantive flexibility that should remain in legislative hands.

Moreover, it is unlikely that more than a few factors—although important ones—for which a shift in the burden of persuasion seriously would be considered will come within the *Mullaney* holding. With some exceptions, then, the State has the authority "to recognize a factor that mitigates the degree of criminality or punishment" without having "to prove its nonexistence in each case in which the fact is put in issue." *Ante*, at 209. New ameliorative affirmative defenses,[14] about

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example, from treating all homicides as murders punishable equally regardless of mitigating factors like heat of passion or extreme emotional disturbance, the *Winship/Mullaney* rule still plays an important role. The State is then obliged to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices by shifts in the burden of persuasion. See Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 894 (1968) ("The burden of persuasion has proved to be a subtle, low-visibility tool for adjusting the interests of competing classes of litigants"). The political check on potentially harsh legislative action is then more likely to operate. Cf. *Tot* v. *United States*, 319 U. S. 463, 472 (1943); *United States* v. *Romano*, 382 U. S. 136 (1965).

Romano involved a challenge to a federal statute that authorized the jury to infer possession, custody, and control of an illegal still from mere presence at the site. The Government contended that the statute should be sustained since it was merely Congress' way of broadening the substantive provisions in order to make a crime of mere presence. The Court rejected this argument, serving notice that Congress could not work a substantive change of that magnitude in such a disguised form. *Id.*, at 144. See Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L. J. 165, 177–178 (1969); Osenbaugh, The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 429, 461 (1976).

[14] Numerous examples of such defenses are available: New York subjects an armed robber to lesser punishment than he would otherwise receive if he proves by a preponderance of the evidence that the gun he used was unloaded or inoperative. N. Y. Penal Law § 160.15 (McKinney 1975). A number of States have ameliorated the usual operation of statutes

which the Court expresses concern, generally remain undisturbed by the holdings in *Winship* and *Mullaney*—and need not be disturbed by a sound holding reversing Patterson's conviction.[15]

Furthermore, as we indicated in *Mullaney*, 421 U. S., at 701–702, n. 28, even as to those factors upon which the prosecution must bear the burden of persuasion, the State retains an important procedural device to avoid jury confusion and prevent the prosecution from being unduly hampered. The State normally may shift to the defendant the burden of production,[16] that is, the burden of going forward with sufficient

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punishing statutory rape, recognizing a defense if the defendant shows that he reasonably believed his partner was of age. *E. g.*, Ky. Rev. Stat. Ann. §§ 500.070, 510.030 (1975); Wash. Rev. Code Ann. § 9.79.160 (2) (Supp. 1975). Formerly the age of the minor was a strict-liability element of the crime. The Model Penal Code also employs such a shift in the burden of persuasion for a limited number of defenses. For example, a corporation can escape conviction of an offense if it proves by a preponderance of the evidence that the responsible supervising officer exercised due diligence to prevent the commission of the offense. § 2.07 (5) (Proposed Official Draft 1962).

[15] A number of commentators have suggested that the Constitution permits the States some latitude in adjusting the burden of persuasion with respect to new ameliorative affirmative defenses that result from legislative compromise, but not with respect to other factors. See, *e. g.*, W. LaFave & A. Scott, *supra*, n. 11, at 49; 1 National Commission on Reform of Federal Criminal Laws, Working Papers 18–19 (1970); ALI, Model Penal Code § 1.13, Comment, p. 113 (Tent. Draft No. 4, 1955) (quoted, *ante*, at 209 n. 11); Note, 51 Wash. L. Rev. 953, 964 (1976); Osenbaugh, *supra*, n. 13, at 459–467. Cf. Fletcher, *supra*, n. 13, at 928–929.

[16] There are outer limits on shifting the burden of production to a defendant, limits articulated in a long line of cases in this Court passing on the validity of presumptions. Most important are the "rational connection" requirement of *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43 (1910), and *Bailey* v. *Alabama*, *supra*, at 238–239, and also the "comparative convenience" criterion of *Morrison* v. *California*,

evidence "to justify [a reasonable] doubt upon the issue." [17] ALI, Model Penal Code § 1.13, Comment, p. 110 (Tent. Draft No. 4, 1955). If the defendant's evidence does not cross this threshold, the issue—be it malice, extreme emotional disturbance, self-defense, or whatever—will not be submitted to the jury.[18] See *Sansone* v. *United States,* 380 U. S. 343, 349 (1965); *Stevenson* v. *United States,* 162 U. S. 313, 314–316 (1896). Ever since this Court's decision in *Davis* v. *United States,* 160 U. S. 469 (1895), federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried this burden of production. See, *e. g., Blake* v. *United States,* 407 F. 2d 908, 910–911 (CA5 1969) (en banc) (insanity); *Frank* v. *United States,* 42 F. 2d 623, 629 (CA9 1930) (self-defense); *United States* v. *Alexander,* 152 U. S. App. D. C. 371, 389–395, 471 F. 2d 923, 941–947, cert. denied *sub nom. Murdock* v. *United States,* 409 U. S. 1044 (1972) (provocation). I know of no indication that this

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291 U. S. 82 (1934). See also, *e. g., Tot* v. *United States, supra,* at 467–468; *Speiser* v. *Randall,* 357 U. S. 513, 523–524 (1958); *Leary* v. *United States,* 395 U. S. 6, 33–34 (1969); *Barnes* v. *United States,* 412 U. S. 837, 843 (1973). Caution is appropriate, however, in generalizing about the application of any of these cases to a given procedural device, since the term "presumption" covers a broad range of procedural mechanisms having significantly different consequences for the defendant. See McCormick, n. 11, *supra,* at 802–806; *Evans* v. *State,* 28 Md. App. 640, 675–678, 349 A. 2d 300, 324–325 (1975).

[17] This does not mean that the defendant must introduce evidence in every case. In some instances the prosecution's case may contain sufficient evidence in support of the defendant's position to generate a jury issue.

[18] On many occasions this Court has sustained a trial court's refusal to submit an issue to the jury in a criminal case when the defendant failed to meet his burden of production. See, *e. g., Sparf* v. *United States,* 156 U. S. 51, 63–64 (1895); *Andersen* v. *United States,* 170 U. S. 481, 510–511 (1898); *Battle* v. *United States,* 209 U. S. 36, 38 (1908). Cf. *Galloway* v. *United States,* 319 U. S. 372, 395 (1943).

practice has proven a noticeable handicap to effective law enforcement.[19]

To be sure, there will be many instances when the *Winship/Mullaney* test as I perceive it will be more difficult to apply than the Court's formula. Where I see the need for a careful and discriminating review of history, the Court finds a bright-line standard that can be applied with a quick glance at the face of the statute. But this facile test invites tinkering with the procedural safeguards of the presumption of innocence, an invitation to disregard the principles of *Winship* that I would not extend.

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[19] Dean McCormick emphasized that the burden of production is "a critical and important mechanism in a jury trial." In his view, "this mechanism has far more influence upon the final outcome of cases than does the burden of persuasion, which has become very largely a matter of the technique of the wording of instructions to juries." C. McCormick, Evidence § 307, pp. 638–639, and n. 2 (1st ed. 1954). Cf. Fletcher, *supra*, n. 13, at 930.

Syllabus

HANKERSON *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 75–6568. Argued February 23, 1977—Decided June 17, 1977

Prior to the decision in *Mullaney* v. *Wilbur*, 421 U. S. 684, petitioner was convicted in a North Carolina court of second-degree murder over his claim that he acted in self-defense. The trial judge had instructed the jury that if the State proved beyond a reasonable doubt that petitioner intentionally killed the victim with a deadly weapon the law raised presumptions that the killing was unlawful and that it was done with malice, and that in order to excuse his act petitioner had to prove to the jury's "satisfaction" that he acted in self-defense. The North Carolina Supreme Court affirmed over petitioner's objection to such instructions, refusing to give retroactive application to *Mullaney*. Although holding that a burden to "satisfy" a jury of a fact is not "significantly less" than persuasion by a preponderance of the evidence and that therefore the charge was erroneous under *Mullaney*, which required the State to establish all elements of a criminal offense beyond a reasonable doubt and which invalidated presumptions that shifted the burden of proving such elements to the defendant, the court concluded that the retroactive application of *Mullaney* would have a devastating impact on the administration of justice. *Held:*

1. The North Carolina Supreme Court erred in declining to hold the *Mullaney* rule retroactive. *Ivan V.* v. *City of New York*, 407 U. S. 203. While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider the State's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the factfinding process is sufficiently small, " 'where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect.' " *Id.*, at 204 (emphasis supplied). The *Mullaney* rule falls within this latter category, since it was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs its truthfinding function." Pp. 240–244.

2. Nor can the North Carolina Supreme Court's judgment be affirmed on the ground that, even if *Mullaney* is applied retroactively, the trial

court's instructions left the burden of disproving self-defense beyond a reasonable doubt on the prosecution, or at least did not require the accused to prove self-defense by a preponderance of the evidence, and thus did not violate the *Mullaney* rule. The North Carolina Supreme Court construed the instructions to the contrary, and since such interpretation is a matter of state law, there is no basis for disagreeing with it. Pp. 244–245.

288 N. C. 632, 220 S. E. 2d 575, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring statement, in which BURGER, C. J., joined, *post,* p. 245. MARSHALL, J., *post,* p. 245, and POWELL, J., *post,* p. 246, filed opinions concurring in the judgment. REHNQUIST, J., took no part in the consideration or decision of the case.

Lawrence G. Diedrick argued the cause and filed briefs for petitioner.

Charles M. Hensey, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *Rufus L. Edmisten,* Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the North Carolina Supreme Court correctly declined to give retroactive application to this Court's decision in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975).

I

Petitioner Hankerson was convicted after a jury trial of second-degree murder and sentenced to 20–25 years in prison. It was conceded at his trial that petitioner killed a man named Gregory Ashe by shooting him through the heart with a pistol at 11 at night on September 29, 1974. The issue at trial was whether petitioner acted in self-defense. The relevant evidence is described below.

Ashe and two friends, Dancy and Whitley, were, according to the testimony of the latter two, driving around in Ashe's

car on the evening of September 29. They went to a pool hall shortly before 11 p. m. and, on discovering that the pool hall was closed, returned to Ashe's car. The car would not start. Ashe asked his companions for a light for his cigarette, but neither had one. Whitley began walking to his home, which was one block away. Ashe and Dancy followed him. Then Ashe decided to return to his car to try to "crank" it. Dancy, according to his and Whitley's testimony, ran after Whitley. Both testified that they then heard a gunshot, heard Ashe yell that he had been shot, and saw petitioner's car speed away. Ashe's body was not found for an hour, and when it was, a fully burned cigarette was lodged between two fingers.

Petitioner testified at trial that he had been driving his car very slowly because of holes in the road when someone asked him for a light. Through his mirror he saw two men. One, *i. e.,* Ashe, walked up to the driver's window. Petitioner pushed his cigarette lighter in and gave it to Ashe. When the lighter was returned, petitioner felt the car shake and saw the other man at the other door, which was locked. Ashe then grabbed petitioner's shoulder with his right hand, and put a knife to petitioner's throat with his left hand. Petitioner then grabbed his gun and shot Ashe. The knife fell inside the car. Petitioner then drove away. Shortly after the murder, the knife was recovered by a policeman from petitioner's car. Petitioner readily admitted the shooting at that time and told a story to the policeman which was roughly equivalent to his trial testimony.

The State then introduced evidence tending to prove that Ashe had never been seen with a knife of the type found in petitioner's car; that petitioner falsely claimed to the policeman—who questioned him shortly after the shooting—no longer to have possession of the gun; that Ashe was right handed, even though petitioner testified that the knife was wielded with Ashe's left hand; and that although petitioner had told police that Ashe had left a grease mark on his shirt

when Ashe grabbed him, Ashe had no grease on his hand when his body was examined. The State argued in its summation that Ashe would not still have had his cigarette in his hand when shot if he had, as petitioner testified, used two hands to attack petitioner.

The jury was instructed, in part, as follows:

> "I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt, first, that the defendant intentionally and *without justification or excuse* and with malice shot Gregory Ashe with a deadly weapon. . . ." [1] App. 9 (emphasis added).

The judge instructed the jury that self-defense constituted an excuse for an intentional killing.[2] However, he instructed the jury:

> "If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. . . . Then there will be some other things I will charge you about, but, nothing else appearing, if you are satisfied of those two things beyond a reasonable doubt then you would find the defendant guilty of second degree murder.
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> ". . . [I]n order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply *to your satisfaction*

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[1] The second requirement defined by the trial court was that the shooting was the proximate cause of death.

[2] "And in order to *excuse* his act altogether on the grounds of self-defense . . . ." App. 10 (emphasis added). Cf. *Id.*, at 11, 14–15.

that he acted in self-defense." *Id.*, at 10 (emphasis added).[3]

The judge proceeded to instruct on the elements of self-defense.[4] No objection was made to any of these instructions

[3] There was a similar instruction on the defendant's burden to satisfy the jury that he acted without malice, that is, that he acted in the heat of passion on sudden provocation. This instruction was challenged in the North Carolina Supreme Court, along with the instruction on self-defense; but we do not reach the question because the state court, although ruling on it as a matter of its own convenience, held that the issue had not been "properly presented" to it in the absence of any evidence that the killing was in the heat of passion on sudden provocation. 288 N. C. 632, 648, 220 S. E. 2d 575, 587 (1975). *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), does not forbid States from requiring the criminal defendant to present at least some evidence to raise a factual issue with respect to heat of passion or self-defense.

[4] "I want to instruct you that to excuse this killing entirely on the grounds of self-defense *the defendant must satisfy you* of four things: first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. The defendant testified that at the time he shot Gregory Ashe or shot at Gregory Ashe that Gregory Ashe was holding a knife at his throat and had his arm around him, and he contends that that should satisfy you that he believed it was necessary to shoot him in order to save himself from death or great bodily harm. The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness, and it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to Gregory Ashe, the fierceness of the assault, if any, upon the defendant, whether or not Gregory Ashe had a weapon in his possession. And the third thing the defendant must satisfy you of is that he was not the aggressor. If he voluntarily and without provocation entered into a fight with Gregory Ashe, he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to Gregory Ashe

at the trial, and the jury found petitioner guilty of second-degree murder.

Petitioner objected to the above-quoted portions of the instructions to the jury for the first time on direct review in the Supreme Court of North Carolina. He argued that the instructions placed a burden on him to persuade the jury that he was not guilty, by proving that the killing was not unlawful; and he claimed that the Due Process Clause of the Fourteenth Amendment as construed in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), required that the State persuade the jury beyond a reasonable doubt as to all elements of the crime, including that of unlawfulness—here the absence of self-defense.

The North Carolina Supreme Court agreed that unlawfulness was an essential ingredient of the crime, 288 N. C. 632, 648–652, 220 S. E. 2d 575, 587–589 (1975), and ruled that under this Court's recently decided cases, the Due Process Clause required that the jury be instructed in a case such as this that the State must persuade it beyond a reasonable doubt that the killing was not in self-defense. Under the presumptions contained in the trial judge's instructions, once an intentional killing with a deadly weapon had been shown, petitioner had the burden to "satisfy" the jury that he had acted in self-defense. The North Carolina Supreme Court held that a burden to "satisfy" the jurors of a fact is not "significantly less" than a burden to persuade them of the fact by a preponderance of the evidence. The court therefore held that the charge was erroneous under this Court's decision in *Mullaney* v. *Wilbur, supra,* which required the

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that he was doing so. One enters a fight voluntarily if he uses towards his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And the fourth thing that the defendant must satisfy you of is that he did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time." App. 11–12. (Emphasis added.)

State to establish all elements of a criminal offense beyond a reasonable doubt and which, despite longstanding practice to the contrary—as in North Carolina since 1864—invalidated presumptions that shifted the burden of proof with respect to such elements to the defendant. The North Carolina Supreme Court stated the rule for future cases:

> "If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty." 288 N. C., at 651–652, 220 S. E. 2d, at 589.

Petitioner's conviction was nevertheless affirmed, for it was concluded that the constitutional rule announced in *Mullaney* was inapplicable in this case because it was handed down after the conclusion of petitioner's trial.[5] In declining to apply *Mullaney* v. *Wilbur* to trials occurring before the date on which it was decided, the North Carolina Supreme Court recognized that in *Ivan V.* v. *City of New York,* 407 U. S. 203 (1972), we held fully retroactive our earlier decision in *In re Winship,* 397 U. S. 358 (1970), to the effect that the Federal Constitution requires the States to apply the reasonable-doubt standard of proof in juvenile proceedings. It also recognized that, as in *Ivan V.,* it was dealing with a constitutional rule the primary purpose of which was to prevent the erroneous conviction of innocent persons. Even so, the court concluded that the retroactive application of *Mullaney* would have a devastating impact on the administration of justice in this country in view of the number of murderers who would be released—many of whom could not now be retried—in the

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[5] *Mullaney* was decided on June 9, 1975. Hankerson's trial was on November 21, 1974.

eight States that the court identified as placing the burden of proving self-defense on the defendant. Accordingly, it declined to apply *Mullaney* to trials occurring before the date on which it was decided.

This Court granted Hankerson's petition for a writ of certiorari, which raised the single question whether *Mullaney* should be held retroactive. 429 U. S. 815. The State of North Carolina has filed an answering brief in which it argues (1) that the North Carolina Supreme Court was correct in holding *Mullaney* not retroactive; and (2) that in any event the judgment below should be affirmed because the instructions given in this case did leave the burden of disproving self-defense beyond a reasonable doubt on the prosecution, or at least did not require the accused to prove self-defense by a preponderance of the evidence in contravention of *Mullaney*. These are the only two issues before this Court, and we treat them in order.[6]

II

The Supreme Court of North Carolina erred in declining to hold retroactive the rule in *Mullaney* v. *Wilbur, supra.* In *Ivan V.* v. *City of New York, supra,* at 204–205, this Court addressed the question whether our decision in *In re Winship, supra*—holding the reasonable-doubt standard applicable to

[6] The State as respondent may make any argument presented below that supports the judgment of the lower court. *Massachusetts Mutual Ins. Co.* v. *Ludwig,* 426 U. S. 479 (1976). The State does *not* argue, as an alternative ground in support of the judgment below, that despite *Mullaney* v. *Wilbur,* it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt. Therefore, we do not address that issue in this case. The Court has said: "We do not reach for constitutional questions not raised by the parties. The fact that the issue was mentioned in argument does not bring the question properly before us." *Mazer* v. *Stein,* 347 U. S. 201, 206 n. 5. (1954) (citations omitted). See generally R. Stern & E. Gressman, Supreme Court Practice, § 6.37 (4th ed. 1969) and cases there cited.

state juvenile proceedings—was to be applied retroactively. The Court there said:

> " 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams* v. *United States,* 401 U. S. 646, 653 (1971). See *Adams* v. *Illinois,* 405 U. S. 278, 280 (1972); *Roberts* v. *Russell,* 392 U. S. 293, 295 (1968).
>
> "*Winship* expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law". . . . "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." ' 397 U. S., at 363–364.
>
> "Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect." 407 U. S., at 204–205.

Ivan V. controls this case. In *Mullaney* v. *Wilbur,* as in *In re Winship,* the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some lesser standard under which an accused would more easily lose his liberty. In *Mullaney,* as in *Winship,* the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function."

Respondent and the North Carolina Supreme Court seek to avoid the force of *Ivan V.* on two grounds. First, the North Carolina Supreme Court thought that the State had justifiably relied upon the validity of the burden-shifting presumptions flowing from intentional killing with a deadly weapon before *Mullaney* v. *Wilbur,* whereas the State in *Ivan V.* should have known, even before *Winship,* that the reasonable-doubt standard of proof would be held applicable to juvenile proceedings. Second, it viewed the retroactive impact of the *Mullaney* rule on the administration of justice as far more devastating than the retroactive impact of *Winship. Winship* involved only juveniles, while *Mullaney* would affect the convictions of murderers.

Respondent recognizes that *Ivan V.* did not rely on the absence of reliance by the State on pre-*Winship* law or on the absence of a devastating impact on the administration of justice. However, respondent claims that in deciding whether a new constitutional rule is to be applied retroactively, the Court has traditionally inquired not only, as in *Ivan V.,* into the purpose of the rule but also into the extent of the State's justified reliance on the old rule and the impact that retroactive application of the new rule would have on the administration of justice. See, *e. g., Stovall* v. *Denno,* 388 U. S. 293 (1967); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406 (1966); *Linkletter* v. *Walker,* 381 U. S. 618 (1965). It claims that

even where the purpose of the new rule is to improve the "integrity of the factfinding process," the rule has been held nonretroactive when the impact of the new rule on the administration of justice would otherwise be devastating and when the States have justifiably relied on the old rule. See, *e. g., Stovall* v. *Denno, supra* (holding nonretroactive the requirement of *United States* v. *Wade,* 388 U. S. 218 (1967), that counsel be present at a pretrial lineup); *Adams* v. *Illinois,* 405 U. S. 278 (1972) (holding nonretroactive the rule of *Coleman* v. *Alabama,* 399 U. S. 1 (1970), that counsel be present at a preliminary hearing).

The force of *Ivan V.* may not be avoided so easily. It is true that we have said that the question of whether the purpose of a new constitutional rule is to enhance the integrity of the factfinding process is a question of "degree," *Johnson* v. *New Jersey, supra,* at 729; and when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small, we have looked to questions of reliance by the State on the old rule and the impact of the new rule on the administration of justice in deciding whether the new rule is to be applied retroactively. *Stovall* v. *Denno, supra; Adams* v. *Illinois, supra; DeStefano* v. *Woods,* 392 U. S. 631 (1968). But we have never deviated from the rule stated in *Ivan V.* that " '[w]here the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect.' " 407 U. S., at 204 (emphasis added). The reasonable-doubt standard of proof is as "substantial" [7] a

[7] Respondent also argues that the results in very few trials in North Carolina would have been altered by a change in the jury instructions on self-defense because juries do not understand the confusing instructions that were given in this and like cases in the past. *Winship* is said to be distinguishable because the factfinding in juvenile cases is performed by

requirement under *Mullaney* as it was in *Winship*. Respondent's attempt to distinguish *Ivan V.* is without merit.[8]

III

Respondent next argues in support of the judgment below that the instruction in this case—that the defendant must "satisfy" the jury that he acted in self-defense—is the equivalent of an instruction that the jury should acquit if it entertains a reasonable doubt on the subject, or is so nearly the equivalent of such an instruction that it is not in violation of the rule announced in *Mullaney*, where the burden impermissibly placed on the defendant was to persuade the jury by a preponderance of the evidence. Respondent's argument is squarely contrary to the construction given by the North Carolina Supreme Court to the jury charge in this case. That court concluded that a burden to "satisfy" the jury of self-defense places a burden on a defendant "no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence." 288 N. C., at 648, 220 S. E. 2d, at 587. The Court has no basis for disagreeing with this interpretation of the charge, which is essentially a question of

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a judge. We do not so readily assume that juries fail to understand the instructions they have been receiving in North Carolina. See *In re Winship*, 397 U. S. 358, 369–370 (1970) (Harlan, J., concurring).

[8] Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, *e. g.*, Fed. Rule Crim. Proc. 30.

state law. Since the issue of whether due process requires the prosecution to disprove self-defense beyond a reasonable doubt under North Carolina law was not raised by either party in this case, we decline to consider it now.

Reversed.

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

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the opinion of the Court. I wish to emphasize, however, that our decision not to consider the correctness of the North Carolina Supreme Court's ruling on the self-defense charge, see *ante,* at 240 n. 6, and this page, does not in any way preclude that court from re-examining its holding in petitioner's case on remand, in light of today's decision in *Patterson* v. *New York, ante,* p. 197.

MR. JUSTICE MARSHALL, concurring in the judgment.

In *Williams* v. *United States,* 401 U. S. 646, 665 (1971), I expressed the view that "a decision of this Court construing the Constitution should be applied retroactively to all cases involving criminal convictions not yet final at the time our decision is rendered." For reasons persuasively stated at that time by Mr. Justice Harlan, *Mackey* v. *United States,* 401 U. S. 667, 675 (1971), I concluded that "cases still on direct review should receive full benefit of our supervening constitutional decisions." *Williams* v. *United States, supra,* at 665. The Court's more recent struggles with the problem of retroactivity, see, *e. g., Adams* v. *Illinois,* 405 U. S. 278 (1972); *Michigan* v. *Payne,* 412 U. S. 47 (1973), have done little to diminish "the inevitable costs and anomalies of the Court's current approach." *Williams* v. *United States, supra,* at 666. See *Adams* v. *Illinois, supra,* at 286 (Douglas, J., dissenting);

Michigan v. *Payne, supra,* at 59 (MARSHALL, J., dissenting). I remain committed to the approach outlined in my opinion in *Williams.** Since this case is here on direct review, I concur in the Court's holding that the rule announced in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), must be applied.

I would add, in view of MR. JUSTICE BLACKMUN's concurring statement, *ante,* p. 245, that irrespective of the applicability of *Patterson* v. *New York, ante,* p. 197, the North Carolina Supreme Court remains free to construe its own State Constitution to give individuals the same protection that it afforded them in its original decision in this case. See *Manson* v. *Brathwaite, ante,* at 128–129, and n. 9 (MARSHALL, J., dissenting); *United States* v. *Washington,* 431 U. S. 181, 193–194 (1977) (BRENNAN, J., dissenting); *Oregon* v. *Mathiason,* 429 U. S. 492, 499, and n. 6 (1977) (MARSHALL, J., dissenting).

MR. JUSTICE POWELL, concurring in the judgment.

Twelve years ago this Court decided *Linkletter* v. *Walker,* 381 U. S. 618 (1965). In the intervening years, we have struggled with the question of retroactivity when new constitutional rules affecting the administration of the criminal law have been adopted. See Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558–1596 (1975). The retroactivity doctrine that has emerged is far from satisfactory. Although on several occasions I have joined in its application, I am now persuaded that it would be wiser to adopt the view urged by Mr. Justice Harlan in *Mackey* v. *United States,* 401 U. S. 667, 675–702 (1971) (separate opinion). See also *Desist* v. *United States,* 394 U. S. 244, 256–269 (1969) (Harlan, J., dissenting); *Williams*

*As I noted in *Williams,* I think there are persuasive reasons to use the Court's traditional retroactivity analysis to decide that issue in cases arising on habeas corpus or other collateral-review proceedings. 401 U. S., at 666.

v. *United States,* 401 U. S. 646, 665–666 (1971) (MARSHALL, J., concurring in part and dissenting in part).

When the Court declines to hold a new constitutional rule retroactive, one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine. This hardly comports with the ideal of "administration of justice with an even hand." *Desist* v. *United States, supra,* at 255 (Douglas, J., dissenting).[1]

On the other hand, the holding that a new constitutional principle is fully retroactive also may result in serious costs. Convictions long regarded as final must be reconsidered on collateral attack; frequently they must be overturned for reasons unrelated to the guilt or innocence of the prisoner, and in spite of good-faith adherence on the part of police, prosecutors, and courts to what they understood to be acceptable procedures. Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense. Reopening a case also carries disadvantages for those who have been convicted:

> "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States,* 373 U. S. 1, 24–25 (1963) (Harlan, J., dissenting).

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[1] In addition, as Mr. Justice Harlan noted, the typical nonretroactivity decision often places the Court in the role of a legislature rather than that of a judicial tribunal. *Mackey* v. *United States,* 401 U. S., at 677–681.

See *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 262 (1973) (POWELL, J., concurring).

A different approach to the retroactivity question is available. Described in detail in Mr. Justice Harlan's separate opinion in *Mackey, supra,* it contemplates, in rough outline, that courts apply a new rule retroactively in cases still pending on direct review, whereas cases on collateral review ordinarily would be considered in light of the rule as it stood when the conviction became final.[2] Mr. Justice Harlan marshaled compellingly the reasoning supporting this view, 401 U. S., at 675–698, and for me to repeat the arguments here would be pointless. I note simply that this approach is closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine. At the same time it is more attuned to the historical limitations on habeas corpus, see *Stone* v. *Powell,* 428 U. S. 465 (1976), and to the importance of finality in a rational system of justice. See *Blackledge* v. *Allison,* 431 U. S. 63, 83 (1977) (POWELL, J., concurring).

The case before us is here on direct review. I therefore agree with the Court that Hankerson is entitled to retroactive application of the *Mullaney* rule. Accordingly, I concur in the judgment.

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[2] Mr. Justice Harlan described two exceptions under which a new rule occasionally would be applied retroactively even on collateral review. *Id.,* at 692–695. The case he makes for these exceptions is persuasive, but I save for another day when the question is squarely presented a decision on when such exceptions are appropriate. See also *Williams* v. *United States,* 401 U. S., at 666 (MARSHALL, J., concurring in part and dissenting in part).

Syllabus

NORTHEAST MARINE TERMINAL CO., INC., ET AL. *v.* CAPUTO ET AL.

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

No. 76–444. Argued April 18, 1977—Decided June 17, 1977*

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (Act) to extend coverage to additional workers in an attempt to avoid anomalies inherent in a system that drew lines at the water's edge by allowing compensation under the Act only to workers injured on the seaward side of a pier. The relevant sections, as so amended, broadened the definition of "navigable waters of the United States" as the required situs of a compensable injury to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," 33 U. S. C. § 903 (a) (1970 ed., Supp. V), and also modified the definition of a covered "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker," 33 U. S. C. § 902 (3) (1970 ed., Supp. V). Respondent Blundo, whose job as a "checker" at a pier for petitioner International Terminal Operating Co. was to check and mark cargo being unloaded from a vessel or from a container (a large metal box resembling a truck trailer without wheels) which had been taken off a vessel, was injured when, while marking cargo "stripped" (unloaded) from a container, he slipped on some ice on the pier. Respondent Caputo, who, though a member of a regular stevedoring "gang" for another company, had been temporarily hired by petitioner Northeast Marine Terminal Co. as a terminal laborer at a pier to load and unload containers, barges, and trucks, was injured while rolling a dolly loaded with ship's cargo into a consignee's truck. Compensation awards to both respondents under the Act, as amended, were upheld by the Court of Appeals. *Held:*

1. Both respondents satisfied the "status" test of eligibility for compensation, since they were both "engaged in maritime employment" and

*Together with No. 76–454, *International Terminal Operating Co., Inc.* v. *Blundo et al.*, also on certiorari to the same court.

were therefore "employees" within the meaning of § 902 (3) at the time of their injuries. Pp. 265–279.

(a) Congress' intent to adapt the Act to modern cargo-handling techniques, such as containerization, which have moved much of the longshoreman's work off the vessel and onto land, clearly indicates that such tasks as stripping a container are included in the category of "longshoring operations" under § 902 (3), and hence it is apparent that respondent Blundo, whose task was an integral part of the unloading process as altered by the advent of containers, was a statutory "employee" when he slipped on the ice. Pp. 269–271.

(b) Both the text of the 1972 amendments to the Act, which focuses primarily on occupations (longshoreman, harbor worker, etc.), and their legislative history, which shows that Congress wanted a system that did not depend on the fortuitous circumstance of whether the injury occurred on land or over water, demonstrate that Congress intended to provide continuous coverage to amphibious workers such as longshoremen, who, without the amendments, would be covered for only part of their activity, and that therefore the amendments were meant to cover such a person as respondent Caputo, who as a member of a regular stevedoring gang worked either on the pier or on the ship, and who on the day of his injury in his job as a terminal laborer could have been assigned to a number of tasks, including stripping containers, unloading barges, and loading trucks. Pp. 271–274.

(c) Respondents' coverage as "employees" under the Act cannot be defeated by the so-called "point of rest" theory, whereby longshoremen's "maritime employment" would be considered, in the case of unloading, to be taking cargo out of a vessel's hold, moving it away from the ship's side, and carrying it to its point of rest on a pier or in a terminal shed, since that theory appears nowhere in the Act, was never mentioned by Congress during the legislative process, does not comport with Congress' intent, and restricts coverage of a remedial Act designed to extend coverage. Pp. 274–279.

2. The injuries of both respondents occurred on a "situs" covered by the Act. Pp. 279–281.

(a) The truck that respondent Caputo was helping to load was parked inside the terminal area adjoining "navigable waters of the United States." P. 279.

(b) Although respondent Blundo's injuries occurred on a pier used only for stripping and stuffing containers and for storage, rather than for loading and unloading ships, nevertheless he too satisfied the "situs" test, since the pier was located in a terminal adjoining the water, so that

even if it is assumed that the phrase "customarily used" in § 903 (a) modifies all the preceding terms, rather than only the immediately preceding term "other adjoining area," he satisfied the test by working in an "adjoining . . . terminal . . . customarily used . . . for loading [and] unloading." Pp. 279–281.

544 F. 2d 35, affirmed.

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

William M. Kimball argued the cause for petitioners in No. 76–444. With him on the brief was *Peter M. Pryor*. *E. Barrett Prettyman, Jr.*, argued the cause for petitioner in No. 76–454. With him on the briefs was *Robert J. Kenney, Jr.*

Angelo C. Gucciardo argued the cause and filed a brief for respondents Caputo and Blundo in both cases. *Frank H. Easterbrook* argued the cause for respondent Director, Office of Workers' Compensation Programs, in both cases *pro hac vice*. With him on the brief were *Acting Solicitor General Friedman, Laurie M. Streeter,* and *Joshua T. Gillelan II*.†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U. S. C. § 901 *et seq.*, in substantial part to "extend [the Act's] coverage to protect additional workers." S. Rep. No. 92–1125, p. 1 (1972) (hereinafter S. Rep.).[1] In these consolidated cases we must determine whether respondents Caputo and Blundo, injured while working on the New York City waterfront, are

†Briefs of *amici curiae* urging reversal were filed by *E. D. Vickery* and *W. Robins Brice* for the West Gulf Maritime Assn.; and by *Thomas D. Wilcox* for the National Association of Stevedores.

Thomas W. Gleason and *Herzl S. Eisenstadt* filed a brief for the International Longshoremen's Assn., AFL–CIO, as *amicus curiae* urging affirmance.

[1] 86 Stat. 1251, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (hereinafter 1972 Amendments).

entitled to compensation. To answer that question we must determine the reach of the 1972 Amendments.

The sections of the Act relevant to these cases are the ones providing "coverage" and defining "employee." They provide, with italics to indicate the material added in 1972:

> "Compensation shall be payable . . . in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). . . ." 33 U. S. C. § 903 (a) (1970 ed., Supp. V).
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> "The term 'employee' *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U. S. C. § 902 (3) (1970 ed., Supp. V).

Specifically at issue here is whether respondents Caputo and Blundo were "employees" within the meaning of the Act and whether the injuries they sustained occurred on the "navigable waters of the United States."

I

At the time of his injury respondent Carmelo Blundo had been employed for five years as a "checker" by petitioner International Terminal Operating Co. (ITO) at its facility in Brooklyn, N. Y., known as the 21st Street Pier. As a checker he was responsible for checking and recording cargo as it was

loaded onto or unloaded from vessels, barges, or containers.[2] Blundo was assigned his tasks at the beginning of each day and until he arrived at the terminal he did not know whether he would be working on a ship or on shore. He was reassigned during the day if he completed the task to which he was assigned initially. App. 63–69, 112.

On January 8, 1974, ITO assigned Blundo to check cargo being "stripped" or removed from a container on the 19th Street side of the pier. The container Blundo was checking had been taken off a vessel at another pier facility outside of Brooklyn and brought overland unopened by an independent trucking company to the 21st Street Pier. It was Blundo's job to break the seal that had been placed on the container in a foreign port and show it to United States Customs Agents. After the seal was broken, Blundo was to check the contents of the container against a manifest sheet describing the cargo, the consignees, and the ship on, and port from which, the cargo had been transported. He was to mark each item of cargo with an identifying number. After the checking, the cargo was to be placed on pallets, sorted according to consignees, and put in a bonded warehouse pending customs inspection. Blundo was injured as he was marking the cargo stripped from the container, when he slipped on some ice on the pier. *Id.*, at 69–74, 86–90.

Blundo sought compensation under the LHWCA. The Administrative Law Judge concluded that Blundo satisfied the

[2] A container is a large metal box resembling a truck trailer without wheels. It can carry large amounts of cargo destined for one or more consignees. If the goods are for a single consignee, the container may be removed from the pier intact and delivered directly to him, but if it carries goods destined for several consignees, it must be unloaded or "stripped" and the goods sorted according to consignee. This operation may be done at the waterfront or inland. The analogous process during the loading phase is called "stuffing." App. 86–89, 96–98, 101–103, 105–107; Brief for Federal Respondent 7 n. 4; Brief for National Association of Stevedores as *Amicus Curiae* 30.

coverage requirements of the Act and the Benefits Review Board (BRB) affirmed.[3]

Respondent Ralph Caputo was a member of a regular longshoring "gang" that worked for Pittston Stevedoring Co.[4] When his gang was not needed, Caputo went to the

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[3] Under the 1972 Amendments, contested compensation claims are heard by an administrative law judge. 33 U. S. C. § 919 (d) (1970 ed., Supp. V). Review is then available from the BRB, a three-member board appointed by the Secretary of Labor. The BRB, created by the 1972 Amendments, is empowered "to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U. S. C. §§ 921 (b)(1), (3) (1970 ed., Supp. V); see generally 20 CFR §§ 801–802 (1976). The decisions of the BRB are subject to review in the courts of appeals. 33 U. S. C. § 921 (c) (1970 ed., Supp. V).

Prior to the 1972 Amendments, cases were heard in the first instance by deputy commissioners and review was then available in the district courts. 33 U. S. C. § 921. There was no administrative review procedure for LHWCA claims.

The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions. The BRB's decision in Blundo's case may be found at 2 BRBS 376 (1975) as well as in App. to Pet. for Cert. in No. 76–454, p. 45a. The Administrative Law Judge's decision is reproduced *id.*, at 49a. A synopsis of it may be found at 1 BRBS 71 (ALJ) (1975).

[4] It is necessary, at this point, to introduce some terminology. "A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator." U. S. Dept. of Labor, Office of Workers' Compensation Programs Task Force Report, Longshore and Harbor Workers' Compensation Program 103 (1976). "[A] marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo between the point-of-rest and any place on the marine terminal property except to shipside." *Ibid.*

Typically, the work of getting the cargo on and off the ship is done by a "gang" of longshoremen "distributed between the ship and the pier so they can move cargo in an uninterrupted flow." *Id.*, at 104. A member of the gang may be designated by the equipment he operates, *e. g.*, a winchman or hustler operator, or by the area in which he works,

waterfront hiring hall, where he was hired by the day by other stevedoring companies or terminal operators with work available. He had been hired on some occasions by Northeast Stevedoring Co. to work as a member of a stevedore gang on ships at the 39th Street Pier in Brooklyn; on other occasions he had been hired by petitioner Northeast Marine Terminal Co., Inc. (Northeast), for work in its terminal operations at the same location. App. 8–10, 14–16.

On April 16, 1973, Caputo was hired by Northeast to work as a "terminal labor[er]." App. to Pet. for Cert. in No. 76–444, p. 48a; App. 8, 14. A terminal laborer may be assigned to load and unload containers, lighters,[5] barges, and trucks.[6] *Id.*, at 8; Brief for Petitioners in No. 76–444, p. 4. When he arrived at the terminal, Caputo was assigned, along with a checker and forklift driver, to help consignees' truckmen load their trucks with cargo that had been discharged from ships at Northeast's terminal.[7] Caputo was injured while rolling a dolly loaded with cheese into a consignee's truck. App. 27–40.

The Administrative Law Judge found that Caputo satisfied the requirements of the Act and awarded him compensation. The BRB affirmed.[8]

The employers in both cases filed petitions to review the

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e. g., holdman. A typical longshore gang ranges from 12 to 20 workers. Because ship arrivals are irregular, the demand for a gang varies from day to day. *Ibid.*

[5] A lighter is a closed barge. App. 8. See discussion n. 35, *infra*.

[6] It is not clear from the record whether loading vessels with "ships' stores" and laundry for the crew may be assigned to a terminal laborer or whether there is a separate classification called "ship laborer" for this. Compare App. 8, 24–25 with Brief for Federal Respondent 5 n. 3.

[7] It was stipulated that all the cargo handled at this terminal either was going on board a vessel or had come from one. App. 6.

[8] The BRB decision is reported at 3 BRBS 13 (1975). A synopsis of the Administrative Law Judge's decision appears at 2 BRBS 4 (ALJ) (1975). Both opinions may also be found in Pet. for Cert. in No. 76–444, pp. 47a, 51a.

decisions and the Court of Appeals for the Second Circuit consolidated the cases. After thorough consideration of the language, history, and purposes of the 1972 Amendments, the court held, one judge dissenting, that the injuries of both respondents were compensable under the LHWCA.[9] In view of the conflict over the coverage afforded by the 1972 Amendments,[10] we granted certiorari to consider both cases.[11] 429 U. S. 998 (1976). We affirm.

II

Congress enacted the LHWCA in 1927, 44 Stat. 1424, after this Court had thwarted the efforts of the States and of Con-

[9] *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d 35 (CA2 1976).

[10] See *ibid.; Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation,* 540 F. 2d 629 (CA3 1976); *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (CA5 1976), cert. pending *sub nom. P. C. Pfeiffer Co.* v. *Ford,* No. 76–641, *Halter Marine Fabricators, Inc.* v. *Nulty,* No. 76–880, and *Director, Office of Workers' Compensation Programs* v. *Jacksonville Shipyards, Inc.,* No. 76–1166; *Stockman* v. *John T. Clark & Son of Boston, Inc.,* 539 F. 2d 264 (CA1 1976), cert. pending, No. 76–571; *I. T. O. Corp. of Baltimore* v. *BRB,* 542 F. 2d 903 (CA4 1976) (en banc), cert. pending *sub nom. Maritime Terminals, Inc.* v. *Brown,* No. 76–706, and *Adkins* v. *I. T. O. Corp. of Baltimore,* No. 76–730. For discussion of these cases, see n. 40, *infra.*

[11] The Court of Appeals questioned whether the Director of the Office of Workers' Compensation Programs (OWCP), the federal respondent here, was a proper party in the Court of Appeals. *Pittston Stevedoring Corp.* v. *Dellaventura, supra,* at 42 n. 5. (The OWCP was established by the Secretary of Labor and given the responsibility to administer several benefits programs, including the LHWCA. 20 CFR § 701.201 (1976).) It concluded that some federal participation was proper and did not reach the question whether the BRB should have been substituted for the Director. Petitioners named the Director rather than the BRB as a respondent in the Court of Appeals and neither party has raised any question in this Court concerning the identity of the federal respondent. This question is therefore not before us. The Department of Labor has recently promulgated a regulation making it clear that the Director of OWCP is the proper federal party in a case of this nature. 42 Fed. Reg. 16133 (Mar. 1977).

gress to provide compensation for maritime workers injured on navigable waters through state compensation programs. In 1917, the Court, in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, held that the States were without power to extend a workmen's compensation remedy to longshoremen injured on the gangplank between a ship and a pier. The decision left longshoremen injured on the seaward side of a pier without a compensation remedy while longshoremen injured on the pier were protected by state compensation Acts. *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263 (1922). Dissatisfied with the gap in coverage thus created, and recognizing that the amphibious nature of longshoremen's work made it desirable to have "one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not," Congress sought to authorize States to apply their compensation statutes to injuries seaward of the *Jensen* line.[12] Its attempts to allow such uniform state systems, however, were struck down as unlawful delegations of congressional power. *Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219 (1924); *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149 (1920). Finally, convinced that the only way to provide workmen's compensation for longshoremen and harborworkers

[12] H. R. Rep. No. 639, 67th Cong., 2d Sess., 2 (1922). More fully, the Report noted:

"It is easy to understand the reason why the representatives of the workmen ask for compensation under State laws. The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into different jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not."

See also S. Rep. No. 139, 65th Cong., 1st Sess., 1 (1917).

injured on navigable waters was to enact a federal system, Congress, in 1927, passed the LHWCA.

The Act was, in a sense, a typical workmen's compensation system, compensating an employee for injuries "arising out of and in the course of employment." [13] But it was designed simply to be a gapfiller—to fill the void created by the inability of the States to remedy injuries on navigable waters. Thus, it provided coverage only for injuries occurring "upon the navigable waters of the United States" and permitted compensation awards only "if recovery . . . through workmen's compensation proceedings [could] not validly be provided by state law." [14]

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[13] "Injury," "employee," and "employer" were defined in 33 U. S. C. §§ 902 (2), (3), (4):

"(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . .

"(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

[14] Title 33 U. S. C. § 903 defined the coverage provided by the Act:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned

Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As two commentators described it, "the relationship between [LHWCA] and the otherwise applicable State Compensation Act [was] shrouded in impenetrable confusion." G. Gilmore & C. Black, Law of Admiralty 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion.[15] Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, *e. g., Davis* v. *Washington Labor Dept.,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co.* v. *Johnson,* 396 U. S. 212 (1969).

In *Nacirema Operating Co., supra,* the Court held that the Act did not cover longshoremen killed or injured on a pier while attaching cargo to ships' cranes for loading onto the ships, even though coverage might have existed had the men been hurled into the water by the accident, *Marine Stevedoring Corp.* v. *Oosting,* 238 F. Supp. 78 (ED Va. 1965), aff'd, 398 F. 2d 900 (CA4 1968) (en banc),[16] or been injured on the

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solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

[15] For discussion of the history, see *Victory Carriers, Inc.* v. *Law,* 404 U. S. 202, 204–209 (1971); *Nacirema Operating Co.* v. *Johnson,* 396 U. S. 212, 216–224 (1969); Gilmore 417–423; 4 A. Larson, Law of Workmen's Compensation § 89 (1976); Note, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683 (1973).

[16] *Nacirema Operating Co., supra,* reversed the en banc decision of the Fourth Circuit in *Marine Stevedoring Corp.* That decision involved four separate cases in which longshoremen had been injured in different incidents while engaged in loading cargo vessels. The Deputy Commissioner awarded compensation to the man hurled into the water by his accident; the others were found to be outside the Act's coverage. The Court of Appeals found that all four should be compensated. No

deck of the ship while performing part of the same operation, *Calbeck* v. *Travelers Ins. Co.*, 370 U. S. 114 (1962). The dissent protested the incongruity and unfairness of having coverage determined by "where the body falls" and argued that the Act was "status oriented, reaching all injuries sustained by longshoremen in the course of their employment." 396 U. S. at 224 (Douglas, J., dissenting). The majority, however, did not agree.

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the [Extension of Admiralty Jurisdiction Act of 1948, 46 U. S. C. § 740,] to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." *Id.*, at 223–224." [17]

In 1972, Congress moved the line.

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petition for certiorari was sought in the case involving the worker who fell in the water and thus this Court did not have that question before it.

[17] The Court reiterated its suggestion to Congress in *Victory Carriers, Inc.* v. *Law, supra,* which held that a longshoreman injured on the pier by a pier-based forklift could not recover from the shipowner under a warranty of seaworthiness. The Court noted the sturdiness of the

The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the 1972 Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties.[18] Congress sought to meet these desires by "specifi-

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Jensen line in the absence of statutory modification. It observed, however, that "if denying federal remedies to longshoremen injured on land is intolerable Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." 404 U. S., at 216.

[18] The Report of the Senate Committee on Labor and Public Welfare described the need for the bill:

"The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1961, at which time the maximum benefit under the Act was set at $70 per week. . . . Clearly, in order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is urgently required.

. . . . . .

"While every one has agreed since at least the mid-1960's that the benefits under this Act should be raised, there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.

"Since 1946, due to a number of decisions by the U. S. Supreme Court [starting with *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946)], it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue

cally eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements[; continuing] to allow suits against vessels or other third parties for negligence[; and raising] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." S. Rep. 5.[19]

In increasing the benefits, however, Congress recognized that the disparity between the federal compensation rates and the significantly lower state rates would exacerbate the harshness of the already unpopular *Jensen* line. It also realized that modern technology had moved much of the longshoreman's work onto the land so that if coverage were not extended, there would be many workers who would be relegated to what Congress deemed clearly inadequate state compensation systems. As both the Senate and House Reports stated:

"[C]overage of the present Act stops at the water's edge;

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the owner of the ship on which he was working for damages as a result of this injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, [under the ruling of *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956),] shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen." S. Rep. 4.

"The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine." *Id.*, at 9.

"The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." *Id.*, at 4.

[19] See Pub. L. 92–576, §§ 5–11, 18, 86 Stat. 1253.

injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . . .

. . . . . .

"It is apparent that if the Federal benefit structure embodied in [the] Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore." [20]

To remedy these problems, Congress extended the coverage shoreward. It broadened the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." [21] At the same time, Congress amended the definition of the persons covered

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[20] S. Rep. 12–13. This appears in the section of the report called Extension of Coverage to Shoreside Areas. The House Report, H. R. Rep. No. 92–1441, pp. 10–11 (1972) (hereinafter H. R. Rep.) contains the identical section.

[21] 33 U. S. C. § 903 (1970 ed., Supp. V). Congress also removed the provision that precluded federal recovery if a state workmen's compensation remedy were available. It retained the exclusions contained in 33 U. S. C. §§ 903 (a)(1), (a)(2), and (b). See n. 14, *supra*.

by the Act. Previously, so long as a work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class,[22] the worker would be eligible for federal compensation provided that his or her employer had at least one employee engaged in maritime employment. It was not necessary that the injured employee be so employed. *Pennsylvania R. Co.* v. *O'Rourke,* 344 U. S. 334, 340–342 (1953). But with the definition of "navigable waters" expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate. It therefore added the requirement that the injured worker be "engaged in maritime employment," which it defined to include "any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U. S. C. § 902 (3) (1970 ed., Supp. V).[23]

The 1972 Amendments thus changed what had been essen-

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[22] The definition of "employee" excluded "a master or member of a crew of any vessel, [and] any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U. S. C. § 902 (3). In addition, the coverage section, § 903, provided that no compensation was payable in respect of the disability or death of an employee of the United States. See n. 14, *supra.* These exclusions have been retained by the 1972 Amendments, see n. 21, *supra.*

[23] The definition of "employer" was changed so as to correspond with the broadened definition of navigable waters. Title 33 U. S. C. § 902 (4) (1970 ed., Supp. V) reads:

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

tially only a "situs" test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured. We must now determine whether respondents Caputo and Blundo satisfied these requirements.

III

We turn first to the question whether Caputo and Blundo satisfied the "status" test—that is, whether they were "engaged in maritime employment" and therefore "employees" at the time of their injuries.[24] The question is made difficult by the failure of Congress to define the relevant terms—"maritime employment," "longshoremen," "longshoring operations" [25]—in either the text of the Act or its legislative history.[26]

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[24] There is no question in these cases that the injuries "arose out of and in the course of employment" and that the employers are statutory employers. See App. to Pet. for Cert. in No. 76–454, pp. 53a–54a; App. to Pet. for Cert. in No. 76–444, pp. 52a–53a; Brief for Petitioners in No. 76–444, p. 3.

[25] As the definition of "employee" makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.

This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined. See *Weyerhaeuser Co.* v. *Gilmore,* 528 F. 2d 957 (CA9), cert. denied, 429 U. S. 868 (1976).

[26] The Reports and discussions used only the terms of the statute without elaboration. Thus, for example, the Section-by-Section Analysis in the Senate Report states:

"Section 2(a) amends section 2(3) of the Act to define an 'employee' as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of 'employee' masters, crew members or persons engaged by the master to

The closest Congress came to defining the key terms is the "typical example" of shoreward coverage provided in the Committee Reports.[27] The example clearly indicates an

unload, load or repair vessels of less than eighteen tons net." S. Rep. 16. See also H. R. Rep. 14.

And in the section describing the shoreward extension, the Committee Reports state:

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel" S. Rep. 13; H. R. Rep. 10.

[27] "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i. e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep. 13; H. R. Rep. 10–11.

intent to cover those workers involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo. But while the example is useful for identifying the outer bounds of who is clearly excluded and who is clearly included, it does not speak to all situations.[28] In particular, it is silent on the question of coverage for those people, such as Caputo and Blundo, who are injured while on the situs, see Part IV, *infra,* and engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading.[29]

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[28] That the example is not exhaustive is clear. Some types of cargo, for example, are never brought to a "holding or storage area" but are placed directly on a truck or railroad car for immediate inland movement. See Brief for Petitioner in No. 76–454, p. 38 n. 46; Tr. of Oral Arg. 44. And, while all would agree that persons bringing such cargo directly from a ship to a truck are engaged in maritime employment, see *infra,* at 274–275, the example does not mention such activity. In addition, while it is incontrovertible that workers engaged in the process of loading a ship and performing steps analogous to those mentioned in the example—that is, moving cargo from storage and placing it immediately on the ship—are covered, the fact is that the example also does not mention these steps. See also discussion, n. 38, *infra.*

[29] Accord, *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d, at 54; *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d, at 540. The First Circuit in fact accused Congress of "seemingly [going] out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving,

Nevertheless, we are not without guidance in resolving that question. The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel,* 346 U. S. 328, 333 (1953). Consideration of the purposes behind the broadened coverage reveals a clear intent to reach persons such as Blundo and Caputo.[30]

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storing and culling cargo on the pier." *Stockman* v. *John T. Clark & Son of Boston, Inc.,* 539 F. 2d, at 274.

[30] We find consideration of the purposes more enlightening than looking simply at whether respondents belong to the International Longshoremen's Association. See Brief for ILA as *Amicus Curiae* 15. We cannot assume that Congress intended to make union membership the decisive factor. The vagaries of union jurisdiction are unrelated to the purposes of the Act. *Pittston Stevedoring Corp., supra,* at 52; *Stockman, supra,* at 272; *Jacksonville Shipyards, Inc., supra,* at 543–544; but cf. *Weyerhaeuser Co.* v. *Gilmore,* 528 F. 2d, at 962.

The private respondents suggest, Brief for Respondents Caputo et al. 19–21, that Congress intended to use the definitions found in the Bi-State Compact between New York and New Jersey that created the Bi-State Waterfront Commission, and was approved by Congress, 67 Stat. 541. The definitions may be found in N. Y. Unconsol. Laws §§ 9806, 9905 (McKinney 1974). Section 9806 provides, in relevant part:

" 'Pier' shall include any wharf, pier, dock or quay.

" 'Other waterfront terminal' shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the port of New York district and which is used for waterborne freight in whole or substantial part.

. . . . .

" 'Longshoreman' shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

"(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

"(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of

One of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that "the advent of modern cargo-handling techniques" had moved

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the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, or

"(c) to supervise directly and immediately others who are employed as in subdivision (a) of this definition."

Section 9905 provides supplementary definitions:

"(6) 'Longshoreman' shall also include a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal

"(a) either by a carrier of freight by water or by a stevedore physically to perform labor or services incidental to the movement of waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, including, but not limited to, cargo repairmen, coopers, general maintenance men, mechanical and miscellaneous workers, horse and cattle fitters, grain ceilers and marine carpenters, or

"(b) by any person physically to move waterborne freight to or from a barge, lighter or railroad car for transfer to or from a vessel of a carrier of freight by water which is, shall be, or shall have been berthed at the same pier or other waterfront terminal, or

"(c) by any person to perform labor or services involving, or incidental to, the movement of freight at a waterfront terminal as defined in subdivision (10) of this section.

. . . . . .

"(10) 'Other waterfront terminal' shall also include any warehouse, depot or other terminal (other than a pier), whether enclosed or open, which is located in a marine terminal in the port of New York district and any part of which is used by any person to perform labor or services involving, or incidental to, the movement of waterborne freight or freight.

"As used in this section, 'marine terminal' means an area which includes piers, which is used primarily for the moving, warehousing, distributing or packing of waterborne freight or freight to or from such piers, and which, inclusive of such piers, is under common ownership or control."

While we find these definitions useful indicators of the terminology used by the industry, we agree with the court below that to assume, absent any indication in the legislative history, that Congress in 1972 had in mind this action of the 1953 Congress is "to attribute a degree of acumen few Congressmen would claim." 544 F. 2d, at 50.

much of the longshoreman's work off the vessel and onto land. S. Rep. 13; H. R. Rep. 10. Noted specifically was the impact of containerization. Unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time-consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo onto the vessel.[31] In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, "[s]tripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on

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[31] "[T]he greatest economies promised by containerization are found in the efficiency of using a specially fitted all-container ship. A most important part of the costs of running a vessel is the dead time in port while loading and unloading. A ship in port earns no income and its heavy fixed costs continue. Moreover, the fast turnaround time of container ships—a container ship can unload and reload in 36–48 hours compared to the seven or eight days required for conventional ships—substantially cuts the number of ships needed to handle any given volume of cargo. . . .

"Labor productivity is astonishingly increased by containerization. One major shipping company reported that each of its work gangs on a conventional ship produced an average of 15 tons per hour compared with 300 tons an hour worked by one gang at a container ship hatch. More generally, the industry considers that 'it would take 126 men 84 hours each, or a total of 10,584 man-hours, to discharge and load about 11,000 tons of cargo aboard a conventional ship. The same amount of cargo on a container vessel can be handled by 42 men working 13 hours each or a total of 546 man hours.'" Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions, 21 Labor L. J. 397, 399–400 (1970).

See Goldberg, Containerization as a Force for Change on the Waterfront, 91 Monthly Labor Rev. 8, 9 (1968).

shore and not in the ship's cargo holds." *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d 35, 53 (CA2 1976). Congress' intent to adapt the LHWCA to modern cargo-handling techniques clearly indicates that these tasks, heretofore done on board ship, are included in the category of "longshoring operations." [32]

It is therefore apparent that respondent Blundo was a statutory "employee" when he slipped on the ice. His job was to check and mark items of cargo as they were unloaded from a container. This task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments. Indeed, the Committee Reports explicitly state: "[C]heckers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." S. Rep. 13; H. R. Rep. 11. We thus have no doubt that Blundo satisfied the status test.[33]

The congressional desire to accommodate the Act to modern technological changes is not relevant to Caputo's case, since

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[32] Accord, *Pittston Stevedoring Corp.,* 544 F. 2d, at 53; *I. T. O. Corp. of Baltimore,* 542 F. 2d, at 905; *Stockman,* 539 F. 2d, at 275–277. As one commentator observed:

"The work of the longshoreman, the loading and unloading of cargo, remains the same; only the procedure and the place of performance [have] changed. It seems unlikely that Congress would acknowledge that longshoring today involves more shore-based activity than formerly and then extend coverage only to those longshoremen working closest to the ship." Comment, Maritime Law—LHWCA Recovery Denied Longshoremen Injured Landward of the "Point of Rest," 10 Suffolk U. L. Rev. 1179, 1188 (1976).

[33] We find no significance in the fact that the container Blundo was stripping had been taken off a vessel at another pier and then moved to the site of the injury. Until the container was stripped, the unloading process was clearly incomplete. The only geographical concern Congress exhibited was that the operation take place at a covered situs. See Part IV, *infra.* It was precisely Congress' intent to accommodate the mobility of containers and the ability to transport and strip them at locations removed from the ship.

he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck. Another dominant theme underlying the 1972 Amendments, however, assists us in analyzing Caputo's status. Congress wanted a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. 13; H. R. Rep. 10–11. It wanted a system that did not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water." S. Rep. 13; H. R. Rep. 10. It therefore extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs. It is the view of the respondent Director of the OWCP that a uniform system must reach "all physical cargo handling activity anywhere within an area meeting the situs [test]." Brief for Federal Respondent 20. "[M]aritime employment," in his view, "include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." *Id.*, at 25. Under this theory, it is clear that the Act would cover someone who, like Caputo, was engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck.

We need not decide, however, whether the congressional desire for uniformity supports the Director's view [34] and enti-

[34] While the Director identifies this as the BRB's position as well as his own, Brief for Federal Respondent 20, it appears to us that the BRB has gone further than this position suggests. For example, the BRB found that a clerk, who worked in an office processing the paperwork for the delivery of cargo to truckmen for removal from the terminal, was a covered "employee." It reasoned that this function, although clerical in nature, was "essential to the removal of cargo from the terminal and was an integral part of longshoring operations." *Farrell* v. *Maher Terminals, Inc.*, 3 BRBS 42, 45 (1975). Contrary to the view expressed by the Director, the BRB showed no concern with the fact that the employee did not handle cargo. Citing the Committee Reports, see n. 27,

tles everyone performing a task such as Caputo's to benefits under the Act. It is clear, at a minimum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations—longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

That Caputo is such a person is readily apparent. As a member of a regular stevedoring gang, he participated on either the pier or the ship in the stowage and unloading of cargo. On the day of his injury he had been hired by petitioner Northeast as a terminal laborer. In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges,[35] and loading and unloading

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supra, the Third Circuit has rejected this conclusion and granted a petition for review. *Maher Terminals, Inc.* v. *Farrell,* 548 F. 2d 476, 478 (1977).

Regardless of whether the view advanced by the Director is the position of the BRB, we agree with Judge Friendly that it would be useful for the BRB to engage in an extensive study of the structure of work on the various piers of the country. While the record before us contains sufficient information to enable us to decide the present cases, such a study will be helpful for future cases.

[35] Lighters and barges are part of the modern technological advancements to which Congress referred when it mentioned "LASH-type vessels." The term LASH is an acronym for "lighter aboard ship." The National Association of Stevedores (NAS) describes the system as follows:

"[C]argo is placed in special uniform size 'lighters,' or barges, which are

trucks. App. 8. Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his assignment could have changed during the day. Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. *Id.*, at 24. Since it is clear that he would have been covered while unloading such a vessel,[36] to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

Petitioners and the NAS seek to avoid these results by proposing a so-called "point of rest" theory.[37] The term "point of rest" is claimed to be a term of art in the industry

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called LASH barges to differentiate them from river barges. The LASH barges are towed from the loading port to the location of the LASH vessel, which is sometimes called the mother ship. The barges are mechanically loaded by a crane on the mother ship and are stacked in specially constructed holds in the mother ship. The actual stowage or unstowage of the barges with their contents in the mother ship requires substantially fewer longshoremen than does the loading of cargo into a breakbulk type ship. A very similar type of operation called SEABEE differs from the LASH operation described only in the size of the barge and the mechanical means for loading or unloading the barge onto or from the mother SEABEE ship.

"The actual loading of the barges is performed by longshoremen in precisely the same manner traditionally employed in the loading or unloading of a breakbulk ship. However, in most instances the size of the longshore gang involved in LASH and SEABEE operations is smaller than the regular ship's gang primarily because of the smaller size of the barge. The barges are in fact vessels and ply the navigable waters of the United States and may be loaded or unloaded at any inland or coastal waterfront facility." Brief for NAS as *Amicus Curiae* 27–28.

[36] The NAS specifically agrees:

"Workers who actually load or unload the barges are engaged in traditional longshore operations and if injured while so engaged would obviously be entitled to the benefits of the LHWCA unless their employer were a state, municipal or other public political entity." *Id.*, at 28.

[37] Petitioner Northeast also argues that the particular cargo Caputo was handling at the moment of injury was no longer in "maritime com-

that denotes the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading). Brief for Petitioner in No. 76–454, p. 9. See n. 4, *supra.* Petitioners contend that the "maritime employment of longshoremen" includes only "the stevedoring activity of the longshore gang (and those directly involved with the gang) which, in the case of unloading, takes cargo out of the hold of the vessel, moves it away from the ship's side, and carries it to its point of rest on the pier or in a terminal shed." Brief for Petitioner in No. 74–454, p. 9. Since Caputo and Blundo were handling cargo that had already reached its first point of rest, petitioners argue they are not to be covered.

This contention that Congress intended to use the point of rest as the decisive factor in the "status" determination has several fatal weaknesses. First, the term "point of rest" nowhere appears in the Act or in the legislative history. It is difficult to understand why, if Congress intended to stop coverage at this point, it never used the term. The absence of a term that is claimed to be so well known in the industry is both conspicuous and telling.

But it is not simply the term's unexplained absence that undermines petitioners' theory. More fundamentally, the

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merce" because it had been at least five days since it had been taken off a ship. See the Administrative Law Judge's decision in App. to Pet. for Cert. in No. 76–444, p. 52a. But the consignee's delay in picking up the cargo has no effect on the character of the work required to effectuate the transfer of the cargo to the consignee. The work performed by the longshoreman is the same whether performed the day the cargo arrives in port or weeks later.

In addition, we reiterate that Caputo did not fall within the excluded category of employees "whose responsibility is only to pick up stored cargo for further trans-shipment." S. Rep. 13; H. R. Rep. 11. As we indicated, *supra,* at 266–267, that exclusion pertains to workers, such as the consignees' truckdrivers Caputo was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation.

theory is simply too restrictive, failing to accommodate either the language or the intent of the 1972 Amendments. The operations petitioners would cover clearly are "longshoring operations" and are appropriately covered by the Act. But petitioners fail to give effect to the obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a "longshoring operation." The theory does not comport with the Act's focus on occupations and its desire for uniformity. As the First Circuit noted: "The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point-of-rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered." *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264, 275 (1976). In addition, the theory fails to accommodate the intent to cover those longshoring operations that modern technology had moved onto the land. Coverage that stops at the point of rest excludes those engaged in loading and unloading the modern functional equivalents of the hold of the ship. As we have indicated, Congress clearly intended to cover such operations.[38]

[38] Moreover, we are not convinced that the point-of-rest theory provides the workable definition that petitioners claim for it. The "point" varies from port to port and with different types of cargo. See the Stevedore and Marine Terminal Industry of the United States (unpublished survey by the NAS) (1974–1975); n. 28, *supra*. The point can be moved seaward or landward at the whim of the employer. Such characteristics make it inconsistent with the uniform system Congress sought to design. As Judge Craven observed, when a panel of the Fourth Circuit adopted the point-of-rest theory and refused to cover persons holding jobs similar to Caputo's and Blundo's:

"[Respondents] will, I think, be surprised to learn that they are not longshoremen, and astonished to discover that they are not engaged in maritime employment of any kind. If they are not, as my brothers hold, then the Congress has labored prodigiously only to have accomplished nothing at all in its effort to simplify the problems of maritime workers' compensation. . . . Henceforth, injured employees and their counsel must

The only support petitioners can find for their theory is the fact that it is consistent with the "typical example" given in the Committee Reports. See n. 27, *supra.* But as we have already indicated, *supra,* at 266–267, the example is equally consistent with a broader view of coverage. Consistency with an illustrative example is clearly not enough to overcome the overwhelming evidence against the theory.[39]

In view of all this, it is not surprising that the "point of rest" limitation has been rejected by all but one of the Circuits that have considered it[40] and by virtually all the com-

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comb the waterfronts of this circuit, probing hopelessly, like Diogenes with his lantern, for that elusive 'point of rest' upon which coverage depends." *I. T. O. Corp. of Baltimore* v. *BRB,* 529 F. 2d 1080, 1089 (1975) (dissenting opinion), modified en banc, 542 F. 2d 903 (1976).

[39] Petitioners also contend that it is too expensive to extend coverage beyond the point of rest and that Congress did not intend to impose such expenses on the employers. Brief for Petitioner in No. 76–454, pp. 68–73. However, there is nothing in the legislative history to indicate what Congress anticipated the expanded coverage would cost.

[40] The Court of Appeals for the Second Circuit, in the case below, rejected the point-of-rest theory and awarded compensation to Blundo and Caputo for reasons similar to those upon which we rely. *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F. 2d 35 (1976). The First Circuit, as noted in n. 29, *supra,* has also found the point-of-rest theory incompatible with Congress' desire for uniformity. Also relying on factors similar to those we consider, the court concluded that the operations of stuffing and stripping containers were clearly longshoring operations and affirmed a compensation award to one so engaged. *Stockman,* 539 F. 2d, at 272–277.

The Third Circuit has extended coverage well beyond the point of rest. *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation,* 540 F. 2d 629 (1976). Its analysis has differed from the other Circuits. It concluded that Congress meant to exercise its full constitutional authority and to "afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it

mentators.[41] We too reject it. A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with

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up." *Id.*, at 638. The Circuit appears to have essentially discarded the situs test, holding that only "[an] employment nexus (status) with maritime activity is [necessary]" and that the situs of the maritime employee at the time of injury is irrelevant. *Ibid.* See also *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs,* 552 F. 2d 985 (CA3 1977); *Maher Terminals, Inc.* v. *Farrell,* 548 F. 2d 476 (CA3 1977).

The Fifth Circuit also has rejected the point-of-rest theory, calling it a "hypertechnical construction." *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d, at 540. It affirmed compensation awards to a worker securing a vehicle to a railway car in preparation for its transportation inland and to a worker unloading bales of cotton from a wagon and stacking them in the warehouse to await future placement on a ship. The awards were affirmed because both people were involved in "an integral part of the ongoing process of moving cargo between land transportation and a ship." *Id.*, at 543–544.

The Fourth Circuit is the one Circuit that has considered the theory and not rejected it. *I. T. O. Corp. of Baltimore* v. *BRB,* 542 F. 2d 903 (1976) (en banc). But it has also not accepted it. While three of six judges sitting en banc accepted the theory, the fourth held that the Act covered certain cargo handling within the terminal shoreside of the point of rest. He found coverage for two workers situated similarly to Blundo, characterizing their activities as part of the overall loading and unloading function. *Id.*, at 905. He denied coverage to a worker in the same situation as Caputo. The other two judges of the en banc court would have covered all three workers since they were engaged in "handl[ing] ships' cargo." *I. T. O. Corp. of Baltimore* v. *BRB,* 529 F. 2d, at 1097 (Craven, J., dissenting).

[41] Only one of the commentators discussing the Act prior to the early cases even thought of the point of rest as a line of demarcation, but he makes no effort to explain why the term was never mentioned in the Act or history. Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63 (1974). Gilmore §§ 6–51, p. 427; Gorman, The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments, 6 J. Mar. L. & Com. 1, 9–10 (1974); Note, The 1972 Amendments to Section 903 of the Longshoremen's and Harbor Workers' Act, 4 Rutgers Camden L. J. 404 (1973); Note, Maritime Jurisdiction and Longshoremen's

Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage is incapable of defeating our conclusion that Blundo and Caputo are "employees."

IV

Having established that respondents Blundo and Caputo satisfied the "status" test for coverage under the Act, we consider now whether their injuries occurred on a covered "situs"—"the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

There is no dispute with respect to Caputo. The truck he was helping to load was parked inside the terminal area. As petitioner Northeast correctly concedes, this situs "unquestionably met the requirements of § 3 (a) of the Act, . . . because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships." Brief for Petitioners in No. 76–444, p. 3 n. 1.

Blundo's injury was sustained while he was checking a container being stripped on a pier located within a facility known as the 21st Street Pier. The fenced-in facility was located on the water and ran between 19th and 21st Streets. It included

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Remedies, 1973 Wash. U. L. Q. 649; Note, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683 (1973).

Those writing after the theory had been advanced in the courts have universally found it inadequate. 4 A. Larson, *supra,* n. 15, § 89.42; Note, Shoreside Coverage Under the Longshoremen's and Harbor Workers' Compensation Act, 18 B. C. Ind. & Com. L. Rev. 135 (1976); Comment, Maritime Law—LHWCA Recovery Denied Longshoremen Injured Landward of "Point of Rest," 10 Suffolk U. L. Rev. 1179 (1976); Note, Admiralty Law/Workmen's Compensation—On the Waterfront, 54 N. C. L. Rev. 925 (1976); Comment, The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments, 55 Texas L. Rev. 99, 116–120 (1976).

two "finger-piers." The pier on the 21st Street end was used to berth ships for purposes of loading and unloading them. The one on the 19th Street end was used only for stripping and stuffing containers and storage. See the Administrative Law Judge's decision in Pet. for Cert. in No. 76–454, pp. 52a–53a. Blundo was working on this latter pier.

Petitioner ITO argues that Blundo was not on a covered situs because the 19th Street Pier was not "customarily used by an employer for loading [or] unloading . . . a vessel." The Court of Appeals labeled this argument "halfhearted" and dismissed it in a footnote. 544 F. 2d, at 51 n. 19. We agree that the argument does not merit extended discussion.

First, we agree with the court below that it is not at all clear that the phrase "customarily used" was intended to modify more than the immediately preceding phrase "other areas." We note that the sponsor of the bill in the House, Representative Daniels, described this section as "expand[ing] the coverage which was limited to the ship in the present law, to the piers, wharves, and terminals." 118 Cong. Rec. 36381 (1972). There was little concern with respect to how these facilities were used.[42]

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[42] Petitioner ITO contends that statements in the Committee Reports indicate that the "customarily used" requirement is to apply to all the specified areas. It points to the Reports' intent to exclude persons not engaged in loading, unloading, repairing or building a vessel "just because they are injured in an area adjoining navigable waters used for such activity," S. Rep. 13; H. R. Rep. 11, and the Senate Report's description of the bill as "expand[ing] the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." S. Rep. 2. These statements, however, serve to undermine rather than to help ITO's attempt to read the situs requirement to exclude the pier on which Blundo was working. Even assuming they suggest a usage requirement for all such adjoining piers, it is clear that the usage is broad enough to encompass stripping and stuffing containers, integral parts of the overall loading and unloading process.

Second, even if we assume that the phrase should be read to modify the preceding terms, we agree with the BRB and the Court of Appeals that Blundo satisfied the situs test in the same way that Caputo did—by working in an "adjoining . . . terminal . . . customarily used . . . in loading [and] unloading." The entire terminal facility adjoined the water and one of its two finger-piers clearly was used for loading and unloading vessels.

Accordingly, we conclude that when Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here. Accord, *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d, at 271–272; *I. T. O. Corp. of Baltimore* v. *BRB*, 529 F. 2d 1080, 1083–1084 (CA4 1975), modified en banc, 542 F. 2d 903 (1976).

Since we find that both Caputo and Blundo satisfied the status and the situs tests, we affirm.

It is so ordered.

DOBBERT *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 76–5306. Argued March 28, 1977—Decided June 17, 1977

The Florida death penalty statute, which was upheld in *Proffitt* v. *Florida,* 428 U. S. 242, requires, upon the conviction of a capital felon, a separate sentencing hearing before the trial judge and jury, at which certain evidence relating to aggravating or mitigating circumstances must be admitted. The jury, based on such circumstances, then renders an advisory decision, not binding on the judge, who must then also weigh the circumstances, and if he imposes a death sentence, he must set forth written findings of fact. The judgment of conviction and death sentence are thereafter subject to an automatic priority review by the Florida Supreme Court. Petitioner was convicted in a Florida court of, *inter alia,* first-degree murder of one of his children. Pursuant to the above statute the jury, after the required sentencing hearing, recommended a life sentence, but the judge overruled that recommendation and sentenced petitioner to death. The Florida Supreme Court affirmed. Petitioner makes three claims based on the constitutional prohibition against *ex post facto* laws: (1) the change in the role of the judge and jury in imposing the death sentence, in that under the statute in effect at the time of the murder a recommendation of mercy by the jury was not reviewable by the judge, constituted an *ex post facto* violation because the change deprived him of a substantial right to have the jury determine, without review by the trial judge, whether the death penalty should be imposed; (2) there was no death penalty "in effect" in Florida at the time of the murder because the earlier statute in effect at such time was later held invalid by the Florida Supreme Court under *Furman* v. *Georgia,* 408 U. S. 238; and (3) the current statute (the one under which he was sentenced) requires anyone sentenced to life imprisonment to serve at least 25 years before becoming eligible for parole, whereas the prior statute contained no such limitation. Petitioner also makes a related claim that since after *Furman* and its own decision invalidating the prior death penalty statute the Florida Supreme Court resentenced to life imprisonment all prisoners then under death sentences pursuant to the old statute, and since his crimes were committed prior to *Furman,* the imposition of the death sentence upon him pursuant to the new statute denied

him equal protection of the laws. He further claims that pretrial publicity concerning his crimes deprived him of his right to a fair trial. *Held:*

1. The changes in the death penalty statute between the time of the murder and the time of the trial are procedural and on the whole ameliorative, and hence there is no *ex post facto* violation. Pp. 293–297.

(a) The new statute simply altered the methods employed in determining whether the death penalty was to be imposed, and there was no change in the quantum of punishment attached to the crime. Pp. 293–294.

(b) The new statute provides capital defendants with more, rather than less, judicial protection than the old statute. Death is not automatic, absent a jury recommendation of mercy, as it was under the old statute; a jury recommendation of life may be overridden by the trial judge only under exacting standards, but, unlike the old statute, a jury recommendation of death is not binding, Defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. Pp. 294–297.

2. The existence of the earlier statute at the time of the murder served as an "operative fact" to warn petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder, and this was sufficient compliance with the *ex post facto* provision of the Constitution, notwithstanding the subsequent invalidation of the statute. Pp. 297–298.

3. Petitioner, having been sentenced to death, may not complain of burdens attached to a life sentence under the new statute which may not have attached to the old. Pp. 298–301.

4. The imposition of the death sentence upon petitioner pursuant to the new statute did not deny him equal protection of the laws. Having been neither tried nor sentenced prior to *Furman,* he was not similarly situated to those whose death sentences were commuted, and it was not irrational for Florida to relegate him to the class of those prisoners whose acts could properly be punished under the new statute that was in effect at the time of his trial and sentence. P. 301.

5. Absent anything in the record, in particular with respect to the *voir dire* examination of the jurors, that would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected, petitioner has failed to show that under the "totality of circumstances" extensive pretrial news media coverage of his case denied him a fair trial. Pp. 301–303.

328 So. 2d 433, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 303. BRENNAN and MARSHALL, JJ., filed a dissenting statement, *post,* p. 304. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 304.

Louis O. Frost, Jr., argued the cause and filed a brief for petitioner.

Charles W. Musgrove, Assistant Attorney General of Florida, argued the cause for respondent. With him on the briefs was *Robert L. Shevin,* Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree, murder in the second degree, child abuse, and child torture. The victims were his children. Under the Florida death penalty statute then in effect he was sentenced by the trial judge to death for the first-degree murder. The Florida Supreme Court affirmed, and we granted certiorari to consider whether changes in the Florida death penalty statutes subjected him to trial under an *ex post facto* law or denied him equal protection of the laws, and whether the significant amount of pretrial publicity concerning the crime deprived petitioner of his right to a fair trial. We conclude that petitioner has not shown the deprivation of any federal constitutional right, and affirm the judgment of the Florida Supreme Court.

I

Petitioner was convicted of first-degree murder of his daughter Kelly Ann, aged 9, and second-degree murder of his son Ryder Scott, aged 7. He was also found guilty of tortur-

**Howard B. Eisenberg* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging reversal.

ing his son Ernest John III, aged 11, and of abusing his daughter Honore Elizabeth, aged 5. The brutality and heinousness of these crimes are relevant both to petitioner's motion for a change of venue due to pretrial publicity and to the trial judge's imposition of the sentence of death. The trial judge, in his factual findings at the sentencing phase of the trial, summarized petitioner's treatment of his own offspring as follows:

> "The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time." App. 47.

The judge then detailed some of the horrors inflicted upon young Kelly Ann, upon which he relied to meet the statutory requirement that aggravating circumstances be found:

> "Over the period of time of the latter portion of Kelly Ann's short, tortu[r]ous life the defendant did these things to her on one or many occasions:
>
> "1. Beat her in the head until it was swollen.
>
> "2. Burned her hands.
>
> "3. Poked his fingers in her eyes.
>
> "4. Beat her in the abdomen until 'it was swollen like she was pregnant.'
>
> "5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'
>
> "6. Held her under water in both the bath tub and toilet.
>
> "7. Kicked her against a table which cut her head—then defendant sewed up her wound with needle and thread.
>
> "8. Scarred her head and body by beating her with a belt and board—causing marks from her cheek, across the neck and down her back—which injuries worsened without treatment 'until the body juices came out.'

"9. On one occasion beat her continuously for 45 minutes.

"10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.

"11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.

"12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any out-siders from discovering her condition.

"13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave." *Id.*, at 47–48.

This sordid tale began to unravel in early 1972 when Ernest John III was found battered and wandering in Jacksonville, Fla.[1] An arrest warrant was issued for petitioner, who evidently had fled the area. About a year later, Honore Elizabeth was found in a Ft. Lauderdale hospital with a note pinned to her clothing asking that she be sent to her mother in Wisconsin. Shortly thereafter petitioner's abandoned automobile was found near a bridge with a suicide note on the front seat. Petitioner, however, had fled to Texas, where he was eventually arrested and extradited to Florida.

Prior to trial, petitioner applied to the Supreme Court of Florida for a Constitutional Stay of Trial,[2] alleging the application of an *ex post facto* law and a violation of equal

[1] These background facts, not referred to in the opinion of the Supreme Court of Florida, 328 So. 2d 433 (1976), are not disputed and are gleaned from the briefs of the parties. See Brief for Petitioner 4–13; accord, Brief for Respondent 3.

[2] See Florida Appellate Rule 4.5g.

protection. *Id.*, at 81–86. The application was denied. Petitioner also moved in the lower court for a change of venue, alleging that he was charged with "inherently odious" acts, *id.*, at 17, and that extensive publicity regarding his flight, extradition, and arrest, as well as a search for bodies by the Jacksonville Police Department, had rendered impossible a fair and impartial trial in Duval County. *Id.*, at 17–18. The trial judge took the motion under advisement and issued an order enjoining anyone connected with the trial from releasing any statement about the case to the news media. *Id.*, at 25–26. The motion was later denied.

Trial was had and the jury found petitioner guilty of, *inter alia*, murder in the first degree. Pursuant to the Florida death penalty statute then in effect, a sentencing hearing was held before the judge and jury. The jury by a 10-to-2 majority found sufficient mitigating circumstances to outweigh any aggravating circumstances and recommended a sentence of life imprisonment. The trial judge, pursuant to his authority under the amended Florida statute, overruled the jury's recommendation and sentenced petitioner to death. The Florida Supreme Court affirmed over two dissents.

II

Petitioner makes three separate claims based on the prohibition against *ex post facto* laws, and a related claim based upon the Equal Protection Clause of the Fourteenth Amendment. His first *ex post facto* claim is addressed to the change in the function of judge and jury in the imposition of death sentences in Florida between the time he committed the acts charged and the time he was tried for them. The second *ex post facto* claim is grounded on his contention that at the time he acted there was no valid death penalty statute in effect in Florida. The third claim relates to the more stringent parole requirements attached to a life sentence under

the new law. A discussion of the relevant changes in Florida death-sentencing procedures brings these claims into focus.

The murders of which petitioner was convicted were alleged to have occurred on December 31, 1971 (Kelly Ann), and between January 1 and April 8, 1972 (Ryder Scott). During that period of time, Fla. Stat. Ann. §§ 775.082 (1971) and 921.141 (Supp. 1971–1972), as then written, provided that a person convicted of a capital felony was to be punished by death unless the verdict included a recommendation of mercy by a majority of the jury.[3]

On June 22, 1972, this Court struck down a Georgia death penalty statute as violative of the Eighth and Fourteenth Amendments. *Furman* v. *Georgia,* 408 U. S. 238. Shortly thereafter, on July 17, 1972, in *Donaldson* v. *Sack,* 265 So. 2d 499, the Florida Supreme Court found the 1971 Florida death penalty statutes inconsistent with *Furman.* Late in 1972 Florida enacted a new death penalty procedure, 1973 Fla. Laws, c. 72–724, amending, *inter alia,* §§ 775.082 and 921.141.[4]

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[3] The text of those statutes is as follows:

"Recommendation to mercy—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment." Fla. Stat. Ann. § 921.141 (Supp. 1971–1972).

"Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, and [*sic*] the discretion of the court." Fla. Stat. Ann. § 775.082 (1971).

[4] The constitutionality of this statute has been upheld by the Florida

The opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS in *Proffitt* v. *Florida,* 428 U. S. 242 (1976), in which the constitutionality of this statute was upheld, details at length the operation of the revised § 921.141.[5]

Supreme Court, *State* v. *Dixon,* 283 So. 2d 1 (1973), and by this Court, *Proffitt* v. *Florida,* 428 U. S. 242 (1976).

[5] The full text of revised § 921.141 (Supp. 1976–1977) is as follows:

"921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

"(b) Whether sufficient mitigating circumstances exist as enumerated in

428 U. S., at 247–251. After a defendant is found guilty of a capital felony, a separate sentencing hearing is held before the trial judge and the trial jury. Any evidence that the judge

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subsection (7), which outweigh the aggravating circumstances found to exist; and

"(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

"(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

"(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

[*Footnote 5 continued on page 291*]

deems relevant to sentencing may be admitted, and certain evidence relating to aggravating or mitigating circumstances must be admitted. The jury, by a majority vote, then renders an advisory decision, not binding on the court, based upon these aggravating and mitigating circumstances. The court must then also weigh the aggravating and mitigating circumstances. If the court imposes a sentence of death, it must set forth written findings of fact regarding the aggravating and mitigating circumstances. A judgment of conviction and sen-

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"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious, or cruel.

"(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime."

tence of death is then subject to an automatic, priority review by the Florida Supreme Court. It is in the light of these changes that we must adjudge petitioner's *ex post facto* claims.

A

Petitioner argues that the change in the role of the judge and jury in the imposition of the death sentence in Florida between the time of the first-degree murder and the time of the trial constitutes an *ex post facto* violation. Petitioner views the change in the Florida death-sentencing procedure as depriving him of a substantial right to have the jury determine, without review by the trial judge, whether that penalty should be imposed. We conclude that the changes in the law are procedural, and on the whole ameliorative,[6] and that there is no *ex posto facto* violation.

Article I, § 10, of the United States Constitution prohibits a State from passing any "ex post facto Law." Our cases have not attempted to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law. In *Beazell* v. *Ohio*, 269 U. S. 167, 169–170 (1925), Mr. Justice Stone summarized for the Court the characteristics of an *ex post facto* law:

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

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[6] These are independent bases for our decision. For example, in *Beazell* v. *Ohio*, 269 U. S. 167 (1925), we found a procedural change not *ex post facto* even though the change was by no means ameliorative.

It is equally well settled, however, that "[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." *Gibson* v. *Mississippi,* 162 U. S. 565, 590 (1896). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy* v. *South Carolina,* 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell* v. *Ohio, supra,* at 171.

Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.* For example, in *Hopt* v. *Utah,* 110 U. S. 574 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not *ex post facto* because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. *Id.,* at 589.

In *Thompson* v. *Missouri,* 171 U. S. 380 (1898), a defendant was convicted of murder solely upon circumstantial evidence. His conviction was reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the Court held that this change was procedural and not violative of the *Ex Post Facto* Clause.

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods

employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language from *Hopt* v. *Utah, supra,* applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the *Ex Post Facto* Clause:

> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U. S., at 589–590.

In this case, not only was the change in the law procedural, it was ameliorative. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law. Petitioner argues that the change in the law harmed him because the jury's recommendation of life imprisonment would not have been subject to review by the trial judge under the prior law. But it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life.[7]

Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling. We must compare the two statutory procedures *in toto* to determine if the new may be fairly characterized as more onerous. Under the old procedure, the death penalty was "presumed" unless the jury, in its unbridled discretion, made a recommendation for mercy. The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by *Furman,* thus

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[7] For example, the jury's recommendation may have been affected by the fact that the members of the jury were not the final arbiters of life or death. They may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final.

providing capital defendants with more, rather than less, judicial protection. The protections thus provided, which this Court upheld in *Proffitt,* are substantial. A separate hearing is held; the defendant is allowed to present any relevant mitigating evidence. The jury renders an advisory verdict based upon its perception of aggravating and mitigating factors in the case. The court makes the final determination, but may impose death only after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Finally, in what may be termed a tripartite review, the Florida Supreme Court is required to review each sentence of death. This required review, not present under the old procedure, is by no means perfunctory; as was noted in *Proffitt,* as of that time the Florida Supreme Court had vacated 8 of the 21 death sentences that it had reviewed to that date. 428 U. S., at 253.[8] Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so *clear and convincing that virtually no reasonable person could differ.*" *Tedder* v. *State,* 322 So. 2d 908, 910 (1975) (emphasis added) (cited with approbation in *Proffitt* v. *Florida,* 428 U. S., at 249).

This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial

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[8] Since that time, the State informs us, the Florida Supreme Court has reversed nine death sentences, and affirmed eight. Brief for Respondent 18–19, n. 3; Respondent's Notice of Additional Authority.

judge only under the exacting standards of *Tedder*.[9] Hence, defendants are not significantly disadvantaged vis-à-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute. Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new

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[9] The fact that the trial judge imposed a death sentence after the jury had recommended life in this case in no way denigrates the procedural protections afforded by the new procedure. The judge did so in circumstances where there were obvious and substantial aggravating factors, and where there had been no significant mitigating factors adduced. To demonstrate that it was the nature of the crime, rather than the scope of the procedure, that resulted in the death sentence in this case, we set forth *in extenso* the conclusions of the trial court at the sentencing phase:

"There are sufficient and great aggravating circumstances which exist to justify the sentence of death.

"In concluding my findings I would like to point out that my 22 years of legal experience have been almost exclusively in the field of criminal law.

"The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years and a Criminal Court Judge and a Circuit Judge—Felony Division for three and one half years.

"During this [*sic*] 22 years I have defended, prosecuted and held trial of almost every type of serious crime. During these years of legal experience I have never known of a more heinous, atrocious and cruel crime than this one.

"My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every conceivable form.

"I am not easily shocked or [a]ffected by tragedy or cruelty—but this murder of a helpless, defenseless and innocent child is the most cruel, atrocious and heinous crime I have eve[r] personally known of—and it is deserving of no sentence but death." App. 49.

statute did not work an onerous application of an *ex post facto* change in the law. Perhaps the ultimate proof of this fact is that this old statute was held to be violative of the United States Constitution in *Donaldson* v. *Sack,* 265 So. 2d 499 (Fla. 1972), while the new law was upheld by this Court in *Proffitt, supra.*

B

Petitioner's second *ex post facto* claim is based on the contention that at the time he murdered his children there was no death penalty "in effect" in Florida. This is so, he contends, because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid under our decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972). Therefore, argues petitioner, there was no "valid" death penalty in effect in Florida as of the date of his actions. But this sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Petitioner's highly technical argument is at odds with the statement of this Court in *Chicot County Dist.* v. *Baxter State Bank,* 308 U. S. 371, 374 (1940):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Chicago, I. & L. Ry. Co.* v.

Hackett, 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored."

Here the existence of the statute served as an "operative fact" to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution.

C

Petitioner's third *ex post facto* contention is based on the fact that the new Florida statute provides that anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole. The prior statute contained no such limitation. The Florida Supreme Court in *Lee* v. *State*, 294 So. 2d 305 (1974), found that this provision restricting parole could not constitutionally be applied to crimes committed prior to its effective date. Petitioner contends that nonetheless its enactment by the Florida Legislature amounts to an *ex post facto* law, and that because of this he may successfully challenge the death sentence imposed upon him.

Petitioner, of course, did not receive a life sentence, and so any added onus attaching to it as a result of the change in Florida law had no effect on him. In *Lindsey* v. *Washington*, 301 U. S. 397, 400–401 (1937), the Court stated:

"The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject

> to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. *It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed.* The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. *Kring* v. *Missouri,* [107 U. S. 221,] 228–229; *In re Medley,* 134 U. S. 160, 171; *Thompson* v. *Utah,* 170 U. S. 343, 351. *It is for this reason that an increase in the possible penalty is ex post facto, Calder* v. *Bull,* 3 Dall. 386, 390; *Cummings* v. *Missouri,* [4 Wall. 277,] 326; *Malloy* v. *South Carolina,* 237 U. S. 180, 184, *regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier, State* v. *Callahan,* 109 La. 946; 33 So. 931; *State* v. *Smith,* 56 Ore. 21; 107 Pac. 980." (Emphasis added.)

Lifted from their context and read expansively, the emphasized portions of the quoted language would lend some support to petitioner's claim. But we think that consideration of the *Lindsey* language in the factual context in which that case was decided does not lead to the result sought by petitioner.

Lindsey came here from the Supreme Court of Washington on a claim that a change in the state law respecting the sentence to be imposed upon one convicted of the felony of grand larceny violated the *Ex Post Facto* Clause. At the time Lindsey committed the larceny, the law provided for a maximum sentence of 15 years, and a minimum sentence of not less than 6 months. At the time Lindsey was sentenced, the law had been changed to provide for a mandatory 15-year sentence. Even though under the new statute a convict could be ad-

mitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation.

Lindsey, then, had received a sentence under the new law which was within permissible bounds under the old law, albeit at the outer limits of those bounds. But under the new law it was the *only* sentence he could have received, while under the old law the sentencing judge could in his discretion have imposed a much shorter sentence. In contrast to the petitioner here, Lindsey was not complaining in the abstract about some change in the law, which as events proved, would have no applicability to his case. His complaint was that the new law totally eliminated any sentence of less than 15 years once he was convicted of larceny, and thereby assured that he would receive what was only the discretionary maximum sentence under the old law.

We think the excerpted language from *Lindsey* must be read in the light of these facts to mean that one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old. It is one thing to find an *ex post facto* violation where under the new law a defendant *must* receive a sentence which was under the old law only the maximum in a discretionary spectrum of length; it would be quite another to do so in a case, such as this, where the change has had no effect on the defendant in the proceedings of which he complains.

Petitioner here can make no claim comparable to Lindsey's. Under the new law, both life imprisonment and death remain as possible alternative sentences. Only if we were to read the excerpted portion of the quoted language from *Lindsey* to confer standing on the defendant to complain of an added burden newly attached to a sentence which was never imposed on him would that language assist him. But we hold that petitioner,

having been sentenced to death, may not complain of burdens attached to the life sentence under the new law which may not have attached to it under the old.

D

After our *Furman* decision and its own decision in *Donaldson* v. *Sack,* the Florida Supreme Court resentenced all prisoners under sentence of death pursuant to the old statute to life imprisonment. *Anderson* v. *State,* 267 So. 2d 8 (1972); *In re Baker,* 267 So. 2d 331 (1972). Petitioner argues that since his crimes were committed before our decision in *Furman,* the imposition of the death sentence upon him pursuant to the new statute which was in effect at the time of his trial denies him equal protection of the laws.

But petitioner is simply not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman,* as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder so as to make the application of this new statute to him consistent with the *Ex Post Facto* Clause of the United States Constitution. Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision, and those whose cases involved acts which could properly subject them to punishment under the new statute. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence.

III

There was, understandably, extensive pretrial publicity concerning several aspects of this case. We accept petitioner's assertion, Brief for Petitioner 38–48, that there was substantial

media coverage, including a number of television and radio stories regarding the various aspects of the case.

In *Murphy* v. *Florida,* 421 U. S. 794 (1975), we reviewed a trial in which many jurors had heard of the defendant through extensive news coverage. Characterizing our previous cases in which we had overturned a state-court conviction on these grounds as involving "a trial atmosphere that had been utterly corrupted by press coverage," *id.,* at 798, we recognized:

> "Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
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> " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " *Id.,* at 799–800, quoting from *Irvin* v. *Dowd,* 366 U. S. 717, 723 (1961).

We concluded that the petitioner in *Murphy* had failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. 421 U. S., at 803.

The Florida Supreme Court in this case noted that 78 prospective jurors were interviewed, and that petitioner exercised only 27 of his 32 peremptory challenges. Specifically referring to our decision in *Murphy,* that court concluded:

> "[W]e find from the record that the trial judge did everything possible to insure an impartial trial for the defendant. The jurors, carefully and extensively examined by defense counsel to determine that they could be fair and impartial, were sequestered and [a] comprehensive gag order was placed on all participants of the trial.
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> . . . . .
>
> "Appellant has failed to show that he did not receive

a fair and impartial trial, that the setting of his trial was inherently prejudicial." 328 So. 2d, at 439–440.

Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under *Murphy,* extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere . . . utterly corrupted by press coverage," *Murphy* v. *Florida, supra,* at 798. One who is reasonably suspected of murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of circumstances," *Murphy, supra,* the Florida Supreme Court was wrong in finding no constitutional violation with respect to the pretrial publicity. The judgment of the Supreme Court of Florida is therefore

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court. A crucial factor in this case, for me, is that, as the Court's opinion recites, when petitioner committed the crime, a Florida statute permitted the death penalty for the offense. Petitioner was at least constructively on notice that this penalty might indeed follow his actions. During the time which elapsed between the commission of the offense and the trial, the statute was

changed to provide different procedures for determining whether death was an appropriate punishment. But these new procedures, taken as a whole, were, if anything, more favorable to the petitioner; consequently the change cannot be read otherwise than as the Court's opinion suggests.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

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

Only a few simple facts are relevant to the question of law presented by this case.[1] At the time of petitioner's offense, there was no constitutional procedure for imposing the death penalty in Florida. Several months after his offense, Florida enacted the death penalty statute that was upheld in *Proffitt* v. *Florida,* 428 U. S. 242. Before this statute was passed, as a matter of Florida law, the crime committed by petitioner was not a capital offense.[2] It is undisputed, therefore, that a law passed after the offense is the source of Florida's power to put petitioner to death.

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[1] The atrocious character of this individual's crimes, which the Court recounts in such detail, is of course no more relevant to the legal issue than the fact that 10 of the 12 jurors who heard all of the evidence voted to spare his life.

[2] In response to this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238, the Florida Supreme Court held that the Florida death penalty had been abolished, that even the category of "capital offenses" had ceased to exist, and that there was no possible procedure under existing Florida law for imposing the penalty. *Donaldson* v. *Sack,* 265 So. 2d 499 (1972); *State* v. *Whalen,* 269 So. 2d 678 (1972). Following these decisions, therefore, the crime committed by petitioner was not a capital offense.

The Court holds that Florida may apply this law to petitioner without violating the *Ex Post Facto* Clause.[3] In its view, the unconstitutional law which was on the Florida statute books at the time of the offense "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers." *Ante,* at 297. The Court concludes that the "fair warning" provided by the invalid statute "was sufficient compliance with the *ex post facto* provision of the United States Constitution." *Ante,* at 298.[4]

This conclusion represents a clear departure from the test the Court has applied in past cases construing the *Ex Post Facto* Clause. That test was stated in *Lindsey* v. *Washington,* 301 U. S. 397, 401, in language that might have been written with the present case in mind:

> "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." [5]

Applying that test in *Lindsey,* the Court held that even though

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[3] Article I, § 10, provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." There is a separate prohibition against *ex post facto* laws in Art. I, § 9, which applies to Congress.

[4] In support of this conclusion, the Court cites not a single case involving the *Ex Post Facto* Clause. Instead, it relies solely on a case which held that a decision of this Court could not serve as a basis for a retroactive attack on a final judgment in a civil case. *Chicot County Dist.* v. *Baxter State Bank,* 308 U. S. 371.

[5] Cf. *Kring* v. *Missouri,* 107 U. S. 221, in which the Court reviewed a number of state cases involving *ex post facto* legislation and explicitly endorsed this "excellent observation" by Judge Denio of the New York Court of Appeals:

" 'No one can be criminally punished in this country, *except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time.*' " *Id.,* at 230–231, quoting *Hartung* v. *People,* 22 N. Y. 95, 104 (1860) (emphasis in original).

the statute in effect at the time of the crime authorized a sentence of 15 years in the discretion of the trial judge, that sentence could not be imposed pursuant to a new mandatory sentencing statute. Notwithstanding the defendant's "fair warning" of the possible 15-year sentence, the Court held that the change in the standard of punishment could not be retroactively applied to him.[6] The change was invalid sim-

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[6] This language from Mr. Justice Stone's opinion is, I believe, plainly applicable to this case:

"It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. *Kring* v. *Missouri, supra,* 228–229; *In re Medley,* 134 U. S. 160, 171; *Thompson* v. *Utah,* 170 U. S. 343, 351. It is for this reason that an increase in the possible penalty is *ex post facto, Calder* v. *Bull,* 3 Dall. 386, 390; *Cummings* v. *Missouri,* [4 Wall. 277,] 326; *Malloy* v. *South Carolina,* 237 U. S. 180, 184, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier, *State* v. *Callahan,* 109 La. 946; 33 So. 931; *State* v. *Smith,* 56 Ore. 21; 107 Pac. 980.

"Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. *Marion* v. *State,* 16 Neb. 349; 20 N. W. 289. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, see *Calder* v. *Bull, supra,* 390. It is plainly to the substantial disadvantage of petitioners . . . ." 301 U. S., at 401–402.

In this case, it is also plainly to the substantial disadvantage of the petitioner to be sentenced to death pursuant to a statute that was enacted

ply because the new standard increased the probability of a severe sentence. In the case before us, the new standard created the possibility of a death sentence that could not have been lawfully imposed when the offense was committed. A more dramatically different standard of punishment is difficult to envision.

We should adhere to the *Lindsey* test. Fair warning cannot be the touchstone, for two reasons. First, "fair warning" does not provide a workable test for deciding particular cases. Second, as Mr. Justice Harlan has explained,[7] fair notice is not the only important value underlying the constitutional prohibition; the *Ex Post Facto* Clause also provides a basic protection against improperly motivated or capricious legislation.[8] It ensures that the sovereign will govern impar-

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after his offense was committed, when he could not have been validly sentenced to death under the law in effect at the time of the offense.

[7] Mr. Justice Harlan understood the *Ex Post Facto* Clause as serving a purpose beyond ensuring that fair notice be given of the legal consequences of an individual's actions. He stated:

"Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James* v. *United States*, 366 U. S. 213, 247 n. 3 (separate opinion).

[8] Unlike the procedural guarantees in the Bill of Rights which originally were applicable only to the Federal Government, the *Ex Post Facto* Clause has always applied to the States. Mr. Justice Chase, writing just a few years after the Constitution was adopted, stated that the Clause was probably a result of the *ex post facto* laws and bills of attainder passed in England. "With very few exceptions, the advocates of *such* laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, . . . the Federal and State Legislatures, were prohibited from passing any bill of

tially and that it will be perceived as doing so. The Court's "fair warning" test, if it extends beyond this case, would allow government action that is just the opposite of impartial. If that be so, the "fair warning" rationale will defeat the very purpose of the Clause.

By what standard is the fairness of the warning contained in an unconstitutional statute to be judged? Is an itinerant, who may not have the slightest notion of what Florida's statute books contain, to be judged differently from a local lawyer? The assumption that the former has "fair warning" can only rest on the somewhat unrealistic presumption that everyone is deemed to know the law. But it is not words in statute books that constitute the law. If citizens are bound to know the law, "they [are] bound to know it as we have expounded it." *Kring* v. *Missouri,* 107 U. S. 221, 235. A consistent application of that presumption would require the conclusion that neither the lawyer nor the itinerant had fair warning because both must also be presumed to know that the old Florida statute was a nullity. The Court's test cannot fairly be applied on the basis of a particular individual's actual knowledge of the law; if applied on the basis of a presumed knowledge of the law, it requires that this death sentence be vacated.

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attainder; or any *ex post facto law.*" *Calder* v. *Bull,* 3 Dall. 386, 389. It is an important indication of the thought of the times that Mr. Justice Chase believed that the Clause did no more than state an inherent rule of government:

"This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. . . . The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them . . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." *Id.,* at 388–389 (italics omitted).

As applied to pre-*Furman* death penalty statutes, the Court's test is dramatically inadequate. The Court makes the assumption that the "existence on the statute books" of the pre-*Furman* statute provided "fair warning" to petitioner "of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." *Ante,* at 297, 298. On the contrary, capital punishment at the time of *Furman* had "for all practical purposes run its course." *Furman* v. *Georgia,* 408 U. S. 238, 313 (WHITE, J., concurring). The death penalty at that time was "freakishly imposed" and "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.,* at 310, 309 (STEWART, J., concurring). The possibility of such capricious punishment is not "fair warning," under any meaningful use of those words.

If the Court's rationale is applicable to all cases in which a State replaces an unconstitutional death penalty statute with a subsequent statute, it is dramatically at odds with the common understanding of the meaning of the Clause. That understanding was most plainly revealed by the nationwide response to this Court's invalidation of the death penalty in *Furman* v. *Georgia, supra.* Of the hundreds of prisoners on death row at the time of that decision, none was resentenced to death. Each of those persons, at the time of his offense, had precisely the same "fair warning" as this petitioner. But our state courts and state legislatures uniformly acted on the assumption that none of them could be executed pursuant to a subsequently enacted statute. Under the "fair warning" rationale the Court adopts today, there was, and is, no such constitutional barrier.

If I am correct that the *Ex Post Facto* Clause was intended as a barrier to capricious government action, today's holding is actually perverse. For when human life is at stake, the need to prevent capricious punishment is greatest, as our decisions in *Furman* and *Proffitt* establish. Cf. *Skinner* v. *Oklahoma ex*

rel. Williamson, 316 U. S. 535. Yet the Court's holding may lead to results which are intolerably arbitrary. For example, the trial in *Miller* v. *State,* 332 So. 2d 65 (Fla. 1976), was delayed by the defendant's incompetence to stand trial. By the time his capacity was restored, Florida had enacted its new death penalty statute. Had it not been for his fortuitous illness, defendant would have been tried promptly and escaped the death penalty. Because of a delay over which he had no control, the enactment of an *ex post facto* statute was held to entitle the State to put him to death. The capricious consequence is particularly grotesque because Miller may well have been advised before trial that this Court's decision in *Furman* had removed the possibility of a death sentence.[9]

Because a logical application of the Court's "fair warning" rationale would lead to such manifestly intolerable results,[10]

[9] A comment by Judge Learned Hand on the unfairness of extending a statute of limitations after it had run has even greater force if applied to this kind of situation:

"The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." *Falter* v. *United States,* 23 F. 2d 420, 425–426 (CA2 1928).

[10] Perhaps this is an area in which an example is worth more than argument. In *Grayned* v. *City of Rockford,* 408 U. S. 104, demonstrators were convicted under an ordinance which prohibited picketing within 150 feet of a school. This Court affirmed convictions under an anti-noise ordinance but reversed the convictions under the anti-picketing ordinance. The reason for reversal was that the ordinance exempted peaceful picketing of any school involved in a labor dispute; it was therefore held to be invalid because it was not neutral as to content. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92. But in the meantime, the ordinance had been amended in 1971 to delete the labor exemption, thus removing the First Amendment problem, 408 U. S., at 107 n. 2. As I understand today's decision, these demonstrators could now be convicted of violating the 1971 ordinance on the basis of their actions in 1969, since they were on fair notice that the State intended to prohibit their conduct. At least in *Grayned* there was no reason to think that the 1971 ordinance was

I assume that this case will ultimately be regarded as nothing more than an archaic gargoyle. It is nevertheless distressing to witness such a demeaning construction of a majestic bulwark in the framework of our Constitution.

I respectfully dissent.

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passed with retroactive application in mind—I am sure that before today no one would have considered such an application constitutional—but the potential for this kind of legislative (and prosecutorial) abuse is created by the Court's holding. It was precisely this potential that the Framers wished to avoid.

Indeed, the Court's holding today seems inconsistent with its holding in *Grayned*. For in *Grayned*, the Court agreed with a concession that the 1971 amendment " 'has, of course, no effect on Appellant's personal situation,' " and went on to say that "[n]essarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted." 408 U. S., at 107 n. 2. Under today's holding, it is difficult to see why the 1971 amendment could not simply have been applied *ex post facto* to cure the defect in the original statute.

THIRD NATIONAL BANK IN NASHVILLE *v.* IMPAC LIMITED, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 76–674. Argued April 26, 1977—Decided June 17, 1977

Title 12 U. S. C. § 91, which prohibits an "attachment, injunction, or execution" from being issued against a national bank or its property before final judgment in any state or local court, *held*, when read in context, merely to prevent prejudgment seizure of bank property by creditors and not to apply to a mortgagor-debtor's action seeking a preliminary injunction to protect its real property from wrongful foreclosure. The legislative history indicates that when the statute was originally enacted in 1873 it was aimed at preventing preferences by creditors. In the provision itself, the word "injunction" is sandwiched in between the words "attachment" and "execution," both of which are writs used by creditors to seize bank property, strongly implying that Congress intended only to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property. Moreover, no reason has been given for assuming that Congress intended to give national banks engaged in making real estate mortgage loans a privilege not available to competing lenders, it being especially unlikely that Congress intended to give national banks a license to inflict irreparable injury on others, free from the normal constraints of equitable relief. Pp. 318–324.

541 S. W. 2d 139, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 324.

Thomas P. Kanaday, Jr., argued the cause and filed briefs for petitioner.

Gail P. Pigg argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

A federal statute enacted in 1873 provides that certain

prejudgment writs shall not be issued against national banks by state courts.[1] The question presented by this case is whether that prohibition applies to a preliminary injunction restraining a national bank from holding a private foreclosure sale, pending adjudication of the mortgagor's claim that the loan is not in default. We conclude that the prohibition does not apply.

I

Only the essentials of the rather complex three-party transaction giving rise to this dispute need be stated. Respondents borrowed $700,000 from petitioner, a national bank, to finance the construction of an office building. The third party, a mortgage company, agreed to provide permanent financing to replace the bank loan upon completion of the building. The loan was secured by a deed of trust, which granted a first lien on respondents' property to the bank while the construction loan was outstanding. A dispute developed between respondents and the long-term lender over whether respondents had satisfied certain preconditions of the long-term loan. Petitioner contends that respondents are in default because of their failure to close the long-term loan. Respondents deny

[1] Title 12 U. S. C. § 91, entitled "Transfers by bank and other acts in contemplation of insolvency," now reads as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.*" (Emphasis added.)

that they are in default and contend that petitioner's remedy is against the long-term lender. On September 4, 1975, petitioner notified respondents that foreclosure proceedings would be commenced unless the loan, plus accrued interest and an extension fee, was paid in full in 10 days.

On September 23, 1975, petitioner published a notice of foreclosure. Under Tennessee practice, foreclosure of a deed of trust is not a judicial proceeding, but is routinely consummated by private sale unless restrained by judicial action initiated by the mortgagor. On September 26, 1975, respondents commenced this litigation by filing a sworn complaint in the Chancery Court of Davidson County, Tenn., seeking to restrain the foreclosure on the ground that the loan was not in default. The chancellor ordered the petitioner to show cause why an injunction should not issue.

Petitioner's answer set forth the basis for its claim of default, but did not question the court's power to restrain the foreclosure. Based on the pleadings, the exhibits, and extensive arguments of counsel, the chancellor found "the existence of issues which should be determined upon a full hearing of this cause and that [respondents] would suffer irreparable harm if the foreclosure occurred prior to such full hearing." App. 56. He therefore temporarily enjoined the foreclosure.

Two days later, petitioner filed a supplemental answer alleging that the state court lacked jurisdiction to enter a temporary injunction against a national bank. In due course, the chancellor concluded that 12 U. S. C. § 91 removed his jurisdiction to grant an injunction "prohibiting the foreclosure of property in which the bank has a security interest." App. 69. He therefore dissolved the preliminary injunction, granted an interlocutory appeal, and "stayed" the bank from foreclosure until the appeal to the Tennessee Supreme Court could be perfected.

The Tennessee Supreme Court reversed. 541 S. W. 2d 139 (1976). It concluded that the federal statute was intended "to

secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors and to protect national banks in general." *Id.*, at 141. It did not believe this purpose justified an application of the statute when "a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure sale by the bank." *Ibid.* The court acknowledged that the bank had a security interest in respondents' property, but did not believe that the statute was intended to give additional protection to an interest of that kind which was already amply protected.[2] One member of the court read the statute as absolutely forbidding the issuance of any temporary injunction against the national bank before judgment, and therefore reluctantly dissented from what he described as the majority's "just result." *Id.*, at 143. We granted certiorari to decide whether the Tennessee Supreme Court's construction of the statute is consistent with the congressional mandate. 429 U. S. 1037. We affirm.

The critical statutory language reads as follows:

> "[N]o attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." 12 U. S. C. § 91.

At least three different interpretations might be placed on that language. Most narrowly, because the rest of § 91 relates

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[2] "In the instant case, appellee is not using the statute as a shield to protect its assets, but is using it to preclude appellant from protecting its own property. True, appellee has a security interest of $700,000 in the property. However, the property is in the form of an office building allegedly worth in excess of $1,000,000 which cannot be sold, or assigned, or spirited away in the dark of the night so as to defeat appellee's security interest. The Chancellor predicated the temporary injunction (before it was dissolved) upon the condition that appellant continue to pay interest on the $700,000 at the contract rate until a final determination on the merits could be made. In short, appellee's security interest in appellant's property was completely protected." 541 S. W. 2d, at 142.

to insolvency, this language might be limited to cases in which a national bank is insolvent, or at least on the verge of insolvency. Secondly, regardless of the bank's financial circumstances, it might be construed to prohibit any prejudgment seizure of bank assets. Most broadly, it might be given a completely literal reading and applied not merely as a shield for the bank's assets but also as a prohibition against prejudgment orders protecting the assets of third parties, including debtors of the bank.

Although there is support for the narrowest reading in the history of the statute, both that reading and the broadest literal reading have been rejected by this Court's prior cases. Before discussing those cases, we shall review the available information about the origin and revisions of the statute.

II

The National Currency Act of 1864 authorized the formation of national banks.[3] Section 52 of that Act contained the first part of what is now 12 U. S. C. § 91. It prohibited any transfer of bank assets in contemplation of insolvency or with a view to preferring one creditor of the bank over another. The 1864 statute did not, however, include the prohibition against the issuance of prejudgment writs now found in 12 U. S. C. § 91.

That prohibition was enacted in 1873 as § 2 of "An Act to require national Banks to restore their Capital when impaired, and to amend the National-currency Act." 17 Stat. 603. If the prohibition had been added to § 52 of the 1864 Act,[4] the

[3] 13 Stat. 99, 100–101. The full title of the statute was "An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof," but subsequent amendments refer to it as the "National Currency Act." See 17 Stat. 603. The 1864 statute replaced the National Banking Act of 1863, 12 Stat. 665.

[4] The only difference would be that the provision on prejudgment writs would be preceded by the phrase "And provided further, That . . . ."

amended section would have been virtually identical with the present 12 U. S. C. § 91. It was, however, added to § 57 of the 1864 Act, which authorized suits against national banks in the state courts. Petitioner therefore infers that the amendment was intended to qualify the jurisdiction of state courts over national banks and that the amendment should be given its full, literal meaning.

There is no direct evidence of the reason for the amendment. It was passed without debate, Cong. Globe, 42d Cong., 3d Sess., 870, 2117–2118 (1873), and does not seem to have been recommended by the administration.[5] However, the historical context in which the bill was passed may offer some clue as to its purpose. We may take judicial notice of the historical fact that 1873 was the year of a financial panic. Moreover, a number of reported cases involved attachments against national banks and attempts by creditors to obtain a preference by attaching assets of an insolvent bank.[6]

When the first edition of the Revised Statutes of the United States was prepared in 1873, the prohibition against prejudgment writs was combined with the provision concerning preferential transfers and acts in contemplation of insolvency to

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[5] It was not mentioned in the Reports of the Comptroller of the Currency for 1872 or 1873.

[6] One, *First Nat. Bank of Selma* v. *Colby*, 46 Ala. 435 (1871), later reached this Court, 21 Wall. 609. See n. 8, *infra*. *Colby* was typical in that it involved an attempt by creditors to obtain a preference by attaching assets of an insolvent bank. This attempt was successful in the Alabama courts, and similar attempts had met with success in New York. See *Allen* v. *Scandinavian Nat. Bank*, 46 How. Pr. 71, 82–83 (Sup. Ct., General Term, 1873); *Bowen* v. *First Nat. Bank of Medina*, 34 How. Pr. 408 (Sup. Ct., General Term, 1867). See also *Cadle* v. *Tracy*, 4 F. Cas. 967 (No. 2,279) (SDNY 1873). Moreover, *Bowen* and another case, *Cooke* v. *State Nat. Bank of Boston*, 50 Barb. 339 (Sup. Ct., Special Term, 1867), raised the possibility that bank assets would be routinely attached by creditors. These cases allowed attachment on the basis that a national bank, wherever it does business, is by definition a "foreign corporation."

form § 5242, which is now 12 U. S. C. § 91.[7] Respondents argue that this revision placed the provision in the context which was originally intended.

For the past century the prohibition against prejudgment writs has remained in the preferential-transfer section.

III

This Court has construed this prohibition only three times.[8] In two cases, the Court held that assets of a national bank could not be attached; in the third, the Court held that property of a third party in the custody of the bank was subject to attachment by a creditor. None of the three involved a preliminary injunction.

Petitioner contends that the earliest of the three, *Pacific Nat. Bank* v. *Mixter,* 124 U. S. 721, "squarely controls" this case. Brief for Petitioner 13. Actually, however, the holding in *Mixter* was quite narrow. The question before the Court was "whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States," 124 U. S., at 724. Although the statutory prohibition was not directly applicable to federal suits, the federal courts were authorized to issue attachments only as provided by state law. The Court concluded:

> "In our opinion the effect of the act of Congress is to deny the state remedy altogether so far as suits against national banks are concerned, and in this way operates as

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[7] Section 5242 was included in c. IV entitled "Dissolution and Receivership." The legislative history is sketched in *Pacific Nat. Bank* v. *Mixter,* 124 U. S. 721, 724–726.

[8] *National Bank* v. *Colby,* 21 Wall. 609, was decided after the passage of the 1873 amendment, but the attachment had been issued before the amendment. The Court invalidated the attachment without relying on the amendment. It based its decision, instead, on the ban against preferential transfers and the paramount lien given the United States in the assets of insolvent national banks. *Id.,* at 613–614.

> well on the courts of the United States as on those of the States. Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances." *Id.*, at 727.[9]

The statement in *Mixter* that the remedy of attachment cannot be used against a national bank "under any circumstances" makes it clear that the statutory prohibition is applicable to solvent as well as insolvent national banks. The financial circumstances of the bank are not of controlling importance. That *Mixter* did so hold was settled by this Court's most recent decision concerning this statute, *Van Reed* v. *People's Nat. Bank,* 198 U. S. 554:

> "Since the rendition of that decision [*Mixter*] it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. It is argued by the plaintiff in error that

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[9] The Court then added:

"It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true. While the law as it stood previous to the act of July 12, 1882, 22 Stat. 163, c. 290, § 4, gave the proper state and federal courts concurrent jurisdiction in all ordinary suits against national banks, it was careful to provide that the jurisdiction of the federal courts should be exclusive when relief by attachment or injunction before judgment was sought." 124 U. S., at 727.

This was simply dictum, as no injunction was involved in *Mixter*. Moreover, in *Mixter* the Court was not presented with a situation in which the requested relief related to assets not belonging to the bank. The *Mixter* dictum is therefore not controlling now that "the very point is presented for decision." *Cohens* v. *Virginia,* 6 Wheat. 264, 399. See generally *Barrett* v. *United States,* 423 U. S. 212, 223.

the decision in the *Mixter case, supra,* should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that at the time when the attachment was issued the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks." *Id.,* at 559 (citations omitted).

Between *Mixter* and *Van Reed,* this Court rendered its only other decision in this area, *Earle* v. *Pennsylvania,* 178 U. S. 449. In that case, the Court held that an "attachment sued out against [a] bank as garnishee is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section." *Id.,* at 454 (emphasis omitted). The holding in *Earle* forecloses a completely literal reading of the statute.[10] It also demonstrates that the "under any circumstances" language in *Mixter* had reference to the financial condition of the bank, rather than to any possible case in which a prejudgment writ issues against a national bank.

Speaking for the Court in *Earle,* the first Mr. Justice Harlan stated that the ban on prejudgment writs must "be construed in connection with the previous parts of the same section" concerning preferential transfers. 178 U. S., at 453. This statement was consistent with the Court's earlier comment in *Mixter:*

"The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a

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[10] In support of its literal reading of the statute, petitioner relies heavily on Mr. Justice Holmes' opinion in *Freeman Mfg. Co.* v. *National Bank of the Republic,* 160 Mass. 398, 35 N. E. 865 (1894); but that opinion preceded *Earle,* in which this Court adopted a contrary approach.

> part of § 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section [concerning preferential transfers], and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank." 124 U. S., at 726.[11]

Thus, the statute can be given its full intended effect if it is applied to actions by creditors of the bank. As always, "[t]he meaning of particular phrases must be determined in context"; [12] read in context, the anti-injunction provision has only a limited scope.[13]

Petitioner argues, however, that the Court erred in *Earle* by reading the anti-attachment and preferential-transfer provisions together. It contends that the two were simply combined by mistake in the Revised Statutes. The burden is on petitioner, we think, to show that the present form of the statute—which, after all, constitutes the legal command of Congress—does not reflect congressional intent. If any mistake occurred, it seems at least as likely that the 1873

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[11] The Court went on to say that "however that may be," the provision as originally enacted in 1873 completely barred all prejudgment attachments, and "[t]he form of its reenactment in the Revised Statutes does not change its meaning *in this particular*." 124 U. S., at 726 (emphasis added). After *Earle*, this statement must be read to apply only to attachments against the bank's property.

[12] *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 466; see also *Haggar Co.* v. *Helvering*, 308 U. S. 389, 396.

[13] "The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under State authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by Congress are to control their own assets and resources, as against State interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment." *Planters Loan & Sav. Bank* v. *Berry*, 91 Ga. 264, 265, 18 S. E. 137 (1893).

amendment was incorrectly added to § 57 as that the revisers, that very year, made an error which has gone undetected for over a century.[14] But there are three stronger reasons for rejecting the argument.

First, the historical evidence supports the revisers. It appears likely that when originally passed the provision barring prejudgment writs actually was aimed at preventing preferences by creditors. As noted earlier, the threat of insolvency was a serious national problem in 1873, and there had been a number of cases just before in which state courts had allowed creditors to obtain preferences in this manner. There does not seem to have been any similar problem with actions by noncreditors. It seems improbable, for instance, that there were many actions by mortgagors to enjoin foreclosures by national banks, because at that time national banks were allowed to accept mortgages only in very limited circumstances.[15]

Second, the anti-injunction provision itself bears strong signs that it was meant to have a limited scope. It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.[16] The word "injunction" is sandwiched in between the words "attachment" and "execution." Both are writs used by creditors to seize bank property. On the other hand, the word "garnishment"

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[14] We do not imply that the original reference to § 57 was a typographical error. We merely suggest that the context in which the amendment was originally placed may not have accurately reflected the meaning its draftsmen intended.

[15] It was only much later that national banks were allowed to make loans secured by real estate mortgages. See *First Nat. Bank* v. *Anderson,* 269 U. S. 341, 353–354. National banks were, however, allowed to accept mortgages as "security for debts previously contracted." 13 Stat. 108.

[16] "One hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion." *United States* v. *Feola,* 420 U. S. 671, 708 (STEWART, J., dissenting).

is conspicuously absent from the list.[17] That writ is directed at the bank, but is used to seize property belonging to others which happens to be in the hands of the bank. The implication is strong that Congress intended only to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property.[18]

Third, petitioner completely fails to identify any national or local interests which its reading of the statute would serve. That reading would give national banks engaged in the business of making loans secured by mortgages on real estate a privilege unavailable to competing lenders. No reason has been advanced for assuming that Congress intended such disparate treatment. We cannot believe that Congress intended to give national banks a license to inflict irreparable injury on others, free from the normal constraints of equitable relief. It is true that Congress has consistently and effectively sought to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment. But those interests are fully vindicated by our construction of the Act.

Even though petitioner's reading of the Act can be supported by its text and by fragments of history, accepted principles of construction require that the provision in ques-

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[17] Moreover, the provision does not forbid other ways in which a state court might exercise *in rem* jurisdiction over the property of a debtor of the bank, such as a state receivership involving the debtor. Yet such state-court jurisdiction might prevent any other court from exercising *in rem* jurisdiction, as in a judicial proceeding by the bank to judicially foreclose its mortgage. See 1A J. Moore, Federal Practice ¶ 0.214 (2d ed. 1974).

[18] Such uses of injunctions before final judgment were not unknown at the time the statute was passed. For example, creditors were sometimes able to enjoin a transfer of a debtor's property which they alleged to be a fraud on creditors. See *Reubens* v. *Joel,* 13 N. Y. 488, 492 (1856) (describing New York statute).

tion be construed in its present context and given a rational reading. Fairly read, the statute merely prevents prejudgment seizure of bank property by creditors of the bank. It does not apply to an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure.

The judgment of the Supreme Court of Tennessee is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

I fear that the Court in this case is driven by sentimentality to reach for what it perceives to be a "just result." In so doing, in my view, it invades the domain of Congress.

The statute provides in unambiguous terms that "no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." 12 U. S. C. § 91. The Court today holds that the statute does not mean what it says: Debtors of a national bank may now obtain injunctions in a state court before final judgment. Perhaps the Court holds, as well, that the statute should apply only to protect banks that are insolvent or nearly so. See *ante*, at 317, 322. But see *ante*, at 315–316, 319, 321. Since the Court rides roughshod over the language of the statute, the legislative history, and a century of consistent interpretation by this Court and others, I cannot join either the Court's opinion or its judgment.

I

At its core, the opinion for the Court rests on a postulated connection between the provision barring prejudgment state writs and certain preceding language of § 91 relating to preferential transfers and acts in contemplation of bankruptcy. From the supposed connection, the Court justifies its

construction that the provision imposes a bar only on the creditors of the bank. Also from this postulated linkage flows the Court's somewhat ambiguous suggestion—one explicitly repudiated in the decided cases—that the statute is limited to the context of bank insolvency. The legislative history, however, is clear that the presence of the provision in a section dealing otherwise with bank insolvency is the result of the revisers' accident. No limitation such as the Court today constructs was ever intended by Congress, or, indeed, has ever before been imposed.

The provision at issue was originally enacted in 1873 as an amendment to § 57 of the National Currency Act of 1864. Section 57 originally read:

> "*And be it further enacted,* That suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however,* That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." 13 Stat. 116.

And the 1873 amendment to this section provided:

> "That section fifty-seven of said act be amended by adding thereto the following: '*And provided further,* That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any State, county, or municipal court.' " Act of Mar. 3, 1873, § 2, 17 Stat. 603.

Thus, as originally enacted by the Congress, the provision

had no connection whatsoever with the insolvency of national banks. It was sweeping in scope, barring all writs before final judgment in a state court. It is obvious that the statute in its original 1873 form would require reversal of the decision reviewed today.

As it happened, the amendment of 1873 was separated from the remainder of § 57 in a subsequent compilation of the federal statutes. At the hands of the revisers, the provision barring prejudgment writs found its current resting place as an addendum to what had been § 52 of the National Currency Act of 1864, a section dealing with preferential transfers. Rev. Stat. § 5242 (1874). The Court seizes upon the revisers' accidental reconstruction to limit the amendment's scope. It justifies its action by suggesting that Congress really intended to amend § 52 rather than § 57. The Court states: "If any mistake occurred, it seems at least as likely that the 1873 amendment was incorrectly added to § 57 as that the revisers, that very year, made an error which has gone undetected for over a century." *Ante,* at 321–322. Thus, the Court by sleight-of-hand transforms a simple clerical error into an error made by Congress in the original placement of the amendment. This attempt to refashion the legislative history will not stand scrutiny.

First, although Congress in 1873 could have amended either § 57 or § 52, there is ample internal evidence that the addition of the amendment of § 57 reflects its considered choice. There can be no question, as the Court seems to acknowledge, *ante,* at 322 n. 14, that the reference to § 57 in the 1873 amendment was not a typographical error. The amendment was in *"And provided further"* form; § 57, unlike § 52 of the 1864 statute, already contained one proviso and so the use of "further" was grammatically proper only with respect to § 57. And the broad reading that is compelled by the language of the amendment attaches logically to the other provisions of § 57. The body of § 57 established venue "in

any state, county, or municipal court . . . in which said association is located," and it was natural to place in the very same section any limitation on the power of those courts. Section 57 also contained a limitation on injunctions directed at the Comptroller of the Currency, and it therefore also was natural to place an amendment imposing a related restriction in the same section. In short, there is nothing to suggest that the amendment was placed by Congress in an unintended context.

Second, the Court's confidence in the reliability of the compilation is misplaced. It is hard to believe that the revisers, faced with the task of compiling for the first time the mass of congressional legislation from 1789 to 1873, could have performed the delicate task of determining what Congress "really" intended in adopting the 1873 amendment and of "correcting" its error. It is far more likely that the revisers' "placement" of the provision governing prejudgment writs was just one of the many errors that marred the first compilation. See M. Price & H. Bitner, Effective Legal Research 29 (3d ed. 1969); Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008, 1014 (1938). Indeed the portion of § 57 dealing with venue in state courts was totally omitted in the first edition of the Revised Statutes and was rescued by inclusion in the second edition at the end of a section dealing with usurious interest rates. Act of Feb. 18, 1875, 18 Stat. 320; Rev. Stat. § 5198 (1878). Just as the Court would not, and has not, construed the venue provision established in § 57 as limited to cases involving usurious interest rates,[1] so, too, it should not in good conscience construe the amendment to § 57 as limited to cases involving bank insolvency and preferential transfers.

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[1] *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148 (1976); *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558–562 (1963).

II

If any doubts remain as to the intended scope of the provision, they should be settled by a century of consistent interpretation by this Court and other courts. The Court first construed the statute in 1888 in *Pacific Nat. Bank* v. *Mixter,* 124 U. S. 721. The Court quotes the following sentence from that opinion, *ante,* at 320–321:

> "The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of § 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank." 124 U. S., at 726.

Since the Court confines its quotation to this solitary sentence, it is able to draw from *Mixter* the proposition that "the statute can be given its full intended effect if it is applied to actions by creditors of the bank." *Ante,* at 321. In its original context, however, the sentence was intended to explain how it happened that the revisers misplaced the amendment and that Congress acquiesced. The sentences immediately following the Court's carefully selected single-sentence quotation are:

> "But however that may be, it is clear to our minds that, as it stood originally as part of § 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. The form of its reenactment

> in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank." 124 U. S., at 726.

As this passage conclusively demonstrates, *Mixter* hardly provides the support the Court attempts to derive from it. And the revisers' error, far from remaining "undetected for over a century," as the Court states, *ante,* at 322, was exposed and overcome in the very first case in which the Court examined the statutory provision. The *Mixter* court gave the provision the broad scope that Congress intended.

The Court next considered the statute in *Earle* v. *Pennsylvania,* 178 U. S. 449 (1900). A national bank was holding a deposit of a customer who happened to be a defendant in an action that otherwise had no connection with the bank. The Court allowed the plaintiff in the action against the defendant-customer to attach the deposit, but only because "an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of [§ 5242]." *Id.,* at 454. The bank itself had no interest in the fund, and it was immaterial to it whether the deposit was considered the property of the plaintiff or of the defendant. The attachment thus was allowed because the bank was merely a stakeholder. *Earle* offers no suggestion of a distinction between debtors and creditors. In fact, the Court dissolved that portion of the attachment that ordered the sale, subject to the bank's interest, of certain securities the defendant had pledged to the

bank as collateral for a loan. *Id.*, at 455. It is apparent that, unlike the deposit, the bank had an interest in the collateral.

The most recent case, *Van Reed* v. *People's Nat. Bank*, 198 U. S. 554 (1905), is consistent with this unbroken theme. The Court quoted extensively from *Mixter*, and summarized that case's "authoritative construction of the statute" in simple and unambiguous terms: "[N]o attachment can issue from a state court before judgment against a national bank or its property." 198 U. S., at 559. The Court specifically held, in vivid contrast to the intimations of the Court's opinion today, that the provision was not limited to cases in which the solvency of the bank was threatened. *Ibid.*

Not surprisingly, in light of the consistent and expansive interpretation of the statutory provision established by this Court's cases, decisions of other courts are also consistent; they hold with near unanimity that all prejudgment writs issued by state courts and directed at the property of national banks cannot stand. See, *e. g.*, *Robinson* v. *First Nat. Bank of Plainview*, 45 F. 2d 613 (ND Tex. 1930), aff'd on other grounds, 55 F. 2d 209 (CA5 1932); *Garner* v. *Second Nat. Bank*, 66 F. 369 (CC SDNY 1895), appeal dismissed, 79 F. 995 (CA2 1896); *First Nat. Bank* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358, cert. denied, 385 U. S. 829 (1966); *National Bank of Savannah* v. *Craven*, 147 Ga. 753, 95 S. E. 246 (1918); *Meyer* v. *First Nat. Bank*, 10 Idaho 175, 77 P. 334 (1904); *Chesapeake Bank* v. *First Nat. Bank*, 40 Md. 269 (1874); *Freeman Mfg. Co.* v. *National Bank of the Republic*, 160 Mass. 398, 35 N. E. 865 (1894); [2] *First Nat. Bank* v. *La Due*, 39 Minn. 415, 40 N. W. 367 (1888).

[2] The Court suggests that Mr. Justice Holmes' opinion in *Freeman Mfg. Co.* is open to question because it preceded *Earle* and because *Earle* purportedly adopted a "contrary approach." *Ante*, at 320 n. 10. This Court's decision in *Van Reed*, however, which in turn succeeded *Earle*, cited *Freeman Mfg. Co.* with approval as a case that followed the "authoritative

In short, in over a century of the application of the statute by this Court and others, no distinction has been drawn between suits by debtors and suits by creditors, and no limitation to bank insolvency has been imposed. And, of course, Congress' continued acquiescence in this interpretation of the statute only reaffirms the correctness of the long-settled construction.

III

Even if the legislative history in the cases were less clear, I could not accept the distinction the Court today draws between applications for prejudgment writs by creditors and those by debtors. If the purpose of the provision is to protect the bank's property, no such distinction logically follows. Surely, it must be acknowledged that an injunction interfering with a bank's security interest in mortgaged property is as much an action against its assets as an attachment of its funds or property. And a debtor's injunction directed at a bank's security interest in a building is just as harmful as an attachment of bank property of comparable value by a creditor.[3]

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construction" of the statute. 198 U. S., at 559. And as to the "contrary approach" of *Earle,* I note that the *Van Reed* Court stated: "We find nothing in the case of *Earle* v. *Pennsylvania,* 178 U. S. 449, which qualifies the decision announced in the *Mixter case.*" 198 U. S., at 559.

[3] Thus the Court's first reason for its construction of the statute, *ante,* at 322—the protection of national banks from insolvency—in fact supports the application of the statute to bar prejudgment state-court writs by both creditors and debtors. The other justifications offered fare no better. The second reason, *ante,* at 322–323—the failure to include garnishment among the prohibited writs—is easily explained by the fact that the seizure of property in which the bank has no interest does not adversely affect it. See *Earle* v. *Pennsylvania,* 178 U. S. 449, 454 (1900). Thus the absence of mention of garnishment hardly justifies a construction that would allow interference with a bank's property by a debtor. The third reason, *ante,* at 323—the alleged absence of an interest supporting the natural reading of the statute—is also easily answered. The statute's obvious purpose

I suspect that the only justification for the Court's decision today is its belief that the statute is unfair in its application. It should be noted in that regard, however, that any unfairness can be traced at least as much to the Tennessee procedure governing foreclosure as to the federal provision barring prejudgment writs in state courts. For if Tennessee law required judicial approval for a foreclosure, any perceived need for the instant preliminary injunction would be eliminated. But even if any unfairness were attributed solely to the federal law, the decision whether to alter the statute remains with the Congress, not with this Court. Since I do not feel free to amend the statute, I respectfully dissent.

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of protecting the property of a national bank requires that interference with that property by all, both debtors and creditors, be treated alike.

Syllabus

HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* WASHINGTON STATE APPLE ADVERTISING COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 76–63. Argued February 22, 1977—Decided June 20, 1977

Appellee, a statutory agency for the promotion and protection of the Washington State apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments finance appellee's operations, brought this suit challenging the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by no grade on the containers other than the applicable federal grade or a designation that the apples are not graded. A three-judge District Court granted the requested injunctive and declaratory relief, holding that appellee had standing to challenge the statute, that the $10,000 jurisdictional amount of 28 U. S. C. § 1331 was satisfied, and that the challenged statute unconstitutionally discriminated against commerce insofar as it affected the interstate shipment of Washington apples. *Held:*

1. Appellee has standing to bring this action in a representational capacity. Pp. 341–345.

(a) An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Warth* v. *Seldin*, 422 U. S. 490. Pp. 342–343.

(b) The prerequisites to associational standing described in *Warth* are clearly present here: (1) At the risk of otherwise losing North Carolina accounts, some Washington apple growers and dealers had (at a per-container cost of 5¢ to 15¢) obliterated Washington State grades from the large volume of North Carolina-bound containers; and they had stopped using preprinted containers, thus diminishing the efficiency of their marketing operations; (2) appellee's attempt to remedy these injuries is central to its purpose of protecting and enhancing the Washington apple market; and (3) neither appellee's constitutional claim nor the relief requested requires individualized proof. Pp. 343–344.

(c) Though appellee is a state agency, it is not on that account precluded from asserting the claims of the State's apple growers and dealers since for all practical purposes appellee performs the functions of a traditional trade association. While the apple growers are not "members" of appellee in the traditional trade association sense, they possess all the indicia of organization membership (*viz.*, electing the members, being the only ones to serve on the Commission, and financing its activities), and it is of no consequence that membership assessments are mandatory. Pp. 344–345.

(d) Appellee's own interests may be adversely affected by the outcome of this litigation, since the annual assessments that are used to support its activities and which are tied to the production of Washington apples could be reduced if the market for those apples declines as a result of the North Carolina statute. P. 345.

2. The requirements of § 1331 are satisfied. Since appellee has standing to litigate its constituents' claims, it may rely on them to meet the requisite amount of $10,000 in controversy. And it does not appear "to a legal certainty" that the claims of at least some of the individual growers and dealers will not come to that amount in view of the substantial annual sales volume of Washington apples in North Carolina (over $2 million) and the continuing nature of the statute's interference with the Washington apple industry, coupled with the evidence in the record that growers and dealers have suffered and will continue to suffer losses of various types from the operation of the challenged statute. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283. Pp. 346–348.

3. The North Carolina statute violates the Commerce Clause by burdening and discriminating against the interstate sale of Washington apples. Pp. 348–354.

(a) The statute raises the costs of doing business in the North Carolina market for Washington growers and dealers while leaving unaffected their North Carolina counterparts, who were still free to market apples under the federal grade or none at all. Pp. 350–351.

(b) The statute strips the Washington apple industry of the competitive and economic advantages it has earned for itself by an expensive, stringent mandatory state inspection and grading system that exceeds federal requirements. By requiring Washington apples to be sold under the inferior grades of their federal counterparts, the North Carolina statute offers the North Carolina apple industry the very sort of protection against out-of-state competition that the Commerce Clause was designed to prohibit. Pp. 351–352.

(c) Even if the statute was not intended to be discriminatory and was enacted for the declared purpose of protecting consumers from deception and fraud because of the multiplicity of state grades, the statute does remarkably little to further that goal, at least with respect to Washington apples and grades, for it permits marketing of apples in closed containers under *no* grades at all and does nothing to purify the flow of information at the retail level. Moreover, Washington grades could not have led to the type of deception at which the statute was assertedly aimed, since those grades equal or surpass the comparable federal standards. Pp. 352–354.

(d) Nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. P. 354.

408 F. Supp. 857, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

John R. Jordan, Jr., argued the cause for appellants. With him on the brief were *Rufus L. Edmisten,* Attorney General of North Carolina, and *Millard R. Rich, Jr.,* Deputy Attorney General.

Slade Gorton, Attorney General of Washington, argued the cause for appellee. With him on the brief were *Edward B. Mackie,* Deputy Attorney General, and *James Arneil,* Special Assistant Attorney General.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, *inter alia,* all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U. S. grade or standard." N. C. Gen. Stat. § 106–189.1 (1973). In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce.

The specific questions presented on appeal are (a) whether the Commission had standing to bring this action; (b) if so, whether it satisfied the jurisdictional-amount requirement of 28 U. S. C. § 1331;[1] and (c) whether the challenged North Carolina statute constitutes an unconstitutional burden on interstate commerce.

(1)

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a significant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $1 million each year.

In addition to the inspection program, the state legislature has sought to enhance the market for Washington apples through the creation of a state agency, the Washington State Apple Advertising Commission, charged with the statutory

[1] Section 1331 provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . . ."

duty of promoting and protecting the State's apple industry. The Commission itself is composed of 13 Washington apple growers and dealers who are nominated and elected within electoral districts by their fellow growers and dealers. Wash. Rev. Code §§ 15.24.020, 15.24.030 (1974). Among its activities are the promotion of Washington apples in both domestic and foreign markets through advertising, market research and analysis, and public education, as well as scientific research into the uses, development, and improvement of apples. Its activities are financed entirely by assessments levied upon the apple industry, § 15.24.100; in the year during which this litigation began, these assessments totaled approximately $1.75 million. The assessments, while initially fixed by statute, can be increased only upon the majority vote of the apple growers themselves. § 15.24.090.

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or a notice indicating no classification. State grades were expressly prohibited.[2] In addition to its obvious consequence—prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed containers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety

[2] The North Carolina regulation, as amended, provides in pertinent part: "(6) Apple containers must show the applicable U. S. Grade on the principal display panel or marked 'Unclassified,' 'Not Graded,' or 'Grade Not Determined.' State grades shall not be shown." § 3–24.5 (6), Rules, Regulations, Definitions and Standards of the North Carolina Department of Agriculture.

and grade. It is the industry's practice to purchase these containers preprinted with the various apple varieties and grades, prior to harvest. After these containers are filled with apples of the appropriate type and grade, a substantial portion of them are placed in cold-storage warehouses where the grade labels identify the product and facilitate its handling. These apples are then shipped as needed throughout the year; after February 1 of each year, they constitute approximately two-thirds of all apples sold in fresh markets in this country. Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of the North Carolina market, *i. e.*, repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.

With these problems confronting the industry, the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted.

Indeed, North Carolina hardened its position shortly thereafter by enacting the regulation into law:

> "All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U. S. grade or standard or the marking 'unclassified,' 'not graded' or 'grade not determined.'" N. C. Gen. Stat. § 106–189.1 (1973).

Nonetheless, the Commission once again requested an exemption which would have permitted the Washington apple growers to display both the United States and the Washington State grades on their shipments to North Carolina. This request, too, was denied.

Unsuccessful in its attempts to secure administrative relief, the Commission [3] instituted this action challenging the constitutionality of the statute in the United States District Court for the Eastern District of North Carolina. Its complaint, which invoked the District Court's jurisdiction under 28 U. S. C. §§ 1331 and 1343, sought a declaration that the statute violated, *inter alia,* the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, insofar as it prohibited the display of Washington State grades, and prayed for a permanent injunction against its enforcement in this manner. A three-judge Federal District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284 to consider the Commission's constitutional attack on the statute.

After a hearing, the District Court granted the requested relief. 408 F. Supp. 857 (1976). At the outset, it held that the Commission had standing to challenge the statute both in its own right and on behalf of the Washington State growers and dealers, and that the $10,000 amount-in-controversy

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[3] Under Washington law, the Commission is a corporation and is specifically granted the power to sue and be sued. Wash. Rev. Code § 15.24.070 (8) (1974).

requirement of § 1331 had been satisfied.[4] 408 F. Supp., at 858. Proceeding to the merits, the District Court found that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts. *Id.*, at 860–861. This discrimination resulted from the fact that North Carolina, unlike Washington, had never established a grading and inspection system. Hence, the statute had no effect on the existing practices of North Carolina producers; they were still free to use the USDA grade or none at all. Washington growers and dealers, on the other hand, were forced to alter their long-established procedures, at substantial cost, or abandon the North Carolina market. The District Court then concluded that this discrimination against out-of-state competitors was not justified by the asserted local interest—the elimination of deception and confusion from the marketplace—arguably furthered by the statute. Indeed, it noted that the statute was "irrationally" drawn to accomplish that alleged goal since it permitted the marketing of closed containers of apples without any grade at all. *Id.*, at 861–862. The court therefore held that the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples,[5] and enjoined its application. This appeal followed and we postponed further consideration of the question of jurisdiction to the hearing of the case on the

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[4] In this regard, it adopted the ruling of the single District Judge who had previously denied appellants' motion to dismiss the complaint brought on the same grounds. App. 51–58. That judge had found it unnecessary to determine whether jurisdiction was also proper under 28 U. S. C. § 1343 in view of his determination that jurisdiction had been established under § 1331. App. 57 n. 2.

[5] As an alternative ground for its holding, the District Court found that the statute would have constituted an undue burden on commerce even if it had been neutral and nondiscriminatory in its impact. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). 408 F. Supp., at 862 n. 9.

merits *sub nom. Holshouser* v. *Washington State Apple Advertising Comm'n*, 429 U. S. 814 (1976).

(2)

In this Court, as before, the North Carolina officials vigorously contest the Washington Commission's standing to prosecute this action, either in its own right, or on behalf of that State's apple industry which it purports to represent. At the outset, appellants maintain that the Commission lacks the "personal stake" in the outcome of this litigation essential to its invocation of federal-court jurisdiction. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The Commission, they point out, is a state agency, not itself engaged in the production and sale of Washington apples or their shipment into North Carolina. Rather, its North Carolina activities are limited to the promotion of Washington apples in that market through advertising.[6] Appellants contend that the challenged statute has no impact on that activity since it prohibits only the display of state apple grades on closed containers of apples. Indeed, since the statute imposed no restrictions on the advertisement of Washington apples or grades other than the labeling ban, which affects only those parties actually engaged in the apple trade, the Commission is said to be free to carry on the same activities that it engaged in prior to the regulatory program. Appellants therefore argue that the Commission suffers no injury, economic or otherwise, from the statute's operation, and, as a result, cannot make out the "case or controversy" between itself and the appellants needed to establish standing in the constitutional sense. *E. g., Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 260–264 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975).

Moreover, appellants assert, the Commission cannot rely on

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[6] During 1974, the Commission spent in excess of $25,000 advertising Washington apples in the North Carolina market. *Id.*, at 859.

the injuries which the statute allegedly inflicts individually or collectively on Washington apple growers and dealers in order to confer standing on itself. Those growers and dealers, appellants argue, are under no disabilities which prevent them from coming forward to protect their own rights if they are, in fact, injured by the statute's operation. In any event, appellants contend that the Commission is not a proper representative of industry interests. Although this Court has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity, *e. g., Warth* v. *Seldin, supra,* at 511; *National Motor Freight Assn.* v. *United States,* 372 U. S. 246 (1963), the Commission is not a traditional voluntary membership organization such as a trade association, for it has no members at all. Thus, since the Commission has no members whose claims it might raise, and since it has suffered no "distinct and palpable injury" to itself, it can assert no more than an abstract concern for the well-being of the Washington apple industry as the basis for its standing. That type of interest, appellants argue, cannot "substitute for the concrete injury required by Art. III." *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U. S. 26, 40 (1976).

If the Commission were a voluntary membership organization—a typical trade association—its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court. In *Warth* v. *Seldin, supra,* we stated:

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and

> of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." 422 U. S., at 511.

See also *Simon* v. *Eastern Ky. Welfare Rights Org., supra,* at 39–40; *Meek* v. *Pittenger,* 421 U. S. 349, 355–356, n. 5 (1975); *Sierra Club* v. *Morton,* 405 U. S. 727, 739 (1972); *National Motor Freight Assn.* v. *United States, supra.* We went on in *Warth* to elaborate on the type of relief that an association could properly pursue on behalf of its members:

> "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." 422 U. S., at 515.

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The prerequisites to "associational standing" described in *Warth* are clearly present here. The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers and dealers (a) to obliterate Washington State grades from the

large volume of closed containers destined for the North Carolina market at a cost ranging from 5 to 15 cents per carton; (b) to abandon the use of preprinted containers, thus diminishing the efficiency of their marketing operations; or (c) to lose accounts in North Carolina. Such injuries are direct and sufficient to establish the requisite "case or controversy" between Washington apple producers and appellants. Moreover, the Commission's attempt to remedy these injuries and to secure the industry's right to publicize its grading system is central to the Commission's purpose of protecting and enhancing the market for Washington apples. Finally, neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.

The only question presented, therefore, is whether, on this record, the Commission's status as a state agency, rather than a traditional voluntary membership organization, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not. The Commission, while admittedly a state agency, for all practical purposes performs the functions of a traditional trade association representing the Washington apple industry. As previously noted, its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public education campaigns, and scientific research. It thus serves a specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.

Moreover, while the apple growers and dealers are not "members" of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit,

through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests. Nor do we find it significant in determining whether the Commission may properly represent its constituency that "membership" is "compelled" in the form of mandatory assessments. Membership in a union, or its equivalent, is often required. Likewise, membership in a bar association, which may also be an agency of the State, is often a prerequisite to the practice of law. Yet in neither instance would it be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.

Finally, we note that the interests of the Commission itself may be adversely affected by the outcome of this litigation. The annual assessments paid to the Commission are tied to the volume of apples grown and packaged as "Washington Apples." In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities. This financial nexus between the interests of the Commission and its constituents coalesces with the other factors noted above to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U. S., at 204; see also *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 459–460 (1958).

Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency. We therefore agree with the District Court that the Commission has standing to bring this action in a representational capacity.

(3)

We turn next to the appellants' claim that the Commission has failed to satisfy the $10,000 amount-in-controversy requirement of 28 U. S. C. § 1331. As to this, the appellants maintain that the Commission itself has not demonstrated that its right to be free of the restrictions imposed by the challenged statute is worth more than the requisite $10,000. Indeed, they argue that the Commission has made no real effort to do so, but has instead attempted to rely on the actual and threatened injury to the individual Washington apple growers and dealers upon whom the statute has a direct impact. This, they claim, it cannot do, for those growers and dealers are not parties to this litigation. Alternatively, appellants argue that even if the Commission can properly rely on the claims of the individual growers and dealers, it cannot establish the required jurisdictional amount without aggregating those claims. Such aggregation, they argue, is impermissible under this Court's decisions in *Snyder* v. *Harris,* 394 U. S. 332 (1969), and *Zahn* v. *International Paper Co.,* 414 U. S. 291 (1973).

Our determination that the Commission has standing to assert the rights of the individual growers and dealers in a representational capacity disposes of the appellants' first contention. Obviously, if the Commission has standing to litigate the claims of its constituents, it may also rely on them to meet the requisite amount in controversy. Hence, we proceed to the question of whether those claims were sufficient to confer subject-matter jurisdiction on the District Court. In resolving this issue, we have found it unnecessary to reach the aggregation question posed by the appellants for it does not appear to us "to a legal certainty" that the claims of at least some of the individual growers and dealers will not amount to the required $10,000. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 288–289 (1938).

In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. *E. g., McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 181 (1936); *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.,* 239 U. S. 121, 126 (1915); *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 336 (1907); 1 J. Moore, Federal Practice ¶¶ 0.95, 0.96 (2d ed. 1975); C. Wright, A Miller, & E. Cooper, Federal Practice & Procedure § 3708 (1976). Here, that object is the right of the individual Washington apple growers and dealers to conduct their business affairs in the North Carolina market free from the interference of the challenged statute. The value of that right is measured by the losses that will follow from the statute's enforcement. *McNutt, supra,* at 181; *Buck* v. *Gallagher,* 307 U. S. 95, 100 (1939); *Kroger Grocery & Baking Co.* v. *Lutz,* 299 U. S. 300, 301 (1936); *Packard* v. *Banton,* 264 U. S. 140, 142 (1924).

Here the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers and shippers lost accounts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that individual growers and dealers incurred substantial costs in complying with the statute. As previously noted, the statute caused some growers and dealers to manually obliterate the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton. Other dealers decided to alter their marketing practices, not without cost, by repacking apples or abandoning the use of preprinted containers entirely, among other things. Such costs of compliance are properly considered in computing the amount in controversy. *Buck* v. *Gallagher, supra; Packard* v. *Banton, supra; Allway Taxi, Inc.* v. *New York,* 340 F. Supp. 1120

(SDNY), aff'd, 468 F. 2d 624 (CA2 1972). In addition, the statute deprived the growers and dealers of their rights to utilize most effectively the Washington State grades which, the record demonstrates, were of long standing and had gained wide acceptance in the trade. The competitive advantages thus lost could not be regained without incurring additional costs in the form of advertising, etc. Cf. *Spock* v. *David,* 502 F. 2d 953, 956 (CA3 1974), rev'd on other grounds, 424 U. S. 828 (1976). Moreover, since many apples eventually shipped to North Carolina will have already gone through the expensive inspection and grading procedure, the challenged statute will have the additional effect of causing growers and dealers to incur inspection costs unnecessarily.

Both the substantial volume of sales in North Carolina—the record demonstrates that in 1974 alone, such sales were in excess of $2 million [7]—and the continuing nature of the statute's interference with the business affairs of the Commission's constituents, preclude our saying "to a legal certainty," on this record, that such losses and expenses will not, over time, if they have not done so already, amount to the requisite $10,000 for at least some of the individual growers and dealers. That is sufficient to sustain the District Court's jurisdiction. The requirements of § 1331 are therefore met.

(4)

We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its

[7] In addition, apples worth approximately 30 to 40 percent of that amount were transshipped into North Carolina in 1974 after direct shipment to apple brokers and wholesalers located in other States.

costs of doing business in the North Carolina market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute's enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading systems which, while differing in their standards, used similar descriptive labels (*e. g.*, fancy, extra fancy, etc.). This multiplicity of inconsistent state grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Moreover, it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. Nonetheless, appellants argue that the District Court gave "scant attention" to the obvious benefits flowing from the challenged legislation and to the long line of decisions from this Court holding that the States possess "broad powers" to protect local purchasers from fraud and deception in the marketing of foodstuffs. *E. g., Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132 (1963); *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176 (1935); *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427 (1919).

As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. *E. g., Great Atlantic & Pacific Tea Co.*

v. *Cottrell,* 424 U. S. 366, 371 (1976); *Freeman* v. *Hewit,* 329 U. S. 249, 252 (1946). Although the Commerce Clause acts as a limitation upon state power even without congressional implementation, *e. g., Great Atlantic & Pacific Tea Co., supra,* at 370–371; *Freeman* v. *Hewit, supra,* at 252; *Cooley* v. *Board of Wardens,* 12 How. 299 (1852), our opinions have long recognized that,

> "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U. S. 761, 767 (1945).

Moreover, as appellants correctly note, that "residuum" is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. *Florida Lime & Avocado Growers, Inc., supra,* at 146. By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354 (1951). Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests. *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970); *Great Atlantic & Pacific Tea Co., supra,* at 370–372. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most

obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA, system because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at

work, Washington sellers would normally enjoy a distinct market advantage vis-à-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed* . . . ." App. 21 (emphasis added). Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the

display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Dean Milk Co.* v. *Madison,* 340 U. S., at 354. See also *Great Atlantic & Pacific Tea Co.,* 424 U. S., at 373; *Pike* v. *Bruce Church, Inc.,* 397 U. S., at 142; *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S. 361, 375 n. 9 (1964); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 524 (1935). North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under *no* grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any poten-

tial for confusion and deception created by the Washington grades [8] was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only "deceive" or "confuse" a consumer to his benefit, hardly a harmful result.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated.[9]

The judgment of the District Court is

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of the case.

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[8] Indeed, the District Court specifically indicated in its findings of fact that there had been no showing that the Washington State grades had caused any confusion in the North Carolina market. 408 F. Supp., at 859.

[9] Our conclusion in this regard necessarily rejects North Carolina's suggestion that the burdens on commerce imposed by the statute are justified on the ground that the standardization required by the statute serves the national interest in achieving uniformity in the grading and labeling of foodstuffs.

Syllabus

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

No. 76–99. Argued April 20, 1977—Decided June 20, 1977

About three years after an employee of petitioner company had first complained to the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 that petitioner had discriminated against her because of her sex, and five months after conciliation efforts by the EEOC had failed, the EEOC brought this enforcement action in the District Court for the Central District of California. The court granted petitioner's motion for summary judgment on the ground that the enforcement action was time barred by § 706 (f)(1) of the Act, since the action had not been brought within 180 days of either the formal filing of the charge with the EEOC or the effective date of the Equal Employment Opportunity Act of 1972. Alternatively, the court held that the action was subject to and barred by the California one-year statute of limitations. The Court of Appeals reversed. Section 706 (f)(1) provides in relevant part: "If a charge filed with the Commission . . . is dismissed by the Commission, or within one hundred and eighty days from the filing of such charge or the expiration of any period of reference [from a state agency], whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." *Held:*

1. Section 706 (f)(1) imposes no limitation upon the EEOC's power to file suit in federal court. The provision's language and legislative history show that it was intended to enable an aggrieved person unwilling to await the conclusion of extended EEOC proceedings to institute a private lawsuit 180 days after a charge has been filed. Pp. 358–366.

2. EEOC enforcement actions are not subject to state statutes of limitations. Pp. 366–372.

(a) Though a congressional intent to apply a local limitations period has been inferred in instances where a federal statute creating a cause of action fails to specify such a period, state limitations periods will not be borrowed if their application would not comport with the federal statute's underlying policies. P. 367.

(b) Under the procedural structure created by amendments to the Act in 1972, when EEOC was created and given enforcement powers in lieu of the previous voluntary-compliance scheme, EEOC does not function as a vehicle for conducting litigation on behalf of private parties but is charged with investigating employment discrimination claims and settling them by informal conciliation if possible, and it is required to refrain from suing until it has discharged its administrative responsibilities. Application of a State's limitation period would not thus further the federal policy, and the one-year California bar applied by the District Court could under some circumstances conflict with that policy. Pp. 367–369.

(c) Congress was well aware of the enormous backlog of EEOC cases but the concern expressed for the fair operation of the Act focused on the filing of the initial charge with the EEOC rather than on later limitations on EEOC's power to sue. Pp. 369–372.

3. The courts do not lack discretionary remedial power if, despite procedural protections accorded a Title VII defendant under the Act, EEOC delay in bringing suit, after conciliation efforts have failed, significantly handicaps the defense. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424–425. Pp. 372–373.

535 F. 2d 533, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion dissenting in part, in which BURGER, C. J., joined, *post*, p. 373.

Dennis H. Vaughn argued the cause for petitioner. With him on the briefs were *Leonard S. Janofsky* and *Howard C. Hay.*

Thomas S. Martin argued the cause for respondent. With him on the brief were *Acting Solicitor General Friedman,*

Deputy Solicitor General Jones, Abner W. Sibal, Joseph T. Eddins, and *Beatrice Rosenberg.**

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 so as to empower the Equal Employment Opportunity Commission to bring suit in a federal district court against a private employer alleged to have violated the Act. The sole question presented by this case is what time limitation, if any, is imposed on the EEOC's power to bring such a suit.

I

On December 27, 1970, an employee of the petitioner Occidental Life Insurance Co. filed a charge with the EEOC claiming that the company had discriminated against her because of her sex.[1] After a fruitless referral to the appropriate state agency, the charge was formally filed with the EEOC on March 9, 1971,[2] and subsequently served on the company. After investigation, the EEOC served proposed findings of fact on the company on February 25, 1972, to which the company in due course filed exceptions. Conciliation discussions between the EEOC and the company began in the summer of 1972. These discussions continued sporadically into 1973, but on September 13 of that year the EEOC determined that conciliation efforts had failed and so

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**Wayne S. Bishop* and *John J. Gallagher* filed a brief for the Texas Association of Business as *amicus curiae* urging reversal.

Robert T. Thompson, Lawrence Kraus, and *Richard P. O'Brecht* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

[1] The charge specified that the most recent act of discrimination was on October 1, 1970.

[2] Civil Rights Act of 1964, §§ 706 (b), (d), 78 Stat. 259, 42 U. S. C. §§ 2000e–5 (b), (d); *Love* v. *Pullman Co.,* 404 U. S. 522.

notified the company and the original complainant. The latter requested that the case be referred to the General Counsel of the EEOC to bring an enforcement action. On February 22, 1974, approximately three years and two months after the complainant first communicated with the EEOC and five months after conciliation efforts had failed, the EEOC brought this enforcement action in a Federal District Court.

The District Court granted the company's motion for summary judgment on the ground that the law requires that an enforcement action be brought within 180 days of the filing of a charge with the EEOC.[3] Alternatively, the court held that the action was subject to the most appropriate state limitations statute and was therefore barred by the one-year limitation provision of Cal. Code Civ. Proc. Ann. § 340 (3) (West Supp. 1977).[4] The Court of Appeals for the Ninth Circuit reversed, holding that the federal law does not impose a 180-day limitation on the EEOC's authority to sue and that the action is not governed by any state statute of limitations. 535 F. 2d 533.

We granted certiorari, 429 U. S. 1022, to consider an important and recurring question regarding Title VII.

II

As enacted in 1964, Title VII limited the EEOC's function to investigation of employment discrimination charges and informal methods of conciliation and persuasion.[5] The failure

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[3] The 1972 amendments to Title VII were made applicable "with respect to charges pending with the Commission on the date of enactment." § 14, 86 Stat. 113. The District Court also held that EEOC enforcement suits, such as this one, based on charges within the coverage of § 14 must be brought within 180 days of March 24, 1972, the effective date of the amendments.

[4] The District Court's decision is reported in 12 FEP Cases 1298.

[5] Civil Rights Act of 1964, § 706 (a), 78 Stat. 259, 42 U. S. C. § 2000e–5 (a).

of conciliation efforts terminated the involvement of the EEOC. Enforcement could then be achieved, if at all, only if the charging party, or other person aggrieved by the allegedly unlawful practice, initiated a private suit within 30 days after EEOC notification that conciliation had not been successful.[6]

In the Equal Employment Opportunity Act of 1972[7] Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing.[8] The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge."[9] If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[10] When "the Commission [is] unable to secure . . . a

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[6] § 706 (e), 42 U. S. C. § 2000e–5 (e).

[7] 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. V), amending Civil Rights Act of 1964, 78 Stat. 253. All subsequent citations to Title VII in this opinion are to the 1964 Act as amended.

[8] § 706 (e), 42 U. S. C. § 2000e–5 (e) (1970 ed., Supp. V). If a charge has been initially filed with or referred to a state or local agency, it must be filed with the EEOC within 300 days after the practice occurred or within 30 days after notice that the state or local agency has terminated its proceeding, whichever is earlier. *Ibid.*

[9] § 706 (b), 42 U. S. C. § 2000e–5 (b) (1970 ed., Supp. V).

[10] *Ibid.*

conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge." [11]

The 1972 Act expressly imposes only one temporal restriction on the EEOC's authority to embark upon the final stage of enforcement—the bringing of a civil suit in a federal district court: Under § 706 (f)(1), the EEOC may not invoke the judicial power to compel compliance with Title VII until at least 30 days after a charge has been filed. But neither § 706 (f) nor any other section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time.

The language of the Act upon which the District Court relied in finding a limitation that bars the bringing of a lawsuit by the EEOC more than 180 days after a timely charge has been filed with it is found in § 706 (f)(1), 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V), which provides in relevant part:

> "If a charge filed with the Commission . . . is dismissed by the Commission, or within one hundred and eighty days from the filing of such charge or the expiration of any period of reference [from a state agency], whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was

[11] § 706 (f)(1), 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V). In the case of a government, governmental agency, or political subdivision, the EEOC is required, upon failure of conciliation, to refer the case to the Attorney General who may then bring a civil action. *Ibid.*

filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

On its face, § 706 (f)(1) provides little support for the argument that the 180-day provision is such a statute of limitations. Rather than limiting action by the EEOC, the provision seems clearly addressed to an alternative enforcement procedure: If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court. The 180-day limitation provides only that this private right of action does not arise until 180 days after a charge has been filed. Nothing in § 706 (f)(1) indicates that EEOC enforcement powers cease if the complainant decides to leave the case in the hands of the EEOC rather than to pursue a private action.

In short, the literal language of § 706 (f)(1) simply cannot support a determination that it imposes a 180-day time limitation on EEOC enforcement suits. On the contrary, a natural reading of § 706 (f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so. After waiting for that period, the complainant may either file a private action within 90 days after EEOC notification or continue to leave the ultimate resolution of his charge to the efforts of the EEOC.

Only if the legislative history of § 706 (f)(1) provided firm evidence that the subsection cannot mean what it so clearly seems to say would there be any justification for construing it in any other way. But no such evidence is to be found.

The dominant Title VII battle in the 92d Congress was over what kind of additional enforcement powers should be granted to the EEOC. Proponents of increased EEOC power

constituted a substantial majority in both Houses of Congress, but they were divided between those Members who favored giving the EEOC power to issue cease-and-desist orders and those who advocated authorizing it to bring suits in the federal district courts.

The supporters of cease-and-desist authority won the first victory when Committees in both Houses favorably reported bills providing for that enforcement technique. The bill reported by the House Committee contained a section entitled "Civil Actions by Persons Aggrieved," embodying the provisions that eventually became that part of § 706 (f)(1) at issue in the present case.[12]

The Committee Report clearly explained that the purpose of this provision was to afford an aggrieved person the option of withdrawing his case from the EEOC if he was dissatisfied with the rate at which his charge was being processed:

> "In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years

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[12] The section in the House Committee bill provided, in relevant part:

"If (1) the Commission determines that there is no reasonable cause to believe the charge is true and dismisses the charge . . . , (2) finds no probable jurisdiction and dismisses the charge, or (3) within one hundred and eighty days after a charge is filed with the Commission . . . , the Commission has not either (i) issued a complaint . . . , (ii) determined that there is not reasonable cause to believe that the charge is true and dismissed the charge, . . . or (iii) entered into a conciliation agreement . . . , the Commission shall so notify the person aggrieved and within sixty days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved . . . . Upon timely application, the court may, in its discretion, permit the Commission to intervene in such civil action if it certifies that the case is of general public importance. Upon the commencement of such civil action, the Commission shall be divested of jurisdiction over the proceeding and shall take no further action with respect thereof [*sic*] . . . ." H. R. 1746, 92d Cong., 1st Sess., § 8 (j) (1971), reprinted in H. R. Rep. No. 92–238, pp. 54–55 (1971).

> before final conciliation procedures can be instituted. This situation leads the committee to believe that the private right of action, both under the present Act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process." [13]

Opponents of cease-and-desist authority carried their cause to the floor of the House, where Congressmen Erlenborn and Mazzoli introduced a substitute bill, which authorized the EEOC when conciliation failed to file federal-court actions rather than conduct its own hearings and issue cease-and-desist orders. The Erlenborn-Mazzoli substitute contained a private action provision substantially the same as that of the Committee bill.[14] There was no suggestion in the House debates that that section in the substitute bill was intended to be a statute of limitations on EEOC enforcement action, or that the purpose of the provision differed in any way from that expressed in the Committee Report. The Erlenborn-Mazzoli substitute was adopted by the House.

Senate action on amendments to Title VII was essentially parallel to that of the House, beginning with the introduction of a bill giving the EEOC cease-and-desist power, and ending with the substitution of a bill authorizing it instead to file suits in the federal courts. As in the House, both the original and substitute Senate bills authorized complainants dissatisfied with the pace of EEOC proceedings to bring individual lawsuits after 180 days.[15] And, as in the House, the Senate Committee explained that such a provision was necessary

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[13] *Id.*, at 12.

[14] H. R. 9247, 92d Cong., 1st Sess., § 3 (c) (1971).

[15] S. 2515, 92d Cong., 1st Sess., § 4 (a) (1971); S. 2617, 92d Cong., 1st Sess., § 3 (c) (1971).

because the heavy caseload of the EEOC could result in delays unacceptable to aggrieved persons:

> "As it indicated in testimony, [the EEOC's] caseload has increased at a rate which surpasses its own projections. The result has been increasing backlogs in making determinations, and the possibility of occasional hasty decisions, made under the press of time, which have unfairly prejudiced complaints. Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission." [16]

The Senate Committee further noted that the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy," and that the purpose of the 180-day provision was to preserve "the private right of action by an aggrieved person." [17]

Senator Dominick led the opposition to the Committee bill on the floor of the Senate. His substitute bill did not give the EEOC power to issue cease-and-desist orders but authorized it instead to bring enforcement suits in federal courts. The substitute bill also contained a provision authorizing private lawsuits almost identical to that contained in the Committee bill. There ensued a month-long Senate debate, at the conclusion of which the substitute bill was adopted by the Senate. During the course of that debate there were only a few isolated and ambiguous references to the provision in the substitute bill authorizing federal suits by complainants dissatisfied with EEOC delay.[18] But a section-by-section

[16] S. Rep. No. 92–415, p. 23 (1971).

[17] *Id.*, at 24, 40.

[18] At one point in the debates Senator Javits, a sponsor of the Committee bill, sought to amend the substitute bill to clarify the relationship

analysis of the substitute bill made available before the final vote in the Senate clearly explained the purpose of the 180-day provision:

> "In providing this provision, it is intended that . . . the person aggrieved should [not] have to endure lengthy delays if the agency does not act with due diligence and speed. Accordingly, the provisions . . . would allow the person aggrieved to elect to pursue his or her own remedy in the courts where agency action does not prove satisfactory." [19]

After the final Senate vote the House and Senate bills were sent to a Conference Committee. An analysis presented to the Senate with the Conference Report provides the final and conclusive confirmation of the meaning of § 706 (f)(1):

> "The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person

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between EEOC and private lawsuits, by providing that "if within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission *shall* bring a civil action . . . ." Senator Dominick objected to the substitution of the word "shall" for "may" and suggested that "in the interest of flexibility in the Commission's schedule, and in the interest of flexibility in working something out through voluntary compliance, it would be far better to put in the word 'may.'" In the exchange that followed, both Senators manifested their understanding that the 180-day provision in the Dominick amendment served the same purpose as the analogous provision in the Committee bill. 118 Cong. Rec. 1068–1069 (1972). Senator Javits later agreed to the use of the word "may," and Senator Dominick responded as follows:

"I think this change is very meritorious, as I pointed out in my first statement. I do not think the Commission should be mandated on what date an agency should bring suit when we are trying to work out matters the best we can by conciliation." *Id.*, at 1069.

[19] *Id.*, at 4942.

aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.

"It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief." [20]

The legislative history of § 706 (f)(1) thus demonstrates that the provision was intended to mean exactly what it seems to say: An aggrieved person unwilling to await the conclusion of extended EEOC proceedings may institute a private lawsuit 180 days after a charge has been filed. The subsection imposes no limitation upon the power of the EEOC to file suit in a federal court.[21]

III

The company argues that if the Act contains no limitation on the time during which an EEOC enforcement suit may be brought, then the most analogous state statute of limitations should be applied.[22] Relying on a long line of cases in this

[20] *Id.*, at 7168; see *id.*, at 7565.

[21] In addition to the Court of Appeals for the Ninth Circuit in the present case, six other Courts of Appeals have reached this conclusion. *EEOC* v. *E. I. du Pont de Nemours & Co.*, 516 F. 2d 1297 (CA3); *EEOC* v. *Cleveland Mills Co.*, 502 F. 2d 153 (CA4); *EEOC* v. *Louisville & Nashville R. Co.*, 505 F. 2d 610 (CA5); *EEOC* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352 (CA6); *EEOC* v. *Meyer Bros. Drug Co.*, 521 F. 2d 1364 (CA8); *EEOC* v. *Duval Corp.*, 528 F. 2d 945 (CA10).

[22] The two Courts of Appeals that have considered this question have reached differing conclusions. *EEOC* v. *Kimberly-Clark Corp.*, *supra*, at 1359–1360 (state limitations not applicable); *EEOC* v. *Griffin Wheel Co.*, 511 F. 2d 456 (CA5) (state limitations applicable to backpay suits only).

Court holding state limitations periods applicable to actions brought under federal statutes, the company contends that California law barred the EEOC from bringing this lawsuit.

When Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local time limitation should apply. *E. g., Runyon* v. *McCrary,* 427 U. S. 160, 179–182 (Civil Rights Act of 1866); *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696 (§ 301 of the Labor Management Relations Act); *O'Sullivan* v. *Felix,* 233 U. S. 318 (Civil Rights Act of 1871); *Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U. S. 390 (Sherman Antitrust Act); *Campbell* v. *Haverhill,* 155 U. S. 610 (Patent Act). This "implied absorption of State statutes of limitation within the interstices of . . . federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination." *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395.

But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 465. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute. *Ibid.; Auto Workers* v. *Hoosier Cardinal Corp., supra,* at 701; *Board of County Comm'rs* v. *United States,* 308 U. S. 343, 352. With these considerations in mind, we turn to the company's argument in this case.

When Congress first enacted Title VII in 1964 it selected "[c]ooperation and voluntary compliance . . . as the pre-

ferred means for achieving" the goal of equality of employment opportunities. *Alexander* v. *Gardner Denver Co.*, 415 U. S. 36, 44. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Ibid.* Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act. Thus, under the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.

In view of the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court, it is hardly appropriate to rely on the "State's wisdom in setting a limit . . . on the prosecution . . . ." *Johnson* v. *Railway Express Agency, supra,* at 464. For the "State's wisdom" in establishing a general limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities. See *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 348; *Cope* v. *Anderson,* 331 U. S. 461, 464; *Rawlings* v. *Ray,* 312 U. S. 96, 98. Indeed, the one-year statute of limitations applied by the District Court in this case could

under some circumstances directly conflict with the timetable for administrative action expressly established in the 1972 Act.[23]

But even in cases involving no inevitable and direct conflict with the express time periods provided in the Act, absorption of state limitations would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments. Throughout the congressional debates many Members of both Houses demonstrated an acute awareness of the enormous backlog of cases before the EEOC [24] and the consequent delays of 18 to 24 months encountered by aggrieved persons awaiting administrative action on their complaints.[25]

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[23] Since California has created a state agency with authority to provide a remedy for employment discrimination, Cal. Labor Code Ann. §§ 1410–1433 (West 1971), an aggrieved party in that State may file a charge with the EEOC as long as 300 days after the allegedly unlawful act. See n. 8, *supra*. Under § 706 (b) the EEOC may then take at least 120 days to investigate the charge and make its determination of reasonable cause. Thus, even if the aggrieved party and the EEOC act within the 420-day period expressly authorized by the Act, the California limitations period applied by the District Court would expire before the EEOC had an opportunity to begin any conciliation efforts, let alone bring a lawsuit.

[24] In his testimony before the House Committee, William Brown III, Chairman of the EEOC, stated that as of February 20, 1971, there was a backlog of 25,195 pending charges. Equal Employment Opportunities Enforcement Procedures, Hearings on H. R. 1746 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess., 81 (1971). By the time Chairman Brown testified before the Senate Committee, the backlog had increased to nearly 32,000 cases and further increases were expected. Equal Employment Opportunity Enforcement Act of 1971, Hearings on S. 2515, S. 2617, H. R. 1746, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., 71 (1971).

[25] See, *e. g.*, 117 Cong. Rec. 31959 (1971) (remarks of Rep. Martin); *id.*, at 31972 (remarks of Rep. Erlenborn); 118 Cong. Rec. 594–595 (1972) (remarks of Sen. Dominick); *id.*, at 699–700 (remarks of Sen. Fannin); *id.*, at 944 (remarks of Sens. Talmadge and Chiles); *id.*, at 2386 (remarks of Sen. Allen); *id.*, at 3136–3137 (remarks of Sens. Gurney and Allen);

Nevertheless, Congress substantially increased the workload of the EEOC by extending the coverage of Title VII to state employers, private employers with as few as 15 employees, and nonreligious educational institutions; [26] by transferring the authority to bring pattern-or-practice suits from the Attorney General to the Commission; [27] and by authorizing the Commission to bring civil actions in the federal courts.[28] It would hardly be reasonable to suppose that a Congress aware of the severe time problems already facing the EEOC would grant that agency substantial additional enforcement responsibilities and at the same time consign its federal lawsuits to the

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id., at 3969–3973 (remarks of Sens. Javits, Cooper, Dominick, Williams, and Allen).

The company contends that the numerous references in the debates to the EEOC's backlog and delays demonstrate that by adopting the court enforcement plan Congress intended to restrict the time allowed for investigation and conciliation of a charge. Nearly all of the references, however, were in the context of discussions of whether enforcement after conciliation efforts had failed could be accomplished more expeditiously through an administrative process or through lawsuits in the federal courts. The concern, therefore, was with the additional delays that complainants would suffer if the EEOC were given the task of conducting its own hearings and issuing cease-and-desist orders. Congressional concern over delays during the investigation and conciliation process was resolved by providing complainants with the continuing opportunity to withdraw their cases from the EEOC and bring private suits. See Part II, *supra*.

[26] §§ 701 (a), (b), 702, 42 U. S. C. §§ 2000e (a), (b), 2000e–1 (1970 ed., Supp. V). The number of state and local governmental employees who would be brought under the jurisdiction of the EEOC was estimated to be more than 10 million. 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins); 118 Cong. Rec. 699 (1972) (remarks of Sen. Fannin). The elimination of the exemption for nonreligious educational institutions added an estimated 4.3 million employees. *Id.*, at 4931 (remarks of Sen. Cranston).

[27] § 707 (c), 42 U. S. C. § 2000e–6 (c) (1970 ed., Supp. V).

[28] § 706 (f)(1), 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V).

vagaries of diverse state limitations statutes, some as short as one year.

Congress did express concern for the need of time limitations in the fair operation of the Act, but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator. The bills passed in both the House and the Senate contained short time periods within which charges were to be filed with the EEOC and notice given to the employer.[29] And the debates and reports in both Houses made evident that the statute of limitations problem was perceived in terms of these provisions, rather than in terms of a later limitation on the EEOC's power to sue.[30] That perception was reflected in the final version of the 1972 Act, which requires that a charge must be filed with the EEOC within 180 days of the alleged

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[29] The House bill provided that the EEOC serve notice of the charge on the alleged violator within five days; the Senate bill required notice within 10 days. Both bills included a 180-day limitation on an aggrieved party's filing of a charge. S. Rep. No. 92–681, pp. 16–17 (1972).

[30] Because the bill reported by the House Committee did not require notice of a charge within any specific time, the dissenters from the Committee Report urged that the 180-day filing limitation be amended to require the EEOC to give notice within five days, or some other reasonable time, after a charge had been filed. H. R. Rep. No. 92–238, p. 66 (1971). On the floor of the House, Congressman Erlenborn explained that the amendment was for the purpose of

"giving notice to the party charged [so] that he would have the opportunity to gather and preserve the evidence with which to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted." 117 Cong. Rec. 31972 (1971).

The requirement of reasonable notice quickly received the support of proponents of the Committee bill. *Id.*, at 31783–31784 (remarks of Rep. Dent); *id.*, at 31961 (remarks of Rep. Perkins). In the Senate a 10-day-notice provision was included in the bill reported out of Committee in order "to protect fully the rights of the person or persons against whom the charge is filed." S. Rep. No. 92–415, p. 25 (1971).

violation of Title VII, and that the alleged violator must be notified "of the charge (including the date, place and circumstances of the alleged unlawful employment practice) . . . within ten days" thereafter.[31]

The fact that the only statute of limitations discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure—a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body.

IV

The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.

Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made,[32]

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[31] §§ 706 (b), (e), 42 U. S. C. §§ 2000e–5 (b), (e) (1970 ed., Supp. V).

[32] Prompt notice of a reasonable-cause determination also serves to cure any deficiencies in the 10-day notice that may result from EEOC amendment of the claimed violation after investigation. See *EEOC* v. *General Electric Co.*, 532 F. 2d 359, 366 (CA4); *EEOC* v. *Huttig Sash & Door Co.*,

29 CFR § 1601.19b (b) (1976), and when the EEOC has terminated its efforts to conciliate a dispute, §§ 1601.23, 1601.25.

It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 424–425. The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," *ibid.,* can also be exercised when the EEOC is the plaintiff.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting in part.

While I agree with Part II of the Court's opinion, holding that § 706 (f)(1), 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V), does not impose a limitation on the power of the EEOC to file suit in a federal court, I do not agree with the Court's conclusion in Part III that the EEOC is not bound by any limitations period at all. The Court's actions, and the reasons which it assigns for them, suggest that it is more concerned with limitlessly expanding the important underlying statutory policy than it is with considerations traditionally dealt with by judges. Since I believe that a consistent line of opinions from this Court holding that, in the absence of a

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511 F. 2d 453, 455 (CA5); *EEOC* v. *Kimberly-Clark Corp.,* 511 F. 2d, at 1363. See also *NLRB* v. *Fant Milling Co.,* 360 U. S. 301; *National Licorice Co.* v. *NLRB,* 309 U. S. 350, 367–369.

federal limitations period, the applicable state limitations period will apply, is being ignored by a process of unwarranted judicial legislation, I would reverse the judgment of the Court of Appeals in this case.

I

Since I agree with the Court that the Act contains no limitation on the time during which an enforcement suit may be brought by the EEOC, I also agree with it that the relevant inquiry is whether the most analogous state statute of limitations applies. Unless the United States is suing in its sovereign capacity, a matter which I treat below, the answer one would have derived before today from the opinions of this Court over a period of 140 years would surely have been "yes." See, *e. g.*, *McCluny* v. *Silliman*, 3 Pet. 270, 277 (1830); *Campbell* v. *Haverhill*, 155 U. S. 610 (1895); *McClaine* v. *Rankin*, 197 U. S. 154 (1905); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390 (1906); *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966); *Johnson* v. *Railway Express Agency*, 421 U. S. 454 (1975); *Runyon* v. *McCrary*, 427 U. S. 160 (1976).

The Court, however, today relies on basically two interrelated reasons for refusing to apply California's applicable statute of limitations to suits brought by the EEOC. First, the Court postulates that "the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Ante*, at 367. Second, "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Ibid.* Both of these assertions are created out of whole cloth; contrary to their tenor, neither statement, as applied to statutes of limitations, draws sustenance from

any cases whatsoever. Rather, anything more than a superficial examination of precedent reveals that they are contrary to the established line of decisions of this Court.

This Court has long followed the rule that, unless the United States was suing in its sovereign capacity, "in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable." *McClaine* v. *Rankin, supra,* at 158. See also *Cope* v. *Anderson,* 331 U. S. 461, 463 (1947). The consistent nature of this history was described in *Auto Workers* v. *Hoosier Cardinal Corp., supra,* at 703–704:

> "As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. *M'Cluny* v. *Silliman,* 3 Pet. 270, 277. In 1895, the question was re-examined in another context, but the conclusion remained firm. *Campbell* v. *Haverhill,* 155 U. S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. Yet when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations. Against this background, we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits." (Citations omitted.)

This general policy has been recently reaffirmed with respect to lawsuits brought under 42 U. S. C. § 1981, see *Johnson* v. *Railway Express Agency, supra,* at 462; *Runyon* v. *McCrary, supra,* at 180. Indeed, *Johnson* noted that "the express terms of 42 U. S. C. § 1988 suggest" that there is not "anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." 421 U. S., at 464. The Court fails to point to any case not involving the

United States in its sovereign capacity, in which, the federal statute being silent, the applicable state limitations period was disregarded in favor of either a judge-made limitations period or, as here, no limitations period at all. There is simply no support for the proposition that a federally created right of action should impliedly be without temporal limitations. Indeed, Mr. Chief Justice Marshall, writing for the Court in 1805, observed that a case without a limitations period "would be utterly repugnant to the genius of our laws." *Adams* v. *Woods,* 2 Cranch 336, 342 (1805). Yet, the Court today, without acknowledging the radical nature of its act, creates precisely such a situation.[1]

As for the second point, I can readily concede that the California Legislature did not specifically consider the federal interests underlying the enactment of Title VII. But this argument begs the question. This Court, in 1830, rejected the argument that a state statute of limitations should not apply because the State had not considered the federal policies. It stated, in *McCluny* v. *Silliman, supra,* at 277–278:

> "It is contended that this statute cannot be so construed as to interpose a bar to any remedy sought against an officer of the United States, for a failure in the performance of his duty; that such a case could not have been contemplated by the legislature. . . .

[1] In *Campbell* v. *Haverhill,* 155 U. S. 610, 615–616 (1895), this Court stated that it might not be necessary to follow a state statute of limitations which discriminated against or was "passed in manifest hostility to Federal rights or jurisdiction" or which gave such an unreasonably limited time to sue so as to "be within the competency of the courts to declare the same unconstitutional and void." These narrowly delimited exceptions are wholly different from the approach the Court takes today in looking to whether the state statute "will not frustrate or *interfere with* the implementation of national policies." *Ante,* at 367. (Emphasis added.) This open-ended standard would seem to render wholly superfluous the narrow exceptions discussed in *Campbell.*

> "It is not probable that the legislature of Ohio, in the passage of this statute, had any reference to the misconduct of an officer of the United States. Nor does it seem to have been their intention to restrict the provision of the statute to any particular causes for which the action on the case will lie. . . .
>
> "Where the statute is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred, if not brought within a limited time, every cause for which the action may be prosecuted is within the statute."

Similar arguments were also rejected in construing § 301 of the Labor Management Relations Act, *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S., at 701–704. And in both *Johnson* v. *Railway Express Agency,* and *Runyon* v. *McCrary,* we followed, without hesitation, state limitations periods even though one would suppose that the federal policies underlying 42 U. S. C. § 1981 were of a magnitude comparable to those of Title VII and even though the general state statute of limitations would hardly have taken these policies into account.

The Court apparently rests its case on the authority of three opinions: *Johnson* v. *Railway Express Agency, Auto Workers* v. *Hoosier Cardinal Corp.,* and *Board of County Comm'rs* v. *United States,* 308 U. S. 343 (1939). None are applicable. *Johnson* did not state, or hint, that "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Ante,* at 367. Rather, *after* concluding that the state limitations period applied, it turned, in a separate section of the opinion, to a question of tolling, 421 U. S., at 465, where the statement that "[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide," so heavily relied on by the Court today, is found. Nor does *Auto Workers* provide support for the Court: point-

ing to the longstanding history of constant interpretation that when the federal statute does not speak, the state limitations period applies, it *rejected* the argument that federal uniformity required a federal limitations period by stating that "there is no justification for the drastic sort of judicial legislation that is urged upon us," 383 U. S., at 703. The last of the three cases, *Board of County Comm'rs,* is also irrelevant. It involved a suit brought by the United States in its sovereign capacity, to which it is clear state limitations period do not apply, 308 U. S., at 351. In any case, the language the Court points to, *id.,* at 351–352, is in the context of a discussion of the absorption of substantive rights and liabilities, not in the context of a statute of limitations at all. The two are decisively different. See *Auto Workers,* 383 U. S., at 703 n. 4; see also *id.,* at 701.

The premises of the majority, then, are supported, not by a slender reed, but by no reed at all. Perhaps the Court's decision can be explained by its apparent fear that the application of the State's limitations period will result in the anomaly of the statute's running before the EEOC is entitled to bring its suit at all. *Ante,* at 369 n. 23. The Court notes, *ante,* at 368: "Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." If this fear is the motivating reason behind the Court's unusual action today, it rests on a misunderstanding of the nature of the application of a State's limitations period to a federal action brought by the EEOC.

The EEOC may not bring a suit on behalf of a complainant for a violation of Title VII until 30 days after a charge is filed with the EEOC, 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V); see *ante,* at 360. It would appear that, as a matter of federal law, the EEOC's cause of action accrues on that date, which is the date on which it first becomes entitled to

sue. See, *e. g., Cope* v. *Anderson,* 331 U. S., at 464; *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221 (1958). In this case, then, the EEOC would have one year, measured from that time, in which to bring suit under Cal. Code Civ. Proc. Ann. § 340 (3) (West Supp. 1977).[2] Thus, the fears expressed by the Court are not well grounded. And while it is true that Congress, in enacting Title VII, chose "[c]ooperation and voluntary compliance . . . as the preferred means of achieving" its goals, *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974), this is not, in the context of this case, a reason to ignore the state limitations period. We noted, in *Johnson* v. *Railway Express Agency,* 421 U. S., at 465, in response to similar arguments, that the "plaintiff . . . may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed." The EEOC in this case is given 30 days plus the one-year limitations period; the fact, then, that there is a federal policy for the EEOC to attempt to achieve its goals by voluntary compliance does not seem to me to be a sound basis for ignoring state limitations periods. That policy is not without constraints, as the statute itself acknowledges. § 706 (f)(1).[3]

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[2] The District Court determined that this is the applicable statute of limitations.

[3] The Act gives the complaining party the right to disrupt the ostensible federal policy of voluntary settlement by filing suit during the "window" period from 180 to 270 days after "the filing of the charge or the expiration of any period of reference [from a state agency]." 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V). The reason given for this option was that "the person aggrieved should [not] have to endure lengthy delays if the agency does not act with due diligence and speed." 118 Cong. Rec. 4942 (1972); see *id.,* at 7168. In light of this, it is odd to rely on the policy of "[c]ooperation and voluntary compliance" as invested with such overpowering importance as to sustain a result different from that reached in a long line of precedents prior to today. As we noted in *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974), the original intent in enacting Title

Given that, I am wholly unable to agree that the utilization of state statutes of limitations, which may be "as short as one year," *ante,* at 371, trenches so severely on the structure or policies of Title VII to warrant this departure from precedent.[4]

II

In this case, Tamar Edelson filed her charge with the EEOC on December 27, 1970, when it was referred to the California Fair Employment Practices Commission in accordance with the provisions of 42 U. S. C. § 2000e–5 (c). When that agency took no action, the charge was formally filed with the EEOC on March 9, 1971. The EEOC, then, had 1 year and 30 days from that point in which to investigate and attempt to secure voluntary compliance. Since the EEOC is directed to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the [formal] filing of the charge," 42 U. S. C. § 2000e–5 (b) (1970 ed., Supp. V), this time period of more than one year would appear ample to ensure that what the Court perceives to be federal policy, including voluntary settlement negotiations, is

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VII was to establish an administrative procedure whereby the EEOC "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was *permitted* to file a lawsuit." (Emphasis added.) Whatever validity the administrative-procedure argument may have, then, is greatly weakened after the expiration of that 180-day period.

[4] In both *Johnson* v. *Railway Express Agency,* 421 U. S. 454 (1975), and *Electrical Workers* v. *Robbins & Myers, Inc.,* 429 U. S. 229 (1976), this Court rejected arguments based, in part, on contentions that Title VII plaintiffs should be treated with special deference because Title VII served to vindicate important public interests. I fear that the Court today adopts, *sub silentio,* these previously rejected "Title VII-is-different" arguments as a way of approaching a statute notable for its expanses of congressional silence.

not unduly denigrated.[5] Yet, here, the EEOC did not file its action in the District Court until February 22, 1974, almost three years after the formal filing of the charge. Since this is clearly outside the state limitations period, I would hold the action barred, unless the EEOC is to be considered to be suing on behalf of the United States in its sovereign capacity, a matter to which I now turn.

Insofar as the EEOC seeks to recover backpay for individuals, it stands in the shoes of the individuals, and represents them in a suit the individuals would otherwise be entitled to bring, 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V). Not only is the United States itself not a party to the suit, but the EEOC is vindicating a right which a private party was entitled to vindicate in his own right. Cf. *Alexander* v. *Gardner-Denver Co., supra,* at 45. Since the United States is not suing in its sovereign capacity, there is no reason to exempt these suits from the general application of state limitations statutes. The scope of the relevant inquiry

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[5] While I agree that it is impossible to read 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. V) as a time limitation on the EEOC's right to bring suit, the existence of that limitations period on the *individual's* right to bring suit is not without significance. I can perceive of no reason, and the legislative debates suggest none, why the private party's right to sue is cut off 90 days after it is given, unless it is intended as a form of a limitations period. Yet, if Congress was concerned with a limitations period when the suit could be brought by the complaining party, it suggests that the Court is wrong in asserting that "the benchmark, for purposes of a statute of limitations" is simply the "commencement of the proceeding before the administrative body." *Ante,* at 372. It also leads me to conclude that there is no reason not to allow the normal presumption to operate in this case, by limiting the EEOC's right of action by the most analogous state limitations period. Cf. *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 704 (1966). I see nothing which affirmatively rebuts the longstanding doctrine that "the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395 (1946).

was formed by this Court in *United States* v. *Beebe,* 127 U. S. 338, 344 (1888):

> "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. *United States* v. *Nashville &c. Railway Company,* 118 U. S. 120, 125, and cases there cited. But this case stands upon a different footing, and presents a different question. The question is, Are these defences available to the defendant in a case where the Government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?"

As this has been interpreted, the decisive fact which excepts the general applicability of these statutes is that the United States is suing to enforce "*its* rights." *United States* v. *Summerlin,* 310 U. S. 414, 416 (1940) (emphasis added); see also *United States* v. *Nashville, C. & St. L. R. Co.,* 118 U. S. 120, 125 (1886); *United States* v. *Des Moines Navigation & R. Co.,* 142 U. S. 510, 538–539 (1892); *United States* v. *Bell Telephone Co.,* 167 U. S. 224, 264–265 (1897); *French Republic* v. *Saratoga Vichy Co.,* 191 U. S. 427, 438 (1903). In *Beebe* itself, the Court acknowledged that "[t]he Government is charged with the duty . . . to protect [the public domain] from trespass and unlawful appropriation . . . ." 127 U. S., at 342. See also *Moran* v. *Horsky,* 178 U. S. 205, 213 (1900). Yet this "interest" was not sufficient to make it a suit by the sovereign, unbounded by a limitations period. While the Government may be interested in the vindication of the policies enunciated in Title VII, cf. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 778 n. 40 (1976)—as,

presumably, it would be interested in vindicating the policies expressed in all congressional enactments—that is not the decisive fact. It is not "interest," but whether the sovereign is suing to recover in its own right. Since here the suit is to recover backpay for an individual that could have brought her own suit, it is impossible to think that the EEOC was suing in the sovereign capacity of the United States. Cf. *United States* v. *Beebe, supra,* at 346. Rather, it is suing as a conduit for the recovery of sums due an individual citizen rather than the public treasury. The Court does not suggest otherwise.

The conclusion should be no different when we turn to the issue of injunctive relief. The decisive fact remains the same: The sovereign is not suing to redress "its" injury, rather it is seeking relief that the complaining individual otherwise would have been entitled to seek. While injunctive relief may appear more "broad based," it nonetheless is redress for individuals. The United States gains nothing tangible as a result of the suit. It does, to be sure, vindicate a congressional policy by seeking to enjoin practices proscribed by Title VII, but, it bears repeating, presumably the Government vindicates some congressional policy *whenever* it sues. That, then, cannot be the test, for it would exalt form (who brings the suit) over substance (whom the suit directly benefits). For these reasons, I am unable to agree with the Ninth Circuit that because the EEOC promotes public policy by its prayer for injunctive relief, it therefore "seeks to vindicate rights belonging to the United States as sovereign," 535 F. 2d 533, 537. This reason does not adequately distinguish a prayer for injunctive relief from a prayer by the EEOC for backpay for individuals.[6]

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[6] The EEOC is only entitled to bring suit after a complaint has been filed with it. Normally, therefore, it brings suit only after a complaining individual has filed a charge with it. "Individual grievants usually ini-

Since I believe that the EEOC's suit is barred by the running of the statute of limitations in Cal. Code Civ. Proc. Ann. § 340 (3) (West Supp. 1977), I respectfully dissent.

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tiate the Commission's investigatory and conciliatory procedures." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 45. While the 1972 amendments allow members of the EEOC to file charges, 42 U. S. C. § 2000e–5 (b) (1970 ed., Supp. V), this is not the normal method of initiating suit. *Alexander, supra,* at 45. Since this case does not involve the situation where the complaining individual is not the allegedly aggrieved party, I do not need to deal with the question of whether a different result would follow when the EEOC brings suit upon a complaint initiated by one of its members.

UNITED AIRLINES, INC. *v.* McDONALD

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

No. 76–545. Argued March 29, 1977—Decided June 20, 1977

Claiming that petitioner United Airlines had violated Title VII of the Civil Rights Act of 1964 by requiring stewardesses, though not stewards, to remain unmarried as an employment condition, one Romasanta, a stewardess who had been discharged by petitioner because of her marriage, brought this Title VII suit as a class action on behalf of herself and all other United stewardesses discharged because of the no-marriage rule. The District Court ruled that only those stewardesses who upon discharge because of marriage had filed charges under either a fair employment statute or United's collective-bargaining agreement constituted the class, and because that class was too small to satisfy the numerosity requirement of Fed. Rule Civ. Proc. 23 (a)(1), the court granted United's motion to strike the complaint's class allegations, but allowed 12 married stewardesses who had protested their discharge to intervene as additional parties plaintiff. The District Court certified for appeal its order striking the class allegations, but the Court of Appeals declined to accept the interlocutory appeal. The litigation proceeded as a joint suit on behalf of the original and intervening plaintiffs, and the District Court ultimately determined that the plaintiffs were entitled to reinstatement and backpay and, following agreement by the parties on the amounts to be awarded each plaintiff, the court entered a judgment of dismissal. After learning of the *Romasanta* judgment and that despite their earlier attempt to do so the plaintiffs in that case did not plan to appeal the order denying class certification, respondent, a former United stewardess who had been discharged on account of the no-marriage rule and was thus a putative member of the *Romasanta* class and who had not filed charges or a grievance, filed, 18 days after the judgment (and therefore within the applicable appeal period) a motion to intervene for the purpose of appealing the adverse class determination order. The District Court denied intervention, from which denial as well as the denial of class certification respondent appealed. The Court of Appeals reversed on the intervention denial as well as on the refusal to certify the class described in Romasanta's complaint—a class consisting of all United stewardesses discharged

because of the no-marriage rule, whether or not they had formally protested their discharge. Petitioner challenges the Court of Appeals' ruling that respondent's post-judgment intervention was timely under this Court's ruling in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, which held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." Petitioner argues that under *American Pipe* the relevant statute of limitations began to run after the denial of certification in *Romasanta*. *Held:* Respondent's motion to intervene was "timely" filed under Fed. Rule Civ. Proc. 24 and should have been granted. Respondent sought to intervene, not to litigate her individual claim based on the illegality of United's no-marriage rule (which would have put her in the same position as the *American Pipe* intervenors), but to obtain appellate review of the District Court's denial of the class-action status in *Romasanta*. The critical question is whether respondent as intervenor acted promptly after entry of the final judgment in *Romasanta*. The District Court's refusal to certify the class was subject to appellate review after final judgment, and since the named plaintiffs had tried to take an interlocutory appeal, respondent had no reason to suppose that they would not later take an appeal until she was advised to the contrary after the trial court had entered its final judgment. Thus as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives, and within the applicable appeal period, respondent moved to protect those interests. Pp. 391–396.

537 F. 2d 915, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 396. STEVENS, J., took no part in the consideration or decision of the case.

Stuart Bernstein argued the cause and filed briefs for petitioner.

Thomas R. Meites argued the cause for respondent. With him on the brief were *Lynn Sara Frackman* and *Kenneth N. Flaxman.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Federal Rule Civ. Proc. 24 requires that an application to intervene in federal litigation must be "timely." In this case a motion to intervene was filed promptly after the final judgment of a District Court, for the purpose of appealing the court's earlier denial of class action certification. The question presented is whether this motion was "timely" under Rule 24.

Until November 7, 1968, United Airlines required its female stewardesses to remain unmarried as a condition of employment; no parallel restriction was imposed on any male employees, including male stewards and cabin flight attendants.[1] This "no-marriage rule" resulted in the termination of the employment of a large number of stewardesses, and in turn spawned a good deal of litigation.

One of the first challenges to this rule was brought by Mary Sprogis, who filed timely charges with the Equal Employment Opportunity Commission in August 1966, contending that her discharge constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964. 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V). The EEOC found reasonable cause to believe that United's policy was illegal, and issued a "right to sue letter." [2] Sprogis then filed a timely individual action in a Federal District Court, and the court agreed that the no-marriage rule violated

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[1] See generally *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1197–1201 (CA7).

[2] The relevant statutory provision at that time, 42 U. S. C. § 2000e–5 (e), stated that if within 30 days after a charge was filed with the Commission or within 30 days after expiration of a period of reference of the charge to a state or local fair employment agency, the Commission had been unable to secure voluntary compliance, it "shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought" by the charging party. The period was extended to 90 days in 1972. § 2000e–5 (f) (1) (1970 ed., Supp. V).

Title VII. 308 F. Supp. 959 (ND Ill.). United took an interlocutory appeal under 28 U. S. C. § 1292 (b) on the issue of liability, and the Court of Appeals for the Seventh Circuit affirmed the finding of sex discrimination. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194.

While the appeal in the *Sprogis* case was pending, the present action was filed in the same District Court by Carole Romasanta, a United stewardess who had been discharged in 1967 because of her marriage. She, too, had filed charges with the EEOC, leading to a finding of cause to believe that the no-marriage rule violated Title VII and the issuance of a right-to-sue letter. Romasanta then promptly filed the present suit as a class action on behalf of herself and all other United stewardesses discharged because of the no-marriage rule. Another United stewardess was later permitted to intervene as a named plaintiff.

Several months later, the District Court granted United's motion to strike the complaint's class allegations, ruling that the class could properly consist of only those stewardesses who, upon the loss of their employment because of marriage, had filed charges under either a fair employment statute or United's collective-bargaining agreement. As thus defined, the class numbered not more than 30 and in the court's view did not satisfy the numerosity requirement of Fed. Rule Civ. Proc. 23 (a)(1).[3] As part of its order, however, the District Court allowed 12 married stewardesses who had protested the termination of their employment to intervene as additional parties plaintiff. Pursuant to 28 U. S. C. § 1292 (b), the District Court certified for appeal its order striking the class allegations, but the Court of Appeals declined to accept this interlocutory appeal.[4]

[3] Rule 23 (a)(1) lists as one prerequisite to maintenance of a class action that "the class is so numerous that joinder of all members is impracticable."

[4] In the Seventh Circuit, a denial of class certification is an interlocutory order not reviewable as of right until after entry of final judgment. *Anschul* v. *Sitmar Cruises, Inc.*, 544 F. 2d 1364. Even were we to

The litigation proceeded as a joint suit on behalf of the original and the intervening plaintiffs, and the court ultimately determined that those plaintiffs not yet reinstated in their jobs were entitled to that remedy, and that every plaintiff was entitled to backpay. To aid in determining the amount of each backpay award, the court appointed as a Special Master the same person who had performed a similar task in the *Sprogis* litigation.[5] Following guidelines adopted in *Sprogis,* the parties eventually agreed upon the amounts to be awarded each plaintiff, and upon consummation of this agreement the trial court entered a judgment of dismissal on October 3, 1975.

The specific controversy before us arose only after the entry of that judgment. The respondent, a former United stewardess, had been discharged in 1968 on account of the no-marriage rule. She was thus a putative member of the class as defined in the original *Romasanta* complaint. Knowing that other stewardesses had challenged United's no-marriage rule, she had not filed charges with the EEOC or a grievance under the collective-bargaining agreement.[6]

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assume, *arguendo,* that the Seventh Circuit is wrong in not recognizing the so-called death-knell doctrine, which permits immediate appeal of adverse class determinations where the claims are so small that individual suits are uneconomical, appeal before final judgment would not have been available in this lawsuit, for the individual claims were sufficiently large to permit the action to proceed, as it did, on an individual basis. See generally 7A C. Wright & A. Miller, Federal Practice and Procedure § 1802, pp. 271–277 (1972); *id.,* at 129–130 (Supp. 1977).

[5] In *Sprogis,* following affirmance by the Court of Appeals of the District Court's finding of liability, the case was remanded for further proceedings. The Special Master appointed by the District Court recommended that the plaintiff be awarded over $10,000 in damages, the District Court approved that award, and the Court of Appeals affirmed. See *Sprogis* v. *United Air Lines, Inc.,* 517 F. 2d 387, 389–390, 392 (CA7).

[6] As the opinion in *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, makes clear, full relief under Title VII "may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members." *Id.,* at 414 n. 8. See also *Franks* v. *Bowman Transp. Co.,* 424 U. S. 747, 771.

After learning that a final judgment had been entered in the *Romasanta* suit, and that despite their earlier attempt to do so the plaintiffs did not now intend to file an appeal challenging the District Court's denial of class certification, she filed a motion to intervene for the purpose of appealing the District Court's adverse class determination order. Her motion was filed 18 days after the District Court's final judgment, and thus was well within the 30-day period for an appeal to be taken.[7] The District Judge denied the motion, stating:

> "Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny this motion. Of course, that is an appealable order itself, and if I am in error then the Court of Appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in."

The respondent promptly appealed the denial of intervention as well as the denial of class certification to the Court of Appeals for the Seventh Circuit. The appellate court reversed, holding that the District Court had been wrong in believing that the motion to intervene was untimely under Rule 24 (b),[8] and had also erred in refusing to certify the class as described in the *Romasanta* complaint—a class consisting of all United stewardesses discharged because of the no-marriage rule, whether or not they had formally protested the termination of their employment. *Romasanta* v. *United Airlines, Inc.*, 537 F. 2d 915.

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[7] See Fed. Rule App. Proc. 4 (a).

[8] In relevant part, Rule 24 (b) provides:

"Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

United's petition for certiorari did not seek review of the determination that its no-marriage rule violated Title VII, nor did it contest the merits of the Court of Appeals' decision on the class certification issue. Instead, it challenged only the Court of Appeals' ruling that the respondent's post-judgment application for intervention was timely. We granted the petition, 429 U. S. 998, to consider that single issue.

In urging reversal, United relies primarily upon *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538. That case involved a private antitrust class action that had been filed 11 days short of the expiration of the statutory limitations period.[9] The trial court later denied class certification because the purported class did not satisfy the numerosity requirement of Rule 23 (a)(1).[10] Neither the named plaintiffs nor any unnamed member of the class appealed that order, either then or at any later time. Eight days after entry of the order, a number of the putative class members moved to intervene as plaintiffs, but the trial court denied the motions as untimely. This Court ultimately reversed that decision, ruling that in those circumstances "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U. S., at 553. Since 11 days remained when the statute of limitations again began to run after denial of class certification, and the motions to intervene as plaintiffs were filed only eight days after that denial, they were timely. *Id.,* at 560–561.

It is United's position that, under *American Pipe,* the relevant statute of limitations began to run after the denial of class certification in the *Romasanta* action. United thus reasons that the respondent's motion to intervene was time barred, and in support of this position makes alternative

[9] See 414 U. S., at 541–542.

[10] See n. 3, *supra.*

arguments based on two different statutory periods of limitations prescribed by Title VII.[11]

This argument might be persuasive if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim based on the illegality of United's no-marriage rule, for she then would have occupied the same position as the intervenors in *American Pipe*. But the later motion to intervene in this case was for a wholly different purpose. That purpose was to obtain appellate review of the District Court's order denying class action status in the *Romasanta* lawsuit,[12] and the motion complied with, as it was required to, the time limitation for lodging an appeal prescribed by Fed. Rule App. Proc. 4 (a). Success in that review would result in the certification of a class, the named members of which had complied with the statute of limitations; the respondent is a member of that class against whom the statute had not run at the time the class action was commenced.

The lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with "the essential information necessary to determine both the subject

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[11] A person complaining of employment discrimination is ordinarily required to file a charge with the EEOC within 180 days of the occurrence of the discriminatory act. 42 U. S. C. § 2000e–5 (e) (1970 ed., Supp. V). Once the administrative process has been exhausted and the EEOC sends the complainant a right-to-sue letter, a civil action in federal district court must be filed within 90 days of receipt of the right-to-sue letter. § 2000e–5 (f)(1) (1970 ed., Supp. V), discussed in n. 2, *supra*. Since nearly three years passed after the adverse class determination before the respondent took any action, under United's theory her action is time barred whichever of the two limitations periods is thought to be the relevant one.

[12] Cf. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 727 (1968) ("It is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all").

matter and size of the prospective litigation . . . ." *American Pipe, supra,* at 555.[13] To be sure, the case was "stripped of its character as a class action" upon denial of certification by the District Court. Advisory Committee's Note on 1966 Amendment to Rule 23, 28 U. S. C. App., p. 7767. But "it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members." *Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 43 F. R. D. 452, 461 (ED Pa.). The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes.[14] And since the named

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[13] The unlawful discrimination alleged in the complaint—enforcement of the no-marriage rule—was plainly part of a uniform companywide policy that had been applied to all stewardesses. See also S. Rep. No. 92–415, p. 27 (1971) ("[T]itle VII actions are by their very nature class complaints"), cited in *Albemarle Paper Co.* v. *Moody,* 422 U. S., at 414 n. 8.

[14] See, *e. g., Share* v. *Air Properties G., Inc.,* 538 F. 2d 279, 283 (CA9); *Zenith Laboratories, Inc.* v. *Carter-Wallace, Inc.,* 530 F. 2d 508, 512 (CA3); *Penn* v. *San Juan Hospital, Inc.,* 528 F. 2d 1181, 1188–1190 (CA10); *Bailey* v. *Ryan Stevedoring Co.,* 528 F. 2d 551, 553–554 (CA5); *Wright* v. *Stone Container Corp.,* 524 F. 2d 1058, 1061–1063 (CA8); *Paton* v. *La Prade,* 524 F. 2d 862, 874–875 (CA3); *Haynes* v. *Logan Furniture Mart, Inc.,* 503 F. 2d 1161, 1162–1165 (CA7); *Galvan* v. *Levine,* 490 F. 2d 1255, 1260–1262 (CA2); *Roberts* v. *Union Co.,* 487 F. 2d 387 (CA6); *Esplin* v. *Hirschi,* 402 F. 2d 94 (CA10).

United argues that it was unfairly surprised when after having settled the case with all of the original and intervening plaintiffs it nonetheless faced an appeal, and suggests that the negotiation of settlements will be impeded if post-judgment intervention like the respondent's is permitted. The characterization of the resolution of the *Romasanta* action as a "settlement" could be slightly misleading. It is of course true that opposing counsel agreed upon a disposition that resulted in dismissal of the complaints. But that agreement came only after the District Judge had granted motions by some plaintiffs for partial summary judgment, and, there was never any question about United's liability in view of the *Sprogis* decision. All that remained to be determined was the computation of backpay, and the guiding principles for that computation had been

plaintiffs had attempted to take an interlocutory appeal from the order of denial at the time the order was entered, there was no reason for the respondent to suppose that they would not later take an appeal until she was advised to the contrary after the trial court had entered its final judgment.

The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.[15]

United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiffs. And it would be circular to argue that an unnamed member of the

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established in *Sprogis*. The "settlement" ultimately reached merely applied those principles to the claims in this case.

The respondent's motion to intervene was filed less than three weeks after the "settlement" was incorporated in the District Court's final judgment, and necessarily "concern[ed] the same evidence, memories, and witnesses as the subject matter of the original class suit." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 562 (BLACKMUN, J., concurring). There is no reason to believe that in that short period of time United discarded evidence or was otherwise prejudiced.

[15] A rule requiring putative class members who seek only to appeal from an order denying class certification to move to intervene shortly after entry of that order would serve no purpose. Intervention at that time would only have made the respondent a superfluous spectator in the litigation for nearly three years, for the denial of class certification was not appealable until after final judgment, see n. 4, *supra*. Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. Cf. *American Pipe, supra*, at 553. The result would be the very "multiplicity of activity which Rule 23 was designed to avoid." 414 U. S., at 551. Cf. *Franks* v. *Bowman Transp. Co.*, 424 U. S., at 757 n. 9.

putative class was not a proper party to appeal, on the ground that her interests had been adversely determined in the trial court. United was put on notice by the filing of the *Romasanta* complaint of the possibility of classwide liability, and there is no reason why Mrs. McDonald's pursuit of that claim should not be considered timely under the circumstances here presented.

Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal.[16] The critical inquiry in every such case

[16] A case closely in point is *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 3 F. R. D. 162 (SDNY). That case involved a plan for reorganization of the Interborough Rapid Transit Co. and for its consolidation with the Manhattan Elevated Railway. Mannheim, an owner of a series of bonds in the Manhattan Railway, had participated in the District Court not merely representing his own interests but also acting as "attorney in fact" for other owners of the bonds. After the District Court had approved the plan as fair and equitable, and had subsequently ordered its implementation, Mannheim filed a notice of appeal. He then decided to abandon the appeal and to seek to surrender his bonds pursuant to the terms of the plan. One of the other holders of the same series of bonds, for whom Mannheim had been acting as attorney-in-fact, then moved to intervene for the purpose of prosecuting an appeal on behalf of herself and all other nonsurrendering bondholders. Noting that it is "essential in the administration of our system of justice, that litigants should have their day in court" and that the motion was filed within the time in which an appeal might have been brought, the District Court ruled that the motion to intervene was timely. *Id.*, at 164.

The decision in *Pellegrino* v. *Nesbit,* 203 F. 2d 463 (CA9), is also similar to the case at bar. There a corporation had filed an action against corporate officers under § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), for recovery of short-swing profits. The District Court entered judgment for the defendants, and when the corporation failed to appeal, a shareholder sought to intervene for the purpose of appealing from the District Court decision. The Court of Appeals, reversing the District Court, ruled that the motion was timely and that intervention should have been permitted. 203 F. 2d, at 465–466.

Post-judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature, and in

is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment. Cf. *NAACP* v. *New York*, 413 U. S. 345, 366. Here, the respondent filed her motion within the time period in which the named plaintiffs could have taken an appeal. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted.

The judgment is

Affirmed.

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

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

The Court's opinion shifts confusingly between the two distinct questions of timeliness raised by respondent McDonald's attempt to intervene in this action against petitioner United Airlines, Inc.[1] The first question involves the effect of the

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which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase. See, *e. g.*, *Hodgson* v. *United Mine Workers*, 153 U. S. App. D. C. 407, 417–419, 473 F. 2d 118, 129; *Smuck* v. *Hobson*, 132 U. S. App. D. C. 372, 378–379, 408 F. 2d 175, 181–182; *Zuber* v. *Allen*, 128 U. S. App. D. C. 297, 387 F. 2d 862, discussed in *Hobson* v. *Hansen*, 44 F. R. D. 18, 29–30, n. 10 (DC); *Wolpe* v. *Poretsky*, 79 U. S. App. D. C. 141, 144, 144 F. 2d 505, 508; *United States Cas. Co.* v. *Taylor*, 64 F. 2d 521, 526–527 (CA4).

Insofar as the motions to intervene in these cases were made within the applicable time for filing an appeal, they are consistent with our opinion and judgment in the present case.

[1] Respondent had been terminated by petitioner in September 1968, under its then-existing "no marriage" rule for stewardesses. The class action complaint in *Romasanta* v. *United Airlines* was filed in May 1970. The District Court denied class status in December 1972, and a number of the members of the putative class intervened in the individual action. Discovery and settlement discussion followed, and the initial and intervening plaintiffs were able to settle their claims. On October 3,

statute of limitations on respondent's rights against petitioner. This question is directly relevant to the motion to intervene because a prerequisite of intervention for any purpose is that the intervenor have an interest in the litigation. Petitioner has consistently contended that respondent's interest in this litigation was barred by the statute of limitations at the time she sought to intervene. Assuming that respondent's interest was not time barred, the second question involves the broader and more discretionary concept of the timeliness of her motion to intervene under Fed. Rule Civ. Proc. 24. This was apparently the basis on which the District Court denied respondent's motion.

In *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), the Court held that the filing of a class action complaint "suspended the running of the limitation period *only during the pendency of the motion to strip the suit of its class action character.*" *Id.*, at 561 (emphasis added). Time again commenced to run under the limitations period when the District Court denied class status, and members of the putative class were allowed to intervene in the nonclass action only if their motions were filed before the expiration of the remaining time.

A straightforward reading of *American Pipe* leads to the conclusion that the filing of the class action complaint in *Romasanta* v. *United Airlines* tolled the statute of limitations for respondent, but "only during the pendency of the motion to strip the suit of its class action character." Under the *American Pipe* rule, the statute of limitations had run

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1975—almost three years after class status was denied—a final order dismissing the suit with prejudice was entered, all "matters in controversy . . . having been settled and resolved." App. 90–92. On October 21, 1975, respondent moved to intervene for purposes of appealing the denial of class status. Before this point, she had filed no grievance under the collective-bargaining agreement, no charge with any state or federal agency, and had taken no part in the preceding litigation—although she was fully aware of the entire situation.

against respondent by the time she attempted to intervene. Thus, the Court's holding must reflect a decision to supplement the *American Pipe* rule with a novel tolling rule applicable only to intervention for the purpose of appealing the denial of class status. Under this new rule, the statute apparently is tolled from the filing of the class action complaint until such time after final judgment as the intervenor can determine that "the interests of the unnamed class members [will] no longer be protected by the named class representatives." *Ante,* at 394. I find no justification for this extension, either in precedent or policy.

Today's opinion also represents a marked departure from established law on the question of timeliness under Rule 24. The Court apparently has ruled that a motion to intervene for the purpose of appealing the denial of class status is timely under Rule 24 as a matter of law, so long as it is filed "within the time period in which the named plaintiffs could have taken an appeal." *Ante,* at 396. The discretionary judgment of the District Court emphasized in *NAACP* v. *New York,* 413 U. S. 345, 365–366 (1973), is thus eliminated.

The Court purports to distinguish *American Pipe* on the ground that respondent's purpose in intervening was not "to join the named plaintiffs in litigating her individual claim" but rather "to obtain appellate review of the District Court's order denying class action status." *Ante,* at 392. The relevance of this undisputed factual distinction is not explained, but two major themes can be identified in the Court's opinion: First, that respondent was justified in relying on the named plaintiffs to protect her interest by taking an appeal, and second, that petitioner was not prejudiced by respondent's intervention at the end of the litigation. These themes have a common analytical weakness, namely, the Court's unwillingness to accept the consequences of the District Court's denial of class status. In the words of the Advisory Committee that drafted the 1966 amendment to Rule 23, the action was

thereby "stripped of its character as a class action." 28 U. S. C. App., p. 7767. After the denial of class status, the action proceeded as an ordinary nonclass action by the individual plaintiffs against petitioner.[2]

Under the Court's analysis, the "critical fact" in this case is that "once the entry of final judgment made the adverse class determination appealable," respondent moved to intervene "as soon as it became clear [to her] that the interests of the unnamed class members would no longer be protected by the named class representatives." *Ante,* at 394. Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23. To the contrary, those sources as well as this Court's decision in *American Pipe* support the view that the denial of class status converts the litigation to an ordinary nonclass action. Reliance by respondent on the former class representatives was therefore misplaced. After the denial of class status, they were simply individual plaintiffs with no obligation to the members of the class. *Pearson* v. *Ecological Science Corp.,* 522 F. 2d 171 (CA5 1975). In the words of Judge Pell, dissenting below, the denial of class status is "a critical point which puts putative class members on notice that they must act to protect their rights." *Romasanta* v. *United Airlines, Inc.,* 537 F. 2d 915, 922 (CA7 1976).

The Court's casual treatment of the prejudice to petitioner also reflects its assumption that the class action persisted despite the denial of class status. Petitioner was fully justi-

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[2] The Court quotes from *Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 43 F. R. D. 452, 461 (ED Pa. 1968), for the proposition that a case need not "'be treated as if there never was an action brought on behalf of absent class members.'" *Ante,* at 393. *Philadelphia Electric* involved the same issue ultimately resolved by this Court in *American Pipe* and is otherwise irrelevant to the question now before us.

fied in attempting to resolve the dispute as a nonclass action. Having achieved a settlement of the case, petitioner was prejudiced by respondent's attempt to reopen the case. It is true that the possibility of an appeal of the denial of class status existed, but the Court's treatment of that possibility misconceives both petitioner's position and the law. It is suggested that petitioner concedes that "[t]he District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs . . . ." *Ante,* at 393. But petitioner concedes only that the named plaintiffs could have appealed the denial of class status *if they had chosen to litigate the case to a final judgment rather than to settle it.* It argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs "could no longer appeal the denial of class" status that had occurred years earlier. Brief for Petitioner 15. Although this question has not been decided by this Court,[3] the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533, p. 271 (1975). This case is sharply distinguishable from cases such as *Sosna* v. *Iowa,* 419 U. S. 393 (1975), and *Franks* v. *Bowman Transp. Co.,* 424 U. S. 747 (1976), where we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them "a legal status separate from the interest[s] asserted by [the named plaintiffs]." *Sosna* v. *Iowa, supra,* at 399. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity.

Considerations of policy militate strongly against the result reached by the Court. Our cases reflect a long tradition of respect for statutes of limitations and the values they serve.

[3] None of the cases cited by the Court, *ante,* at 393 n. 14, involves this situation.

These legislative enactments "are vital to the welfare of society and are favored in the law," because they "promote repose by giving security and stability to human affairs" and "stimulate to activity and punish negligence." *Wood* v. *Carpenter,* 101 U. S. 135, 139 (1879). When a "plaintiff has slept on his rights," an otherwise meritorious claim is barred, both to ensure "fairness to defendants" and to relieve "the burden [on the courts] of trying stale claims." *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 428 (1965). Statutes of limitations thus "make an end to the possibility of litigation after the lapse of a reasonable time." *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 136 (1938). The Court nevertheless has reached a decision that rewards those who delay asserting their rights. I view the result as an injustice to petitioner and as a precedent that ill serves the need for repose.

The Court also ignores the important "principle that '[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts . . . and preventing lawsuits.' " *Pearson* v. *Ecological Science Corp., supra,* at 176, quoting *D. H. Overmyer Co.* v. *Loflin,* 440 F. 2d 1213, 1215 (CA5 1971). Settlements particularly serve the public interest "within the confines of Title VII where 'there is great emphasis . . . on private settlement and the elimination of unfair practices without litigation.' " *Air Lines Stewards* v. *American Airlines, Inc.,* 455 F. 2d 101, 109 (CA7 1972), quoting *Oatis* v. *Crown Zellerbach Corp.,* 398 F. 2d 496, 498 (CA5 1968). Today's decision will deter settlements because of the additional uncertainty as to whether the agreements will be nullified by the action of persons who enter the litigation only after final judgment.[4]

[4] As Judge Pell noted, respondent's delay in seeking intervention was especially costly in this case:

"It is important to note that had she sought intervention immediately

In support of its decision, the Court suggests that adherence to the *American Pipe* rule might result in precautionary interventions to guard against the possibility that the named plaintiffs would fail to appeal the denial of class status, thus producing the very " 'multiplicity of activity which Rule 23 was designed to avoid.' " *Ante,* at 394 n. 15, quoting *American Pipe,* 414 U. S., at 553. But, as I have shown, Rule 23 was not designed to eliminate any multiplicity of activity *after* class status is denied.[5]

In my view, the proper analysis of these questions is as follows: Under *American Pipe,* the filing of a class action complaint tolls the statute of limitations until the District Court makes a decision regarding class status. If class status is denied in whole or in part, the statute of limitations begins to run again as to class members excluded from the class. In order to protect their rights, such individuals must seek to intervene in the individual action (or possibly file an action of their own) before the time remaining in the limitations period expires. Assuming that intervention is sought within the limitations period, the district court's decision whether

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after the denial of class status, and her intervention had been denied, the intervention issue would have been before this court three years ago. Furthermore, assuming that her intervention had been denied because of petitioner's failure to protest the no-marriage rule—the requirement which was the basis of the court's holding that this action lacked the requisite numerosity to proceed as a class action—then *that* issue would have been before this court and decided three years ago. Instead, petitioner chose to sit back and allow others to assume the costs and risks in prosecuting their individual actions, and now she attempts to revive her dead claim through another suit which after years of legal argument and negotiation was finally settled to the satisfaction of all parties." 537 F. 2d, at 922 (dissenting opinion).

[5] Moreover, precautionary intervention is likely even under the Court's decision. As in *American Pipe* itself, individuals concerned about their claims will frequently move to intervene as plaintiffs in the nonclass action rather than placing all of their hopes on the possibility that the denial of class status will be reversed on appeal.

to allow intervention is made according to the discretionary timeliness concept of Rule 24, as interpreted in *NAACP* v. *New York,* 413 U. S. 345 (1973). This decision is made in light of all of the circumstances in the case and is entitled to substantial deference on appeal. But delay in seeking intervention should militate against allowing intervention. Under this approach, a premium is placed on attempting to intervene as soon as possible after the denial of class status. When combined with the requirement of Rule 23 (c)(1) that the decision as to class status be made "[a]s soon as practicable after the commencement of an action brought as a class action," this approach would ensure that the contours of the nonclass action would be defined early in the litigation. This would enable the major decisions concerning the case to be made expeditiously, thus speeding its ultimate resolution. The Court's decision today encourages the opposite result.

BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* BELL, ATTORNEY GENERAL, ET AL.

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

No. 76–60. Argued April 20, 1977—Decided June 20, 1977

The provision of § 4 (b) of the Voting Rights Act of 1965 that a determination of the Attorney General or Director of the Census that a State is covered by the Act "shall not be reviewable in any court" *held* absolutely to preclude judicial review of such a determination. Hence the District Court and Court of Appeals erred in holding that they had jurisdiction to review petitioners' claims that the Attorney General and Director of the Census (respondents) had erroneously applied § 4 (b) in determining that Texas is covered by the 1975 amendments to the Act extending its protections to language minorities, such as Mexican-Americans. A "bailout" suit under § 4 (a) to terminate coverage is Texas' sole remedy. Pp. 409–415.

(a) Such construction of § 4 (b) is supported by its language and legislative history and by the Act's structure and its purpose to eradicate voting discrimination with all possible speed, as well as by this Court's interpretations of the Act. See *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Gaston County* v. *United States*, 395 U. S. 285; *Morris* v. *Gressette, post*, p. 491. Pp. 410–414.

(b) While the finality of determinations under § 4 (b) may be "an uncommon exercise of congressional power," *South Carolina* v. *Katzenbach, supra*, at 335, nevertheless in attacking the pervasive evils and tenacious defenders of voting discrimination, Congress acted within its "power to enforce" the Fourteenth and Fifteenth Amendments "by appropriate legislation." Pp. 414–415.

175 U. S. App. D. C. 297, 535 F. 2d 1259, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., concurred in the judgment.

David M. Kendall, First Assistant Attorney General of Texas, argued the cause for petitioners. With him on the brief were *John L. Hill,* Attorney General, *Thomas W. Choate,*

Special Assistant Attorney General, and *Lonny F. Zwiener,* Assistant Attorney General.

Howard E. Shapiro argued the cause for respondents. On the brief were *Acting Solicitor General Friedman, Assistant Attorney General Days, Deputy Solicitor General Wallace, Allan A. Ryan, Jr., Brian K. Landsberg,* and *Cynthia L. Attwood.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the construction of § 4 of the Voting Rights Act of 1965, 42 U. S. C. § 1973b (1970 ed. and Supp. V). "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (1966). While the Act has had a dramatic effect in increasing the participation of black citizens in the electoral process, both as voters and elected officials, Congress has not viewed it as an unqualified success.[1] Most recently, as part of the 1975 amendments to the Voting Rights Act, 89 Stat. 400, Congress extended the Act's strong protections to cover language minorities—that is, citizens living in environments where the dominant language is not English. Congress concluded after extensive hearings that there was "overwhelming evidence" showing "the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise

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**Vilma S. Martinez, Joaquin Avila, Jack Greenberg, Eric Schnapper, David S. Tatel, Joseph L. Rauh, Jr., James T. Danaher, Armand G. Derfner, Albert E. Jenner, Jr., Nicholas DeB. Katzenbach, Stephen J. Pollak, Norman Redlich, Robert A. Murphy,* and *William E. Caldwell* filed a brief for the Mexican American Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging affirmance.

[1] See, *e. g.,* S. Rep. No. 94–295, pp. 13–15 (1975) (hereafter Senate Report); H. R. Rep. No. 94–196, pp. 6–8 (1975) (hereafter House Report).

affect the voting rights of language minorities." [2] Concern was particularly expressed over the plight of Mexican-American citizens in Texas, a State that had not been covered by the 1965 Act.[3] This case arises out of Texas' efforts to prevent application of the 1975 amendments to it.

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Petitioners, the Governor and Secretary of State of Texas, filed suit in the District Court for the District of Columbia against the Attorney General of the United States and the Director of the Census.[4] These officials are responsible for

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[2] Senate Report 30, 35; House Report 22, 26–27. See § 4 (f) (1) of the Act, 42 U. S. C. § 1973b (f) (1) (1970 ed., Supp. V):

"The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices."

"The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." § 14 (c) (3) of the Act, 42 U. S. C. § 1973*l* (c) (3) (1970 ed., Supp. V). See Senate Report 24; House Report 16. The language minority protections apply only to jurisdictions where "the Director of the Census determines that more than five per centum of the citizens of voting age . . . are members of a single language minority." § 4 (f) (3) of the Act, 42 U. S. C. § 1973b (f) (3) (1970 ed., Supp. V).

[3] See Senate Report 25–28; House Report 17–20.

[4] Also named as defendants were the Assistant Attorney General,

determining whether the preconditions for application of the Act to particular jurisdictions are met. See § 4 (b) of the Act, 42 U. S. C. § 1973b (b) (1970 ed., Supp. V).[5] Petitioners sought interlocutory injunctive relief to restrain official publication of respondents' determinations that Texas was covered by the 1975 amendments, and a "declaratory judgment" determining "how and under what circumstances the determinations . . . should be made." [6] Pet. for Cert. 6.

Respondents opposed the motion for a preliminary injunction, and moved to dismiss the suit for failure to state a claim upon which relief could be granted and for lack of jurisdiction to review determinations made under § 4 (b). The jurisdictional argument was based on the final paragraph of § 4 (b),

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Civil Rights Division, the Secretary of Commerce, and the Public Printer of the United States.

[5] As pertinent to this case, § 4 (b) substantively provides:

"[T]he provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972."

[6] Petitioners argued that the Attorney General, in determining whether Texas had used a "test or device" of English-only elections, see § 4 (f) (3), 42 U. S. C. § 1973b (f) (3) (1970 ed., Supp. V), was obliged to consider whether it had done so "for the purpose or with the effect of denying or abridging the right to vote" as that is defined in § 4 (d). They argued that the Director of the Census should have interpreted "such persons," in the last clause of § 4 (b) quoted in n. 5, *supra*, to refer only to persons registered to vote rather than to all citizens. They also argued that even if their statutory interpretation claims were rejected, the Attorney General and the Director had violated their duties under the statute by failing to afford Texas a hearing before making the coverage determination and by incorrectly calculating the number of citizens and persons of Spanish heritage in Texas. Petitioners disclaimed any constitutional challenge to the Act.

which provides in pertinent part: "A determination or certification of the Attorney General or of the Director of the Census under this section . . . shall not be reviewable in any court . . . ." The District Court ruled, however, that this apparent preclusion of judicial review was not absolute. It found that there was jurisdiction to consider the "pure legal question" whether the Executive officials had correctly interpreted an Act of Congress. Reaching the merits of petitioners' claims, the District Court rejected them all and granted summary judgment for respondents.[7]

On appeal to the Court of Appeals for the District of Columbia Circuit, respondents discussed but did not "take issue with" the jurisdictional ruling of the District Court. The Court of Appeals nevertheless considered the issue carefully, concluding:

> "It is . . . apparent that even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority. . . . The district court in the instant case was careful to note that the actual computations made by the Director of the Census were *not* within its jurisdiction to review, and that its scope of review was limited to determining whether the Director acted 'consistent with the apparent

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[7] After the District Court denied relief, the § 4 (b) coverage determination was officially published. 40 Fed. Reg. 43746 (1975).

The Attorney General found that Texas had maintained the "test or device" of English-only elections. The Director of the Census calculated from his agency's statistics that more than 5% of the voting age citizens in Texas were of Spanish heritage, and that 46.2% of voting age citizens cast ballots in the 1972 Presidential election:

	Estimated number
Voting age population on November 1, 1972	7,655,000
Less aliens of voting age	140,657
Citizens of voting age	7,514,343
Votes cast	3,472,714

App. 156.

> meaning of the statute.' Narrowly defined in this manner, the jurisdiction of the trial court to consider the Director's determinations is supported by precedent . . . ." *Briscoe* v. *Levi,* 175 U. S. App. D. C. 297, 303, 535 F. 2d 1259, 1265 (1976).

Turning to the merits of petitioners' procedural and statutory construction arguments, the Court of Appeals thoroughly analyzed the statute and the legislative history. It found that respondents had correctly interpreted the Act and affirmed the judgment of the District Court.[8]

We granted certiorari *sub nom. Briscoe* v. *Levi,* 429 U. S. 997 (1976). Although respondents do not assert before us the jurisdictional objection raised in the District Court, we find that the courts below incorrectly concluded that they had power to review respondents' determinations that Texas was covered by the Act. See *Philbrook* v. *Glodgett,* 421 U. S. 707, 721 (1975), and cases there cited. We therefore order dismissal of the complaint without reaching the merits of petitioners' claims.

II

Section 4 (b) of the Voting Rights Act could hardly prohibit judicial review in more explicit terms. It states that a "determination or certification of the Attorney General or of the

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[8] The Court of Appeals ruled that the definitions in § 4 (d) apply only in suits brought to terminate coverage under § 4 (a), and not to the Attorney General's determination under § 4 (b). It held that while the language of the statute was unclear, the legislative history and administrative and judicial interpretation of § 4 (b) clearly indicated that "such persons" referred to "citizens of voting age." The court also held that the Director properly relied on census figures in calculating the number of citizens of voting age, rejecting petitioners' "amalgams of estimates and hypotheses," 175 U. S. App. D. C., at 307, 535 F. 2d, at 1269, allegedly showing large numbers of illegal aliens in Texas. It found that while Texas was not entitled to any pre-determination hearing on coverage, it had been afforded ample opportunity to present information before the decision was made.

Director of the Census under this section . . . shall not be reviewable in any court and shall be effective upon publication in the Federal Register." The language is absolute on its face and would appear to admit of no exceptions. The purposes and legislative history of the Act strongly support this straightforward interpretation.

The Voting Rights Act was conceived by Congress as a stern and powerful remedy to combat "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach,* 383 U. S., at 309. The stringent remedial provisions of the Act [9] were based on Congress' finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered . . . ." *Id.,* at 328. The intention of the drafters of the Act was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Ibid.* Reading § 4 (b) as completely precluding judicial review thus implements Congress' intention to eradicate the blight of voting discrimination with all possible speed.

The drafters' specific comments on § 4 (b) further support this view. The House Report stated that the coverage formula "requires certain factual determinations—determinations that are final when made and not reviewable in court." H. R. Rep. No. 439, 89th Cong., 1st Sess., 25 (1965). The minority report criticized the Act precisely because it went into effect "without evidence, without a judicial proceeding or a

[9] The Act suspends the operation of all "tests or devices," including English-only elections, in covered jurisdictions. § 4. Before such jurisdictions may implement any change in voting laws or procedures, they must secure the approval of the Attorney General or a three-judge court in the District of Columbia that the change will not violate the Act. § 5. In addition, federal registrars and observers may be appointed to effectuate compliance with the Act. §§ 6–9.

hearing of any kind." *Id.*, at 45; see also *id.*, at 43. The Report of the Senate Judiciary Committee sponsors of the Act also described § 4 as requiring "factual determinations . . . that are not reviewable in court." S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 22 (1965).

Congress was well aware, however, that the simple formula of § 4 (b) might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices. It afforded such jurisdictions immediately available protection in the form of an action to terminate coverage under § 4 (a) of the Act. While this so-called "bailout" suit is subject to narrow procedural and substantive limitations,[10] § 4 (a) does instruct the Attorney General that if he "determines that he has no reason to believe that any . . . test or device" has been used for a prohibited purpose during the relevant time period, "he shall consent to the entry of . . . judgment" exempting the jurisdiction. See H. R. Rep. No. 439, *supra,* at 14–15, 19.[11]

Although this Court has never considered at length the scope of the § 4 (b) preclusion clause, we have indicated that the words of the statute mean what they say. In *South Carolina* v. *Katzenbach, supra,* the Court upheld the consti-

[10] The action may be brought only before a three-judge District Court in the District of Columbia, with direct appeal to this Court. Under the 1975 amendments, Texas would be required to show in such a bailout suit "that no . . . test or device has been used during the ten years preceding the filing of an action . . . for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the [language minority] guarantees . . . ." § 4 (a). Another proviso of § 4 (a), and § 4 (b), further define the applicable standards.

[11] It is notable that a number of jurisdictions brought within the Act by the coverage formula have successfully exempted themselves in bailout suits. See Senate Report 12 n. 4, 13 n. 5; House Report 5 n. 4, 6 n. 5. The burden of proving nondiscrimination is thus not an impossible one by any means, and this ameliorative route has been available to Texas at all times.

tutionality of § 4 (b), which the Court stated "bar[red] direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula." 383 U. S., at 332. The Court recognized that § 4 (b) might be "improperly applied," but found that a bailout suit was the only available remedy. 383 U. S., at 333. The Court noted that "[t]his procedure serves as a partial substitute for direct judicial review." *Ibid.*

Similarly, in *Gaston County* v. *United States,* 395 U. S. 285 (1969), we stated that "[t]he coverage formula chosen by Congress was designed to be speedy, objective, and incontrovertible." *Id.,* at 291–292. A footnote added: "Section 4 (b) of the Act makes the determinations by the Attorney General and the Director of the Census unreviewable in any court." *Id.,* at 292 n. 6. See also *id.,* at 287. The significant part played by the discretionary authority of the Attorney General in administering the Act is also underlined by *Morris* v. *Gressette, post,* p. 491. There the Court finds no authority to review the Attorney General's failure to object, under § 5 of the Act, to a change in the voting laws of a covered jurisdiction. Although § 5 contains no express preclusion of review, the Court concludes from its structure and purposes that Congress intended no prolonged suspension of the operation of validly enacted state laws to allow judicial review. Since § 4 (b) expressly provides that the administrative determinations "shall not be reviewable in any court," and conclusions similar to those in *Morris* may be drawn from the statutory structure, the case for preclusion is, if anything, stronger here than in *Morris.*

We conclude, then, that the plain meaning and history of § 4 (b), the purpose and structure of the Act, as well as this Court's interpretation of it, indicate that judicial review of § 4 (b) determinations by the Attorney General and the Director of the Census is absolutely barred. There is in this case " 'persuasive reason to believe that such was the purpose

of Congress.' *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967)." *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975). "[T]he heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of this administrative decision has been met with the requisite " 'clear and convincing evidence.' " *Ibid.*[12]

Under these circumstances, the Court of Appeals erred in relying on cases that inferred jurisdiction to review administrative actions where there was no clear showing of preclusion.[13] Since different congressional enactments have distinct

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[12] Petitioners argued in support of reviewability in the District Court that because the preclusion paragraph of § 4 (b) contains the statement that coverage determinations "shall be effective upon publication in the Federal Register," review is foreclosed only after publication, but is available before. This case was commenced prior to publication of the coverage determination. Petitioners' argument tortures the plain meaning of the paragraph, which is made up of two independent clauses. The first precludes review without limitation as to time; the second establishes the precise date at which a coverage determination becomes effective, thereby requiring, for example, preclearance of any laws affecting voting rights after that date.

[13] The Court of Appeals primarily reasoned by analogy with *Leedom* v. *Kyne*, 358 U. S. 184 (1958). The issue there was whether a district court had jurisdiction to review a claim that the National Labor Relations Board had acted "in excess of its delegated powers and contrary to a specific [statutory] prohibition," *id.*, at 188, in certifying a collective-bargaining unit. While § 9 (d) of the National Labor Relations Act, 29 U. S. C. § 159 (d), arguably divested the district courts of jurisdiction, it contained no express language to that effect. It merely specified the manner in which the record of a certification proceeding would be transmitted to a court of appeals for ultimate review in the event an unfair labor practice case followed an employer's refusal to bargain with a certified union. The action in *Leedom* was brought by a group of employees affected by the NLRB's admitted violation of the Act in certifying their bargaining unit. The Court noted that unless the District Court had jurisdiction, the employees might never secure review of the Board's error. Absent express preclusion, the Court was unwilling to find that Congress intended to allow " 'obliteration of a right which Congress' has given

purposes and use diverse means to achieve them, each case raising an administrative reviewability question must be analyzed on the basis of the specific statutory provisions involved. If the intent of Congress is unmistakable—and we have no doubt that it is here—the only remaining issue is whether prohibiting judicial review is constitutionally permissible.

On that score, the finality of determinations under § 4 (b), like the preclearance requirement of § 5, may well be "an uncommon exercise of congressional power," *South Carolina* v. *Katzenbach,* 383 U. S., at 334; see also *Morris* v. *Gressette, post,* at 501. But there can be no question that in attacking the pervasive evils and tenacious defenders of voting discrimination, Congress acted within its "power to enforce" the Four-

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[the affected employees], for there is no other means, within their control . . . to protect and enforce that right." 358 U. S., at 190.

By contrast in this case, § 4 (b) on its face forecloses judicial review. No inference from the structure of the statute nor from its legislative history, cf. 358 U. S., at 191–201 (BRENNAN, J., dissenting), is necessary to make its meaning plain. And as we have noted, preclusion of review of § 4 (b) determinations does not wholly pretermit judicial action by the affected jurisdiction to terminate coverage.

The Court of Appeals also erred in relying on *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976). At issue there was the authority of a court of appeals to grant mandamus relief against the improper remand to a state court of an action previously removed to federal court. A remand order is generally "not reviewable on appeal or otherwise." 28 U. S. C. § 1447 (d). We held, however, that review is not precluded if the order is based " 'on grounds wholly different from those . . . which [the statute authorizing remand, 28 U. S. C.] § 1447 (c) permits.' " *Gravitt* v. *Southwestern Bell Tel. Co.,* 430 U. S. 723, 724 (1977). Where the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand. *Id.,* at 723.

While we express no opinion on the question whether § 4 (b) precludes review of coverage determinations based on criteria not specified in the statute, we note that in the present case, there is no question that the Attorney General and the Director of the Census relied solely upon the statutory grounds in finding Texas covered by the Act.

teenth and Fifteenth Amendments "by appropriate legislation." *South Carolina* v. *Katzenbach, supra.*

For the foregoing reasons, we hold that the courts below erred in finding that they had jurisdiction to review petitioners' claims of erroneous application of § 4 (b). The only procedure available to Texas to seek termination of Voting Rights Act coverage is a bailout suit under the strict limitations of § 4 (a). Accordingly, the decision of the Court of Appeals is vacated, and the case is remanded with instructions to direct the District Court to dismiss the complaint.

It is so ordered.

MR. JUSTICE POWELL concurs in the judgment of the Court.

BATTERTON, SECRETARY, DEPARTMENT OF HUMAN RESOURCES OF MARYLAND, ET AL. *v.* FRANCIS ET AL.

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

No. 75–1181. Argued April 19, 1977—Decided June 20, 1977

Section 407 (a) of the Social Security Act delegates to the Secretary of Health, Education, and Welfare the power to prescribe "standards" for determining what constitutes "unemployment" for purposes of eligibility for benefits under the Aid to Families with Dependent Children-Unemployed Fathers (AFDC–UF) program. Pursuant to § 407 (a), the Secretary promulgated a regulation authorizing participating States, within their discretion, to exclude from the definition of an unemployed father one "whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law." In class actions on behalf of families who were denied AFDC–UF benefits under a state rule because the fathers' unemployment resulted from discharges for misconduct, involvement in a strike, or voluntarily quitting their jobs, the courts below held the federal regulation invalid as exceeding the Secretary's statutory authority. *Held:* The regulation is a proper exercise of the Secretary's statutory authority and is reasonable. Pp. 424–432.

(a) Since the statute expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC–UF eligibility, a reviewing court is not free to set aside the regulation simply because it would have interpreted the statute in a different manner from the Secretary, but only if the Secretary exceeded his statutory authority or the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Pp. 424–426.

(b) By allowing the States to exclude persons who would be disqualified under the State's unemployment compensation law, the Secretary has incorporated a well-known and widely applied standard for "unemployment," and exclusion of individuals who are out of work as a result of their own conduct and thus disqualified from state unemployment compensation is consistent with the goal of

AFDC–UF, namely, to aid the families of the involuntarily unemployed. Pp. 426–429.

(c) The power to prescribe "standards" for determining what constitutes "unemployment" gives the Secretary sufficient flexibility to recognize local options in determining AFDC–UF eligibility, including the option of denying unemployment compensation benefits to participants in a labor dispute. While the congressional purpose was to promote greater uniformity in the application of the AFDC–UF program, such goal can be met without imposing identical standards on each State, and hence the Secretary's approach does not defeat the statute's purpose. Pp. 429–432.

529 F. 2d 514 and 515, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 432.

Joel J. Rabin, Assistant Attorney General of Maryland, argued the cause for petitioners. With him on the brief were *Francis B. Burch,* Attorney General, *George A. Nilson,* Deputy Attorney General, and *Theodore Losin,* Assistant Attorney General.

C. Christopher Brown argued the cause for respondents Francis et al. With him on the brief was *Dennis M. Sweeney. Gerard C. Smetana, William H. DuRoss III, Lawrence B. Kraus,* and *Richard O'Brecht* filed briefs for respondent Chamber of Commerce of the United States.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the validity of 45 CFR § 233.100 (a) (1) (1976),[1] a regulation promulgated by the Secretary of

[1] "§ 233.100 Dependent children of unemployed fathers.

"(a) *Requirements for State Plans.* If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV—Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

"(1) Include a definition of an unemployed father which shall apply

Health, Education, and Welfare (HEW) pursuant to a delegation of rulemaking authority in § 407 (a) of the Social Security Act, 42 U. S. C. § 607 (a).[2] The issue is whether the regulation is a proper exercise of the Secretary's statutory authority.

I

The statute is contained in the Social Security Act's Title IV, which has to do primarily with Aid to Families with Dependent Children (AFDC). The AFDC program was established by the Act in 1935 to provide welfare payments where children are needy because of the death, absence, or incapacity of a parent. 42 U. S. C. § 606 (a). The original conception of AFDC was to allow widows and divorced mothers to care for their children at home without having to go to work, thus eliminating the practice of removing needy children in situations of that kind to institutions. See *Burns* v. *Alcala,*

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only to families determined to be needy in accordance with the provisions in § 233.20 of this chapter. Such definition must include any father who:

"(i) Is employed less than 100 hours a month; or

"(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

"except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law."

[2] "§ 607. Dependent children of unemployed fathers; definition.

"(a) The term 'dependent child' shall, notwithstanding section 606 (a) of this title, include a needy child who meets the requirements of section 606 (a) (2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606 (a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home."

420 U. S. 575, 581–582 (1975). AFDC was not originally designed to assist children who are needy simply because the family breadwinner is unable to find work; it was contemplated that other programs would alleviate that problem by attacking unemployment directly. See *Carleson* v. *Remillard,* 406 U. S. 598, 603 (1972); *King* v. *Smith,* 392 U. S. 309, 313, 327–329 (1968). Other parts of the Act encouraged the establishment of state unemployment compensation programs, primarily through tax incentives, but the federal role in these programs is not so great as in AFDC. See *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471 (1977).

Title IV was amended in 1961 to add § 407. Pub. L. 87–31, § 1, 75 Stat. 75. This section established an experimental program (AFDC–UF) [3] to provide assistance in some cases where the unemployment of a parent causes dependent children to be needy. The States were given broad power to define "unemployment" for purposes of the program and to determine the relationship of this new program to existing state unemployment compensation plans. In 1968 the AFDC–UF program was made permanent, 81 Stat. 882, but the eligibility criteria were modified to withdraw some of the definitional authority delegated to the States. The statute now requires a participating State to provide assistance where a needy child "has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father." 42 U. S. C. § 607 (a). See *Philbrook* v. *Glodgett,* 421 U. S. 707, 709–711 (1975).[4]

[3] The program originally was to expire June 30, 1962. It was extended, however, first for five years, 76 Stat. 193, and then to June 30, 1968, 81 Stat. 94.

[4] Before the 1968 amendments, § 407 (a) referred to "unemployment (as defined by the State)." 75 Stat. 75. Under the original statute the States were also free to decide to what extent receipt of unemployment compensation would affect eligibility for AFDC–UF benefits. Section 407 (b)(2)(C)(ii) was added and amended in 1968 to require participating

Both AFDC and AFDC–UF are cooperative ventures of the Federal Government and the States. States that elect to participate in these programs administer them under federal standards and HEW supervision. Funding is provided from state and federal revenues on a matching basis. See, *e. g.*, *Shea* v. *Vialpando,* 416 U. S. 251, 253 (1974); *King* v. *Smith,* 392 U. S., at 316. Although every State currently participates in AFDC, only about half the States participate in the AFDC–UF program. Dept. of HEW, Public Assistance Statistics, Oct. 1976, table 5, p. 9 (1977).

II

The instant case originated in 1971 as a challenge to Rule 200.X.(A)(2) of the Maryland Department of Employment and Social Services. That Rule denies AFDC–UF benefits to families where the father is out of work for reasons that disqualify him for state unemployment insurance compensation.[5]

States to deny AFDC–UF benefits "with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States." § 302, 82 Stat. 273.

In *Philbrook* v. *Glodgett,* 421 U. S., at 710 n. 6, 719, the Court observed that a purpose of the 1968 amendments was to eliminate variations in AFDC–UF coverage among the States. Accordingly, § 407 (b)(2)(C)(ii) was held to establish a nationwide test of eligibility under which only the actual "receipt" of unemployment compensation would preclude AFDC–UF benefits. Thus the States were required to allow persons eligible for both programs to refuse unemployment compensation and receive AFDC–UF benefits instead. 421 U. S., at 713–719.

The effect of the Court's decision in *Philbrook* was counteracted the following year when Congress again amended § 407 (b)(2)(C)(ii) to require denial of AFDC–UF benefits where a father is qualified for unemployment compensation but refuses to apply for or accept it. Pub. L. 94–566, § 502, 90 Stat. 2688.

[5] This Rule, which has since been redesignated COMAR 07.02.09.10 (A)(2) (1975), provides that AFDC–UF benefits may not be paid "[t]o meet need due to being disqualified for unemployment insurance." Maryland's Unemployment Insurance Law specifies various grounds that disqualify

The original plaintiffs represented two classes of families with dependent children who were thereby ineligible for AFDC–UF benefits: one where the father had been discharged for misconduct (excessive absenteeism), and the other where the father was out of work because of a strike. The defendants were Maryland officials having responsibility for the administration of public assistance grants in the State. A three-judge United States District Court was convened to consider the claim that Rule 200.X.(A)(2) violated the Equal Protection Clause of the Fourteenth Amendment. The court sustained the constitutionality of the state regulation but went on to hold it invalid because it was contrary to the federal regulation prescribing standards for the determination of unemployment under the AFDC–UF program. *Francis* v. *Davidson,* 340 F. Supp. 351 (Md.), summarily aff'd, 409 U. S. 904 (1972) (*Francis I*). Although HEW did not agree that its regulation was inconsistent with Rule 200.X.(A)(2), the Solicitor General, in his memorandum for the United States as *amicus curiae,* filed in *Francis I* at this Court's invitation, 408 U. S. 920 (1972), suggested a summary affirmance in that case in light of the then-forthcoming revision of the HEW regulation.

The HEW regulation, as amended, expressly authorizes some state discretion in defining unemployment. Generally, it requires the States to consider a person to be unemployed for AFDC–UF purposes if he works less than 100 hours a month, except for intermittent employment, and "except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification

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otherwise eligible individuals from receiving benefits. These grounds include, among others, voluntarily leaving work without good cause, gross misconduct, discharge or suspension as a disciplinary measure (temporary disqualification for not less than one week and for not more than nine weeks), and certain work stoppages due to labor disputes other than lockouts. Md. Ann. Code, art. 95A, §§ 6 (a), (b), (c), and (e) (1969).

for unemployment compensation under the State's unemployment compensation law." 45 CFR § 233.100 (a)(1) (1976). The Secretary had stated that the purpose of this amendment was to nullify the effect of *Francis I* by making explicit the HEW policy of allowing the States to exclude AFDC–UF participants based on the particular reason that the father was out of work.[6]

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[6] The notice of rulemaking read:

"Dependent Children of Unemployed Fathers

"Notice is hereby given that the regulation set forth in tentative, alternative form below is proposed by the Administrator, Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare. Both alternatives would amend § 233.100 (a)(1), which provides a Federal definition of unemployed father under the AFDC program in terms of hours of work.

"In applying the existing regulation, the Department policy has been to permit a State, at its option, to use a definition of unemployed father which imposes additional conditions relating to the reason for the unemployment, *e. g.*, the State definition might exclude a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law. In *Davidson* v. *Francis,* the U. S. Supreme Court on October 16, summarily affirmed the judgment of the district court which held, in effect, that while the Secretary has broad authority to define an unemployed father for purposes of section 407 of the Social Security Act, the existing Federal regulation provides only an hours-of-work test, and thus prohibits a State from excluding fathers who meet this test but are disqualified for unemployment compensation.

"Accordingly, the proposed alternative A below would amend the regulation to make the prior Department policy explicit, by stating the options which are permitted to the States in defining an unemployed father. Alternative B, on the other hand, would amend the regulation to make clear that the hours-of-work test is intended as the exclusive definition of unemployed father, so that States may not have definitions which impose added conditions. This would be a change in Department policy, but would be consistent with the way that the existing regulation has been interpreted by the courts." 38 Fed. Reg. 49 (1973).

"Alternative A" was eventually adopted. *Id.*, at 18549.

After the amended HEW regulation became effective, the defendant Maryland officials moved that the District Court dissolve its earlier injunction issued March 16, 1972, after *Francis I* had been decided, against enforcement of Rule 200.X.(A)(2). That court recognized that "[t]he conflict between the federal and the Maryland regulation ended after the former was amended," but nevertheless it denied the motion and continued the injunction on the ground that the amended federal regulation now was in conflict with the federal statute. *Francis* v. *Davidson,* 379 F. Supp. 78, 81 (Md. 1974) (*Francis II*). First, with regard to the class of fathers discharged for misconduct, the District Court stated that these people are necessarily "unemployed," within the meaning of the statute, and that any contrary regulation is invalid. Second, the court recognized that it is not clear whether the statutory term "unemployed" includes persons involved in a labor dispute. The court held, however, that the HEW regulation was invalid in this regard because it delegated the question of coverage to the States without providing a uniform national standard. *Id.,* at 81–82.

After this Court dismissed a direct appeal in *Francis II* for want of jurisdiction, 419 U. S. 1042 (1974), appeals were taken by the state defendants and by the Chamber of Commerce of the United States, as intervenor, to the United States Court of Appeals for the Fourth Circuit. There the case was consolidated with an appeal in a similar case, *Bethea* v. *Mason,* 384 F. Supp. 1274 (Md. 1974), where a single District Judge had followed *Francis II* in holding the same HEW regulation invalid insofar as it authorized the State to deny AFDC–UF benefits to fathers who had voluntarily quit their previous jobs.

The Fourth Circuit affirmed the three appeals in an unpublished *per curiam* adopting the respective opinions of the two District Judges. See 529 F. 2d 514 and 515 (1975). The state defendants petitioned for certiorari, contending that the

current HEW regulation is authorized by the federal statute and that the injunction against the state regulation therefore should be dissolved.[7] The Solicitor General, at the invitation of the Court, 425 U. S. 969 (1976), filed a memorandum for the United States as *amicus curiae,* supporting the state defendants' position. We granted certiorari. 429 U. S. 939 (1976).

III

The ultimate question in this case is whether the statutory term "unemployment" may be interpreted to allow the State to exclude the three classes of respondents from receiving AFDC–UF benefits. There can be no doubt that 45 CFR § 233.100 (a)(1) (1976) embodies that interpretation. Thus, the actual issue we must decide is not how the statutory term should be interpreted, but whether the Secretary's regulation is proper.

Ordinarily, administrative interpretations of statutory terms are given important but not controlling significance. This was the Court's approach, for example, when it had under consideration the question whether the term "wages" in Title II of the Social Security Act included a backpay award. *Social Security Board* v. *Nierotko,* 327 U. S. 358, 369 (1946).[8]

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[7] The Chamber of Commerce of the United States, as intervenor in *Francis II,* also filed a petition for certiorari, No. 75–1182, arguing that federal labor policy prohibits the payment of welfare benefits to persons involved in labor disputes. Although we did not act on its petition, the Chamber filed a brief as respondent-intervenor in the present case. In light of today's decision, the petition for certiorari in No. 75–1182 is denied.

[8] The Court there explained:

"Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. Congress might have declared that 'back pay' awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such

Unlike the statutory term in Title II, however, Congress in § 407 (a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC–UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner. *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 235–237 (1936).[9]

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interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word—'wages'—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

"We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits." 327 U. S., at 369 (footnote omitted).

[9] Legislative, or substantive, regulations are "issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law." U. S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n. 3 (1947). See *United States* v. *Mersky,* 361 U. S. 431, 437–438 (1960); *Atchison, T. & S. F. R. Co.* v. *Scarlett,* 300 U. S. 471, 474 (1937).

By way of contrast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. See *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 141–145 (1976); *Morton* v. *Ruiz,* 415 U. S. 199, 231–237 (1974); *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944).

See generally K. Davis, Administrative Law Treatise § 5.03 (1958 and

The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §§ 706 (2)(A), (C).[10]

IV

We turn now to the grounds on which the District Courts and the Court of Appeals held the regulation invalid, keeping in mind the narrow scope of review that is indicated in this situation.

These courts held that the Secretary exceeded his statutory authority to prescribe standards, in the first place, because he permitted the determination of eligibility to turn in part on the reason for the father's unemployment. The language of § 407 (a) was thought to make the only relevant consideration that of whether, not why, the father was out of work:

> "'A man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion' . . . . [N]o combination of federal and state regulations may provide that a father who is unemployed is not unemployed." *Francis II,* 379 F. Supp., at 81, quoting *Francis I,* 340 F. Supp., at 366.

And in *Bethea* the court by like reasoning held that a person who voluntarily quit his job is to be considered unemployed

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Supps. 1970, 1976); L. Jaffe, Judicial Control of Administrative Action 564–565 (1965).

[10] The other kinds of review provided by the Administrative Procedure Act are not involved in this case. The constitutionality and procedural aspects of the regulation, 5 U. S. C. §§ 706 (2)(B), (D), are not at issue at this time. Neither substantial-evidence review nor trial *de novo,* §§ 706 (2)(E), (F), was available in this case. See *Camp* v. *Pitts,* 411 U. S. 138, 140–142 (1973); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 413–416 (1971).

within the meaning of the statute. 384 F. Supp., at 1280–1281.

We do not agree that the statutory language is so unambiguous. The term "unemployment" is often used in a specialized context where its meaning is other than simply not having a job. For example, the concept of unemployment is frequently limited to persons who have some connection with the work force, that is, individuals who desire to work and are capable of working, and who, usually but not always, have held jobs in the past. In addition, the feature of involuntariness is often linked with unemployment. Limitations of this nature are found in the definitions used by the Department of Labor in compiling unemployment statistics.[11] State unemployment compensation programs generally confine their benefits in this manner.[12] Indeed, the other provisions of

[11] "Employed persons are (1) those who worked for pay any time during the week which includes the 12th day of the month or who worked unpaid for 15 hours or more in a family-operated enterprise and (2) those who were temporarily absent from their regular jobs because of illness, vacation, industrial dispute, or similar reasons. . . .

"Unemployed persons are those who did not work during the survey week, but were available for work except for temporary illness and had looked for jobs within the preceding 4 weeks. Persons who were available for work but did not work because they were on layoff or waiting to start new jobs within the next 30 days are also counted among the unemployed. . . .

". . . Persons not in the labor force are those not classified as employed or unemployed; this group includes persons retired, those engaged in their own housework, those not working while attending school, those unable to work because of long-term illness, those discouraged from seeking work because of personal or job market factors and those who are voluntarily idle. . . ." U. S. Dept. of Labor, Monthly Labor Review 91 (Apr. 1977).

[12] "Unemployment insurance programs are designed to provide cash benefits to regularly employed members of the labor force who become involuntarily unemployed and who are able and willing to accept suitable jobs." Dept. of HEW, Social Security Programs in the United States 54 (1971). See also *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S., at 482, and 487 n. 15.

§ 407 impose similar limitations, indicating that the AFDC–UF program was not intended to provide assistance without regard to the reason a person is out of work.[13]

Thus, we conclude that the statutory term is capable of more than the tautological definition imposed by the District Judges and the Court of Appeals. Congress itself must have appreciated that the meaning of the statutory term was not self-evident, or it would not have given the Secretary the power to prescribe standards.

Respondents argue, however, that Congress intended that the Secretary prescribe an "hours-worked" standard for determining unemployment but did not intend any further additions to the eligibility criteria specified in other provisions of the statute. In fact, a minimum hours-worked standard is part of the regulation at issue in this case, but there is no indication in the statutory language or legislative history that Congress intended to foreclose other factors in the determination of what constitutes unemployment for purposes of the AFDC–UF program.

Of course, the Secretary's statutory authority to prescribe standards is not unlimited. He could not, for example, adopt a regulation that bears no relationship to any recognized concept of unemployment or that would defeat the purpose of the AFDC–UF program. But the regulation here at issue does not even approach these limits of the delegated authority. By allowing the States to exclude persons who would be disqualified under the State's unemployment compensation law, the Secretary has incorporated a well-known and widely applied standard for "unemployment." Exclusion of individuals who are out of work as a result of their own conduct and thus disqualified from state unemployment compensation

[13] Among the conditions imposed by § 407 (b) are requirements that the unemployed father have a substantial connection with the work force and that he actively seek employment. See *Philbrook* v. *Glodgett,* 421 U. S. 707, 710 n. 6 (1975).

is consistent with the goal of AFDC–UF, namely, to aid the families of the involuntarily unemployed.[14] On the other hand, state unemployment benefits are ordinarily available only after a waiting period and only for a limited number of weeks or months. By providing benefits during the periods before and after state unemployment compensation is available, AFDC–UF fills a significant gap in social insurance coverage.[15] Thus we cannot say that the Secretary's regulation defeats the purpose of the AFDC–UF program.

We therefore hold that the HEW regulation, to the extent it allows the States to determine that persons disqualified under unemployment compensation laws are not "unemployed" under § 407 (a), is within the statutory authority delegated to the Secretary, and is reasonable.

V

The second stated reason for the District Judges' and Court of Appeals' holding that the Secretary's regulation was invalid was that it permitted the States the option of denying unemployment compensation benefits to participants in a labor dispute.[16] Although the holding is not entirely clear to us, it

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[14] In describing the bill on the floor of the House, a cosponsor stated that the concern was with the "involuntarily unemployed and I put the emphasis on the word 'involuntarily.'" 107 Cong. Rec. 3767 (1961) (remarks of Cong. Byrnes).

[15] When President Kennedy proposed the adoption of the AFDC–UF program in 1961, the only example he gave of the sort of person that would be covered was one "who has exhausted unemployment benefits and is not receiving adequate local assistance. . . ." Message from the President on Economic Recovery and Growth, 107 Cong. Rec. 1679 (1961).

[16] Although 45 CFR § 233.100 (a)(1) (1976) contains a separate option for States to exclude labor-dispute participants from AFDC–UF, Maryland has incorporated its labor-dispute rule as a disqualification for unemployment compensation. The labor-dispute provision of the federal regulation, therefore, is not directly at issue in this case. We attach no significance to the approach followed by Maryland in this case.

appears that what was regarded as fatal was the Secretary's failure to impose sufficient standards to control the States' decisions under this optional feature.[17] Presumably, the same rationale would provide an alternative basis for holding the regulation invalid to the extent it allows States the uncontrolled option of denying benefits to persons who were discharged for cause or had voluntarily quit their jobs.

It is clear that a major purpose of the 1968 amendment was to retract some of the authority previously delegated to the States under § 407 (a). *Philbrook* v. *Glodgett*, 421 U. S., at 710. We, however, do not think this shift of authority from the States to the Secretary required the Secretary to adopt a regulation that precludes any recognition of local policies. If Congress had intended such a result, it might have changed the statutory language from "unemployment (as defined by the State)" to "unemployment (as defined by the Secretary)." Instead, § 407 (a) now reads "unemployment (as determined in accordance with standards prescribed by the Secretary)." The power to "determine" unemployment remains with the States, and we conclude that the power to prescribe "standards" gives the Secretary sufficient flexibility to recognize some local options in determining AFDC–UF eligibility.

The legislative history, we acknowledge, is at some variance with the statutory language. The effect of the 1968 amend-

[17] The *Francis I* court initially held that the Secretary could have left the decision on whether strikers are unemployed up to each State, but that he had failed to do so in the regulation then in effect. 340 F. Supp., at 367–368. After the regulation was so amended, however, the same court held it invalid, 379 F. Supp., at 81–82, because the Secretary failed to establish "national standards within which the regulations of each of the states were to be channelized and confined." *Id.*, at 82. The extent to which any significant options in coverage would be tolerated under this approach is not clear. The court, however, stopped short of repudiating its previous conclusion that § 407 (a) does not require the Secretary to adopt a "national definition" of unemployment. 379 F. Supp., at 82.

ment is described as to "provide for a uniform definition of unemployment throughout the United States," and as to "authorize a Federal definition of unemployment by the Secretary." S. Rep. No. 744, 90th Cong., 1st Sess., 3–4, 160 (1967). See H. R. Rep. No. 544, 90th Cong., 1st Sess., 3, 17, 108 (1967); 113 Cong. Rec. 32592 (1967) (remarks of Sen. Long). We do not understand these comments to mean, however, that the Secretary is prohibited from allowing the States any options in determining whether or not a person is "unemployed" for purposes of the AFDC–UF program. First, the legislative history cannot be read literally in its claim that the amended statute itself provides a federal definition of unemployment; at best the statute delegates to the Secretary the power to prescribe such a definition. Second, we have no quarrel with the statements in the legislative history that the Secretary is *authorized* to adopt such a uniform definition; we simply hold that he is not *required* to do so.

Certainly, the congressional purpose was to promote greater uniformity in the applicability of the AFDC–UF program. But the goal of greater uniformity can be met without imposing identical standards on each State. In one case, for example, a State was permitted to adopt a somewhat more liberal hours-worked test than the minimum required by the Secretary. *Macias* v. *Finch,* 324 F. Supp. 1252 (ND Cal.), summarily aff'd, 400 U. S. 913 (1970). We conclude, therefore, that the Secretary's approach in the present case is not contrary to the purpose of the statute.

Our conclusion is reinforced by our understanding of the AFDC–UF program as involving the concept of cooperative federalism. The States are free not to participate in the program, and, as we have noted, only about half of them in fact do so. The congressional purpose is not served at all in those States where AFDC–UF is totally unavailable. Accordingly, we should not lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local

policies in determining eligibility. See *New York Dept. of Soc. Services* v. *Dublino,* 413 U. S. 405, 413–414, 421–422 (1973).

We therefore hold that 45 CFR § 233.100 (a)(1) (1976) adequately promotes the statutory goal of reducing interstate variations in the AFDC–UF program. In this respect, the regulation is both reasonable and within the authority delegated to the Secretary.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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

The regulation under review in this case, 45 CFR § 233.100 (a)(1) (1976), provides that for purposes of the AFDC–UF program, the definition of unemployment need not include, "*at the option of the State,*" a father whose unemployment results from a labor dispute or some conduct that would disqualify him under the State's unemployment compensation law. (Emphasis added.) The Court today sustains this regulation notwithstanding its recognition that "a major purpose of the 1968 amendment was to retract some of the authority previously delegated to the States under § 407 (a)." *Ante,* at 430. The Court reasons, without citation to legislative authority, that "the goal of greater uniformity can be met without imposing identical standards on each State." *Ante,* at 431. Contrary to the majority, I do not believe that the legislative history reflects a congressional intent to achieve merely "greater uniformity" in the definition of unemployment; the legislative record plainly reveals that Congress contemplated a federal definition of unemployment applicable to all States that adopt the AFDC–UF program. Since I do not believe that the subject regulation conforms to this

congressional mandate, I would affirm the judgment of the Court of Appeals.

The Court acknowledges that the legislative history is "at some variance" with its position. *Ante,* at 430. This understates the case; literally *all* of the relevant legislative history repeatedly and unequivocally affirms the strong congressional objective of creating a federal definition of unemployment. It is common ground that Congress changed the wording of § 407 (a) from "unemployment (as defined by the State)" to "unemployment (as determined in accordance with standards prescribed by the Secretary)" for the express purpose of "eliminat[ing] the variations in state definitions of unemployment." *Philbrook* v. *Glodgett,* 421 U. S. 707, 719 (1975). But the Court would have us believe that the statute nevertheless contemplates a regulation leaving it completely within state discretion whether to cover those not working by reason of labor disputes or because of discharge for cause.* In my view, this is flatly contrary to the

*The Court appears to believe that the statutory language supports its view that the States are still free to define the eligibility criteria for AFDC–UF benefits; but the statute provides that "unemployment" will be "determined in accordance with standards prescribed by the *Secretary,*" not the States. (Emphasis added.) The Court concludes that the statutory language contemplates that unemployment will be "determined" by the States and that only the "standards" will be determined by the Secretary. The majority suggests that if Congress had intended for the Secretary to define unemployment, it would have used the words "unemployment (as defined by the Secretary)." The Court's paper-thin distinction between "determining" unemployment and prescribing "standards" totally escapes me. Moreover, according to the Court's logic, if Congress had intended the meaning suggested by the majority, it would have provided that unemployment would be "determined *by the States* in accordance with the standards prescribed by the Secretary"; instead, Congress eliminated all references to the States. The commonsense meaning of the statutory language is that "unemployment" is to be defined by the Secretary, and as we shall see, the statute is susceptible of no other interpretation when read in the context of the legislative history.

thrust of the legislative history, which bears some recitation.

In the Senate, most of the work on the 1968 amendments was done by the Finance Committee. That Committee reported that the bill would:

> "(e) modify the optional unemployed fathers program to provide for a *uniform definition of unemployment throughout the United States.*" S. Rep. No. 744, 90th Cong., 1st Sess., 4 (1967) (emphasis added).
>
> "A major characteristic of the existing law is the authority left to the States to define 'unemployment.' The committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have been relatively broad. The committee bill is designed to correct this situation and to make other improvements in the program.
>
> "The amendments proposed by the committee would authorize *a Federal definition of unemployment* by the Secretary . . . ." *Id.*, at 160 (emphasis added).

The Ways and Means Committee, which carried the legislation in the House, adopted the same view:

> "Under present law . . . [t]he definition of unemployment is left up to the individual States. Under the bill . . . *the definition of unemployment would be made by the Federal Government.*" H. R. Rep. No. 544, 90th Cong., 1st Sess., 17 (1967) (emphasis added).

See also *id.*, at 3, 108 (using language almost identical to that adopted by the Senate Finance Committee, S. Rep. No. 744, *supra*, at 3–4, 160).

The Undersecretary of HEW, Wilbur J. Cohen, expressed his Department's view that the new legislation would require a uniform national standard:

> "Today, 22 States have programs to assist [children

who are needy because their fathers are unemployed]. But the differences between State programs are great. States may define unemployment as narrowly or broadly as they wish, requiring substantial previous work experience or no work experience. This variation in definition of unemployment is shown clearly by three adjacent Southwestern States, Arizona, Utah, and Colorado. Each of these States has a population of between 1 and 2 million, yet in Arizona only 19 families of unemployed parents received AFDC in May, while during the same month there were 880 in Utah and 1,600 in Colorado. Arizona's narrow definition of unemployment has kept its program to a token level.

"The House bill continues to allow States to choose whether they will include dependent children of unemployed parents under AFDC. But for the first time the House will set a *Federal definition of unemployment. We are in complete agreement that there should be a Federal definition of unemployment established by the Congress and the Secretary.*" Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., 268 (1967) (emphasis added).

The members of the Senate Finance Committee expressed no doubt as to the meaning of the Undersecretary's remarks: "Senator WILLIAMS: I notice you say you are in complete agreement that there should be a *Federal definition of unemployment.*" *Id.*, at 269 (emphasis added).

Finally, after the enactment of the 1968 amendments, the Senate Finance Committee was unequivocal in summing up the amendments to the unemployed fathers provisions: "The amendments provide for a *Federal definition of unemployment* for States which have AFDC–UF programs." Senate Committee on Finance, 90th Cong., 2d Sess., Report on Social Security Amendments of 1967—Pub. L. 248, Brief Summary of Major Provisions and Detailed Comparison with

Prior Law 3 (July 15, 1968) (emphasis added). See also *id.*, at 63 ("Unemployment will be defined by the Secretary of Health, Education, and Welfare"); 113 Cong. Rec. 23054 (1967) (remarks of Rep. Mills) ("[W]e found . . . that the fact that the definition of unemployment is left to the States has had unfortunate results. . . . The Bill would correct this situation"); *id.*, at 32592 (remarks of Sen. Long) ("[T]here would be a Federal definition of 'unemployment' "); *id.*, at 36373–36374 ("[T]he Secretary will prescribe standards for the determination of what constitutes unemployment. The term is defined by the States under present law"); Senate Committee on Finance and House Committee on Ways and Means, 90th Cong., 1st Sess., Report on Summary of Social Security Amendments of 1967, p. 17 (Comm. Print 1967) ("[T]he Secretary will prescribe standards for the determination of what constitutes unemployment").

Unlike the majority, I have no doubt that the legislative history means what it says and confines the regulatory authority of the Secretary; by amending § 407 (a) to place the responsibility for defining unemployment on the Secretary, Congress intended to establish "a uniform definition of unemployment throughout the United States." S. Rep. No. 744, *supra,* at 4; H. R. Rep. No. 544, *supra,* at 3. While I agree with the majority that this Court should defer to any reasonable definition given by the Secretary to the term "unemployment," I cannot agree, in light of the legislative history, that the Secretary may simply delegate the responsibility for defining that term to the States, for in important respects this would simply return the law to the situation existing prior to the amendment defining that term to the States. Here, the Secretary has promulgated a regulation describing a rather broad category of individuals who may be eligible for AFDC–UF benefits but has then permitted the States to include or exclude those individuals from eligibility "at the option of the State."

Contrary to the obvious intent of Congress, this leaves to state discretion the coverage of important categories of claimants and invites the very diversity in coverage that the 1968 amendment was designed to prevent. I cannot believe that this regulation conforms to the statutory purpose. Accordingly, I respectfully dissent.

BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* DOE ET AL.

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

No. 75–554. Argued January 11, 1977—Decided June 20, 1977

Title XIX of the Social Security Act establishes a Medical Assistance (Medicaid) program, under which participating States financially assist qualified individuals in five general categories of medical treatment, state plans being required to establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plan which are consistent with" Title XIX's objectives. Respondents, who are eligible for medical assistance under Pennsylvania's Medicaid plan and who were denied financial assistance for desired nontherapeutic abortions pursuant to state regulations limiting such assistance to abortions certified by physicians as medically necessary, brought this action seeking injunctive and declaratory relief, contending that the certification requirement contravened Title XIX and denied them equal protection of the laws. A three-judge District Court decided the statutory issue against respondents but the constitutional issue partially in their favor. The Court of Appeals, not reaching the constitutional question, reversed on the statutory issue, holding that Title XIX prohibits participating States from requiring a medical-necessity certificate as a funding condition during the first two trimesters of pregnancy. *Held:*

1. Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the Medicaid program established by that Act. Pp. 443–447.

(a) Nothing in the language of Title XIX requires a participating State to fund every medical procedure falling within the delineated categories of medical care. Each State is given broad discretion to determine the extent of medical assistance that is "reasonable" and "consistent with the objectives" of Title XIX. Pp. 443–444.

(b) Although serious statutory questions might be presented if state Medicaid plans did not cover necessary medical treatment, it is not inconsistent with the Act's goals to refuse to fund *unnecessary* (though perhaps desirable) medical services. Pp. 444–445.

(c) The State has a strong interest in encouraging normal child-

birth that exists throughout the course of a woman's pregnancy, and nothing in Title XIX suggests that it is unreasonable for a State to further that interest. It therefore will not be presumed that Congress intended to condition a State's participation in Medicaid on its willingness to undercut that interest by subsidizing the costs of nontherapeutic abortions. Pp. 445–446.

(d) When Congress passed Title XIX nontherapeutic abortions were unlawful in most States, a fact that undermines the contention that Congress intended to require—rather than permit—participating States to fund such abortions. Moreover, the Department of Health, Education, and Welfare, the agency that administers Title XIX, takes the position that the Title allows, but does not mandate, funding for such abortions. P. 447.

2. Whether or not that aspect of Pennsylvania's program under which financial assistance is not provided for medically necessary abortions unless two physicians in addition to the attending physician have examined the patient and have concurred in writing as to the medical necessity of the abortion interferes with the attending physician's medical judgment in a manner not contemplated by Congress should be considered on remand. P. 448.

523 F. 2d 611, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 448. MARSHALL, J., filed a dissenting opinion, *post,* p. 454. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 462.

Norman J. Watkins, Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With him on the briefs were *Robert P. Kane,* Attorney General, and *J. Justin Blewitt, Jr.,* Deputy Attorney General.

Judd F. Crosby argued the cause and filed a brief for respondents.*

**William F. Hyland,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Erminie L. Conley,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal.

David S. Dolowitz, Melvin L. Wulf, and *Judith M. Mears* filed a brief

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether Title XIX of the Social Security Act, as added, 79 Stat. 343, and amended, 42 U. S. C. § 1396 *et seq.* (1970 ed. and Supp. V), requires States that participate in the Medical Assistance (Medicaid) program to fund the cost of nontherapeutic abortions.

I

Title XIX establishes the Medicaid program under which participating States may provide federally funded medical assistance to needy persons.[1] The statute requires participating States to provide qualified individuals with financial assistance in five general categories of medical treatment.[2] 42

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for the American Public Health Assn. et al. as *amici curiae* urging affirmance.

Patricia A. Butler and *Michael A. Wolff* filed a brief for Jane Doe as *amicus curiae*.

[1] Title XIX establishes two groups of needy persons: (1) the "categorically" needy, which includes needy persons with dependent children and the aged, blind, and disabled, 42 U. S. C. § 1396a (a)(10)(A) (1970 ed., Supp. V); and (2) the "medically" needy, which includes other needy persons, § 1396a (a)(10)(C) (1970 ed., Supp. V). Participating States are not required to extend Medicaid coverage to the "medically" needy, but Pennsylvania has chosen to do so.

[2] The general categories of medical treatment enumerated are:

"(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

"(2) outpatient hospital services;

"(3) other laboratory and X-ray services;

"(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered to be sexually active)

U. S. C. §§ 1396a (a)(13)(B) (1970 ed., Supp. V), 1396d (a)(1)–(5) (1970 ed. and Supp. V). Although Title XIX does not require States to provide funding for all medical treatment falling within the five general categories, it does require that state Medicaid plans establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]." 42 U. S. C. § 1396a (a)(17) (1970 ed., Supp. V).

Respondents, who are eligible for medical assistance under Pennsylvania's federally approved Medicaid plan, were denied financial assistance for desired abortions pursuant to Pennsylvania regulations limiting such assistance to those abortions that are certified by physicians as medically necessary.[3] When

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who are eligible under the State plan and who desire such services and supplies;

"(5) physicians' services furnished by a physician (as defined in section 1395x (r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere." 42 U. S. C. § 1396d (a) (1970 ed. and Supp. V).

Participating States that elect to extend coverage to the "medically" needy, see n. 1, *supra*, have the option of providing somewhat different categories of medical services to those individuals. 42 U. S. C. § 1396a (a)(13)(C)(ii) (1970 ed., Supp. V).

[3] An abortion is deemed medically necessary under the Pennsylvania Medicaid program if:

"(1) There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;

"(2) There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or

"(3) There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and

"(4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

"(5) The procedure is performed in a hospital accredited by the Joint

respondents' applications for Medicaid assistance were denied because of their failure to furnish the required certificates, they filed this action in the United States District Court for the Western District of Pennsylvania seeking declaratory and injunctive relief. Their complaint alleged that Pennsylvania's requirement of a certificate of medical necessity contravened relevant provisions of Title XIX and denied them equal protection of the laws in violation of the Fourteenth Amendment.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. After resolving the statutory issue against respondents, the District Court held that Pennsylvania's medical-necessity restriction denied respondents equal protection of the laws. *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (1974).[4]

Commission on Accreditation of Hospitals." Brief for Petitioners 4, citing 3 Pennsylvania Bulletin 2207, 2209 (Sept. 29, 1973).

In *Doe* v. *Bolton,* 410 U. S. 179, 192 (1973), this Court indicated that "[w]hether 'an abortion is necessary' is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." We were informed during oral argument that the Pennsylvania definition of medical necessity is broad enough to encompass the factors specified in *Bolton.* Tr. of Oral Arg. 7–8.

The dissent of Mr. Justice Brennan emphasizes the "key" role of the physician within the Medicaid program, noting that "[t]he Medicaid statutes leave the decision as to the choice among pregnancy procedures exclusively with the doctor and his patient . . . ." *Post,* at 449–450. This is precisely what Pennsylvania has done. Its regulations provide for the funding of abortions upon certification of medical necessity, a determination that the physician is authorized to make on the basis of all relevant factors.

[4] The District Court was of the view that the regulation creates "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." 376 F. Supp., at 191. In *Maher* v. *Roe, post,* p. 464, we today conclude that the Equal Protection Clause of the Fourteenth Amendment does not prevent a State from making the policy

Accordingly, the court granted a declaratory judgment that the Pennsylvania requirement was unconstitutional as applied during the first trimester. The United States Court of Appeals for the Third Circuit, sitting en banc, reversed on the statutory issue, holding that Title XIX prohibits participating States from requiring a physician's certificate of medical necessity as a condition for funding during both the first and second trimesters of pregnancy.[5] 523 F. 2d 611 (1975). The Court of Appeals therefore did not reach the constitutional issue.[6]

We granted certiorari to resolve a conflict among the federal courts as to the requirements of Title XIX.[7] 428 U. S. 909 (1976).

II

The only question before us is one of statutory construction: whether Title XIX requires Pennsylvania to fund under

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choice to fund costs incident to childbirth without providing similar funding for costs incident to nontherapeutic abortions.

[5] Petitioners appealed the District Court's declaratory judgment to the Court of Appeals. Respondents cross-appealed from the denial of declaratory relief with respect to the second and third trimesters of pregnancy. Since respondents did not seek review of the District Court's denial of injunctive relief, the Court of Appeals had jurisdiction over the appeals. *Gerstein* v. *Coe,* 417 U. S. 279 (1974).

[6] As a result of the decision of the Court of Appeals, petitioners issued a Temporary Revised Policy on September 25, 1975. This interim policy allows financial assistance for abortions without regard to medical necessity. Brief for Petitioners 3 n. 3.

[7] Two other Courts of Appeals have concluded that the federal statute does not require participating States to fund the cost of nontherapeutic abortions. *Roe* v. *Norton,* 522 F. 2d 928 (CA2 1975); *Roe* v. *Ferguson,* 515 F. 2d 279 (CA6 1975). See also, *e. g., Doe* v. *Westby,* 402 F. Supp. 140 (WDSD 1975) (three-judge court) (Title XIX requires funding of nontherapeutic abortions), appeal docketed, No. 75–813; *Doe* v. *Stewart,* Civ. No. 74–3197 (ED La., Jan. 26, 1976) (three-judge court) (Title XIX does not require funding of nontherapeutic abortions), appeal docketed, No. 75–6721.

its Medicaid program the cost of *all* abortions that are permissible under state law. "The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 756 (1975) (POWELL, J., concurring). Title XIX makes no reference to abortions, or, for that matter, to any other particular medical procedure. Instead, the statute is cast in terms that require participating States to provide financial assistance with respect to five broad categories of medical treatment. See n. 2, *supra.* But nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care. Indeed, the statute expressly provides:

> "A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title] . . . ." 42 U. S. C. § 1396a (a)(17) (1970 ed., Supp. V).

This language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be "reasonable" and "consistent with the objectives" of the Act.[8]

Pennsylvania's regulation comports fully with Title XIX's broadly stated primary objective to enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services. See 42 U. S. C. §§ 1396, 1396a (10)(C) (1970 ed., Supp. V). Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State

[8] Respondents concede that Title XIX "indicates that the states will have wide discretion in determining the extent of services to be provided." Brief for Respondents 9.

to refuse to fund *unnecessary*—though perhaps desirable—medical services.

The thrust of respondents' argument is that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable on both economic and health grounds.[9] The economic argument is grounded on the view that abortion is generally a less expensive medical procedure than childbirth. Since a pregnant woman normally will either have an abortion or carry her child full term, a State that elects not to fund nontherapeutic abortions will eventually be confronted with the greater expenses associated with childbirth. The corresponding health argument is based on the view that an early abortion poses less of a risk to the woman's health than childbirth. Consequently, respondents argue, the economic and health considerations that ordinarily support the reasonableness of state limitations on financing of unnecessary medical services are not applicable to pregnancy.

Accepting respondents' assumptions as accurate, we do not agree that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable under Title XIX. As we acknowledged in *Roe* v. *Wade,* 410 U. S. 113 (1973), the State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the "important and legitimate

[9] Respondents also contend that Pennsylvania's restriction on coverage is unreasonable within the meaning of Title XIX in that it interferes with the physician's professional judgment concerning appropriate treatment. With one possible exception addressed in Part III, *infra,* the Pennsylvania program does not interfere with the physician's medical judgment concerning his patient's needs. If a physician certifies that an abortion is medically necessary, see n. 3, *supra,* the medical expenses are covered under the Pennsylvania Medicaid program. If, however, the physician concludes that the abortion is not medically necessary, but indicates a willingness to perform the abortion at the patient's request, the expenses are not covered. The decision whether to fund the costs of the abortion thus depends solely on the physician's determination of medical necessity. Respondents point to nothing in the Pennsylvania Medicaid plan that indicates state interference with the physician's initial determination.

interest [of the State] . . . in protecting the potentiality of human life." *Id.*, at 162. That interest alone does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest. But it is a significant state interest existing throughout the course of the woman's pregnancy. Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth.[10] Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.[11]

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[10] Respondents rely heavily on the fact that in amending Title XIX in 1972 to include "family planning services" within the five broad categories of required medical treatment, see n. 2, *supra,* Congress did not expressly *exclude* abortions as a covered service. Since Congress had expressly excluded abortions as a method of family planning services in prior legislation, see 42 U. S. C. § 300a–6, respondents conclude that the failure of Congress to exclude coverage of abortions in the 1972 amendments to Title XIX "strongly indicates" an intention to *require* coverage of abortions. This line of reasoning is flawed. The failure to exclude abortions from coverage indicates only that Congress intended to allow such coverage, not that such coverage is mandatory for nontherapeutic abortions.

[11] The Court of Appeals concluded that Pennsylvania's regulations also violated the equality provisions of Title XIX requiring that an individual's medical assistance "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U. S. C. § 1396a (a)(10)(B) (1970 ed., Supp. V). See § 1396a (a)(10)(C) (1970 ed., Supp. V). According to the Court of Appeals, the Pennsylvania regulation "force[s] pregnant women to use the least voluntary method of treatment, while not imposing a similar requirement on other persons who qualify for aid." 523 F. 2d 611, 619 (1975). We find the Pennsylvania regulation to be entirely consistent with the equality provisions of Title XIX. Pennsylvania has simply decided that there is reason-

Our interpretation of the statute is reinforced by two other relevant considerations. First, when Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most States.[12] In view of the then-prevailing state law, the contention that Congress intended to require—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than respondents have offered. Second, the Department of Health, Education, and Welfare, the agency charged with the administration of this complicated statute,[13] takes the position that Title XIX allows—but does not mandate—funding for such abortions. "[W]e must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .'" *New York Dept. of Soc. Services* v. *Dublino,* 413 U. S. 405, 421 (1973), quoting *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969). Here, such indications are completely absent.

We therefore hold that Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX.[14] We make clear, however, that the federal statute leaves a State free to provide such coverage if it so desires.[15]

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able justification for excluding from Medicaid coverage a particular medically unnecessary procedure—nontherapeutic abortions.

[12] At the time of our 1973 decision in *Roe,* some eight years after the enactment of Title XIX, at least 30 States had statutory prohibitions against nontherapeutic abortions. 410 U. S. 113, 118 n. 2 (1973).

[13] Federal funds are made available only to those States whose Medicaid plans have been approved by the Secretary of HEW. 42 U. S. C. § 1396 (1970 ed., Supp. V).

[14] Congress by statute has expressly prohibited the use during fiscal year 1977 of federal Medicaid funds for abortions except when the life of the mother would be endangered if the fetus were carried to term. Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, § 209, Pub. L. 94–439, 90 Stat. 1434.

[15] Our dissenting Brothers, in this case and in *Maher* v. *Roe, post,*

III

There is one feature of the Pennsylvania Medicaid program, not addressed by the Court of Appeals, that may conflict with Title XIX. Under the Pennsylvania program, financial assistance is not provided for medically necessary abortions unless two physicians in addition to the attending physician have examined the patient and have concurred in writing that the abortion is medically necessary. See n. 3, *supra*. On this record, we are unable to determine the precise role played by these two additional physicians, and consequently we are unable to ascertain whether this requirement interferes with the attending physician's medical judgment in a manner not contemplated by the Congress. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for consideration of this requirement.

It is so ordered.

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

The Court holds that the "necessary medical services" which Pennsylvania must fund for individuals eligible for

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p. 482, express in vivid terms their anguish over the perceived impact of today's decisions on indigent pregnant women who prefer abortion to carrying the fetus to childbirth. We think our Brothers misconceive the issues before us, as well as the role of the judiciary.

In these cases we have held merely that (i) the provisions of the Social Security Act do not *require* a State, as a condition of participation, to include the funding of elective abortions in its Medicaid program; and (ii) the Equal Protection Clause does not require a State that elects to fund expenses incident to childbirth also to provide funding for elective abortions. But we leave entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court.

Medicaid do not include services connected with elective abortions. I dissent.

Though the question presented by this case is one of statutory interpretation, a difficult constitutional question would be raised where Title XIX of the Social Security Act, as amended, 42 U. S. C. § 1396 *et seq.* (1970 ed. and Supp. V), is read not to require funding of elective abortions. *Maher* v. *Roe, post,* p. 464; *Doe* v. *Bolton,* 410 U. S. 179 (1973); *Roe* v. *Wade,* 410 U. S. 113 (1973). Since the Court should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," *Ashwander* v. *TVA,* 297 U. S. 288, 341, 348 (1936) (Brandeis, J., concurring); see *Westby* v. *Doe,* 420 U. S. 968 (1975), Title XIX, in my view, read fairly in light of the principle of avoidance of unnecessary constitutional decisions, requires agreement with the Court of Appeals that the legislative history of Title XIX and our abortion cases compel the conclusion that elective abortions constitute medically necessary treatment for the condition of pregnancy. I would therefore find that Title XIX requires that Pennsylvania pay the costs of elective abortions for women who are eligible participants in the Medicaid program.

Pregnancy is unquestionably a condition requiring medical services. See *Roe* v. *Norton,* 380 F. Supp. 726, 729 (Conn. 1974); *Klein* v. *Nassau County Medical Center,* 347 F. Supp. 496, 500 (EDNY 1972), vacated for further consideration (in light of *Roe* v. *Wade* and *Doe* v. *Bolton*), 412 U. S. 925 (1973). Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. "[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . ." *Roe* v. *Norton,* 408 F. Supp. 660, 663 n. 3 (Conn. 175). The

Medicaid statutes leave the decision as to choice among pregnancy procedures exclusively with the doctor and his patient, and make no provision whatever for intervention by the State in that decision. Section 1396a (a)(19) expressly imposes the obligation upon participating States to incorporate safeguards in their programs that assure medical "care and services will be provided, in a manner consistent with . . . the best interests of the recipients." And, significantly, the Senate Finance Committee Report on the Medicaid bill expressly stated that the "physician is to be the key figure in determining utilization of health services." S. Rep. No. 404, 89th Cong., 1st Sess., 46 (1965). Thus the very heart of the congressional scheme is that the physician and patient should have complete freedom to choose those medical procedures for a given condition which are best suited to the needs of the patient.

The Court's original abortion decisions dovetail precisely with the congressional purpose under Medicaid to avoid interference with the decision of the woman and her physician. *Roe* v. *Wade, supra,* at 163, held that "[t]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." And *Doe* v. *Bolton, supra,* at 192, held that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."* Once medical treatment of some

*The Court states, *ante,* at 442 n. 3, that Pennsylvania has left the abortion decision to the patient and her physician in the manner prescribed in *Doe* v. *Bolton.* Pennsylvania indeed does allow the attending physician to provide a certificate of medical necessity "on the basis of all relevant factors," *ante,* at 442 n. 3, but Pennsylvania's concept of relevance does not extend far enough to permit doctors freely to provide certificates

sort is necessary, Title XIX does not dictate what that treatment should be. In the face of Title XIX's emphasis upon the joint autonomy of the physician and his patient in the decision of how to treat the condition of pregnancy, it is beyond comprehension how treatment for therapeutic abortions and live births constitutes "necessary medical services" under Title XIX, but that for elective abortions does not.

If Pennsylvania is not obligated to fund medical services rendered in performing elective abortions because they are not "necessary" within the meaning of 42 U. S. C. § 1396 (1970 ed., Supp. V), it must follow that Pennsylvania also would not violate the statute if it refused to fund medical services for "therapeutic" abortions or live births. For if the

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of medical necessity for all elective abortions. At oral argument, counsel for petitioners carefully stated the State's position as follows:

"[L]et me make perfectly clear my concession. That is, that a physician, in examining a patient, may take psychological, physical, emotional, familial considerations into mind and in the light of those considerations, may determine if those factors affect the health of the mother to such an extent as he would deem an abortion necessary.

"I think the key in the *Bolton* language, and the key in the *Vuitch* [*United States* v. *Vuitch,* 402 U. S. 62 (1971)] language is the fact that the physician, using all of these facts—and there are probably more that he should use—must determine if the woman's health—that is, her physical or psychological health—is jeopardized by the condition of pregnancy.

"That is not to say, obviously, as I believe the Plaintiffs are asserting, that the fact that the family is going to increase makes an abortion medically necessary." Tr. of Oral Arg. 8.

Petitioners' "concession" only goes so far as to permit an attending physician to consider an abortion as it relates to a woman's health. *Bolton* recognized that the factors considered by a physician "*may* relate to health," but in the very same paragraph made clear that those factors were more broadly directed to the "well-being" of the woman. 410 U. S., at 192 (emphasis added). While the right to privacy does implicate health considerations, the constitutional right recognized and protected by the Court's abortion decisions is the "right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird,* 405 U. S. 438, 453 (1972).

availability of therapeutic abortions and live births makes elective abortions "unnecessary," the converse must also be true. This highlights the violence done the congressional mandate by today's decision. If the State must pay the costs of therapeutic abortions and of live birth as constituting medically necessary responses to the condition of pregnancy, it must, under the command of § 1396, also pay the costs of elective abortions; the procedures in each case constitute necessary medical treatment for the condition of pregnancy.

The 1972 family-planning amendment to the Act, 42 U. S. C. § 1396d (a)(4)(C) (1970 ed., Supp. V), buttresses my conclusion that the Court's construction frustrates the objectives of the Medicaid program. Section 1396 (2) states that an explicit purpose of Medicaid is to assist eligible indigent recipients to "attain or retain capability for independence or self-care." The 1972 amendment furthered this objective by assisting those who "desire to control family size in order to enhance their capacity and ability to seek employment and better meet family needs." S. Rep. No. 92–1230, p. 297 (1972). Though far less than an ideal family-planning mechanism, elective abortions are one method for limiting family size and avoiding the financial and emotional problems that are the daily lot of the impoverished. See Special Subcommittee on Human Resources of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Report of the Secretary of Health, Education, and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Programs 319 (Comm. Print 1971).

It is no answer that abortions were illegal in 1965 when Medicaid was enacted, and in 1972 when the family-planning amendment was adopted. Medicaid deals with general categories of medical services, not with specific procedures, and nothing in the statute even suggests that Medicaid is designed to assist in payment for only those medical services that were

legally permissible in 1965 and 1972. I fully agree with the Court of Appeals statement:

> "It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973." 523 F. 2d 611, 622–623 (1975).

Nor is the administrative interpretation of the Department of Health, Education, and Welfare that funding of elective abortions is permissible but not mandatory dispositive of the construction of "necessary medical services." The principle of according weight to agency interpretation is inapplicable when a departmental interpretation, as here, is patently inconsistent with the controlling statute. *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971).

Finally, there is certainly no affirmative policy justification of the State that aids the Court's construction of "necessary medical services" as not including medical services rendered in performing elective abortions. The State cannot contend that it protects its fiscal interests in not funding elective abortions when it incurs far greater expense in paying for the more costly medical services performed in carrying pregnancies to term, and, after birth, paying the increased welfare bill incurred to support the mother and child. Nor can the State contend that it protects the mother's health by discouraging an abortion, for not only may Pennsylvania's exclusion force the pregnant woman to use of measures dangerous to her life and health but, as *Roe* v. *Wade*, 410 U. S., at 149, concluded, elective abortions by competent licensed physicians are now "relatively safe" and the risks to women

undergoing abortions by such means "appear to be as low as or lower than . . . for normal childbirth."

The Court's construction can only result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous. Indeed, as the Court said only last Term: "For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary." *Singleton* v. *Wulff*, 428 U. S. 106, 118–119, n. 7 (1976). The Court's construction thus makes a mockery of the congressional mandate that States provide "care and services . . . in a manner consistent with . . . the best interests of the recipients." We should respect the congressional plan by construing § 1396 as requiring States to pay the costs of the "necessary medical services" rendered in performing elective abortions, chosen by physicians and their women patients who participate in Medicaid as the appropriate treatment for their pregnancies.

The Court does not address the question whether the provision requiring the concurrence in writing of two physicians in addition to the attending physician conflicts with Title XIX. I would hold that the provision is invalid as clearly in conflict with Title XIX under my view of the paramount role played by the attending physician in the abortion decision, and in any event is constitutionally invalid under *Doe* v. *Bolton*, 410 U. S., at 198–200.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, dissenting.*

It is all too obvious that the governmental actions in these cases, ostensibly taken to "encourage" women to carry preg-

*[This opinion applies also to No. 75–1440, *Maher, Commissioner of Social Services of Connecticut* v. *Roe et al.*, *post*, p. 464, and No. 75–442, *Poelker, Mayor of St. Louis, et al.* v. *Doe*, *post*, p. 519.]

nancies to term, are in reality intended to impose a moral viewpoint that no State may constitutionally enforce. *Roe* v. *Wade,* 410 U. S. 113 (1973); *Doe* v. *Bolton,* 410 U. S. 179 (1973). Since efforts to overturn those decisions have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society. See, *e. g., Planned Parenthood of Missouri* v. *Danforth,* 428 U. S. 52 (1976); *Singleton* v. *Wulff,* 428 U. S. 106 (1976); *Bellotti* v. *Baird,* 428 U. S. 132 (1976). The present cases involve the most vicious attacks yet devised. The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions.[1]

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[1] Although an abortion performed during the first trimester of pregnancy is a relatively inexpensive surgical procedure, usually costing under $200, even this modest sum is far beyond the means of most Medicaid recipients. And "if one does not have it and is unable to get it the fee might as well be" one hundred times as great. *Smith* v. *Bennett,* 365 U. S. 708, 712 (1961).

Even before today's decisions, a major reason that perhaps as much as one-third of the annual need for an estimated 1.8 million abortions went unmet was the fact that 8 out of 10 American counties did not have a single abortion provider. Sullivan, Tietze, & Dryfoos, Legal Abortion in the United States, 1975–1976, 9 Family Planning Perspectives 116–117, 121, 129 (1977). In 1975, 83,000 women had to travel from their home States to obtain abortions (there were 100 abortions performed in West Virginia and 310 in Mississippi), and about 300,000 more, or a total of nearly 40% of abortion patients, had to seek help outside their home counties. *Id.,* at 116, 121, 124. In addition, only 18% of the public hospitals in the Nation performed even a single abortion in 1975 and in 10 States not one public hospital provided abortion services. *Id.,* at 121, 128.

Given the political realities, it seems inevitable that the number and geographical distribution of abortion providers will diminish as a result of today's decisions. It is regrettable but likely that fewer public hospitals will provide the service and if Medicaid payments are unavailable, other

The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools. Cf. *Smith* v. *Organization of Foster Families,* 431 U. S. 816 (1977). Many children of the poor, sadly, will attend second-rate segregated schools. Cf. *Milliken* v. *Bradley,* 418 U. S. 717 (1974). And opposition remains strong against increasing Aid to Families With Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. Cf. *Dandridge* v. *Williams,* 397 U. S. 471 (1970). I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare

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hospitals, clinics, and physicians will be unable to do so. Since most Medicaid and public hospital patients probably do not have the money, the time, or the familiarity with the medical delivery system to travel to distant States or cities where abortions are available, today's decisions will put safe and legal abortions beyond their reach. The inevitable human tragedy that will result is reflected in a Government report:

"[F]or some women, the lack of public funding for legal abortion acted as a deterrent to their obtaining the safer procedures. The following case history [of a death which occurred during 1975] exemplifies such a situation:

". . . A 41-year-old married woman with a history of 6 previous pregnancies, 5 living children, and 1 previous abortion sought an illegal abortion from a local dietician. Her stated reason for seeking an illegal procedure was financial, since Medicaid in her state of residence would not pay for her abortion. The illegal procedure cost $30, compared with an estimated $150 for a legal procedure . . . . Allegedly the operation was performed by inserting a metal rod to dilate the cervix . . . . [The woman died of cardiac arrest after two weeks of intensive hospital care and two operations.]" U. S. Dept. of Health, Education, and Welfare, Center for Disease Control, Abortion Surveillance, 1975, p. 9 (1977) (hereafter CDC Surveillance).

existence in utter misery for so many poor women and their children.

I

The Court's insensitivity to the human dimension of these decisions is particularly obvious in its cursory discussion of appellees' equal protection claims in *Maher* v. *Roe*. That case points up once again the need for this Court to repudiate its outdated and intellectually disingenuous "two-tier" equal protection analysis. See generally *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 317 (1976) (MARSHALL, J., dissenting). As I have suggested before, this "model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases." *Id.*, at 318. In the present case, in its evident desire to avoid strict scrutiny—or indeed any meaningful scrutiny—of the challenged legislation, which would almost surely result in its invalidation, see *id.*, at 319, the Court pulls from thin air a distinction between laws that absolutely prevent exercise of the fundamental right to abortion and those that "merely" make its exercise difficult for some people. See *Maher* v. *Roe*, *post*, at 471–474. MR. JUSTICE BRENNAN demonstrates that our cases support no such distinction, *post*, at 485–489, and I have argued above that the challenged regulations are little different from a total prohibition from the viewpoint of the poor. But the Court's legal legerdemain has produced the desired result: A fundamental right is no longer at stake and mere rationality becomes the appropriate mode of analysis. To no one's surprise, application of that test—combined with misreading of *Roe* v. *Wade* to generate a "strong" state interest in "potential life" during the first trimester of pregnancy, see *infra*, at 460; *Maher* v. *Roe*, *post*, at 489–490 (BRENNAN, J., dissenting); *post*, at 462 (BLACKMUN, J., dissenting)—"leaves little doubt about the

outcome; the challenged legislation is [as] always upheld." *Massachusetts Bd. of Retirement* v. *Murgia, supra,* at 319. And once again, "relevant factors [are] misapplied or ignored," 427 U. S., at 321, while the Court "forgo[es] all judicial protection against discriminatory legislation bearing upon" a right "vital to the flourishing of a free society" and a class "unfairly burdened by invidious discrimination unrelated to the individual worth of [its] members." *Id.,* at 320.

As I have argued before, an equal protection analysis far more in keeping with the actions rather than the words of the Court, see *id.,* at 320–321, carefully weighs three factors—"the importance of the governmental benefits denied, the character of the class, and the asserted state interests," *id.,* at 322. Application of this standard would invalidate the challenged regulations.

The governmental benefits at issue here, while perhaps not representing large amounts of money for any individual, are nevertheless of absolutely vital importance in the lives of the recipients. The right of every woman to choose whether to bear a child is, as *Roe* v. *Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. See n. 1, *supra.* If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All

chance to control the direction of her own life will have been lost.

I have already adverted to some of the characteristics of the class burdened by these regulations. While poverty alone does not entitle a class to claim government benefits, it is surely a relevant factor in the present inquiry. See *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 70, 117–124 (1973) (MARSHALL, J., dissenting). Indeed, it was in the *San Antonio* case that MR. JUSTICE POWELL for the Court stated a test for analyzing discrimination on the basis of wealth that would, if fairly applied here, strike down the regulations. The Court there held that a wealth-discrimination claim is made out by persons who share "two distinguishing characteristics: because of their impecunity they [are] completely unable to pay for some desired benefit, and as a consequence, they sustai[n] an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.,* at 20. Medicaid recipients are, almost by definition, "completely unable to pay for" abortions, and are thereby completely denied "a meaningful opportunity" to obtain them.[2]

It is no less disturbing that the effect of the challenged regulations will fall with great disparity upon women of minority races. Nonwhite women now obtain abortions at nearly twice the rate of whites,[3] and it appears that almost

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[2] If public funds and facilities for abortions are sharply reduced, private charities, hospitals, clinics, and doctors willing to perform abortions for far less than the prevailing fee will, I trust, accommodate some of the need. But since abortion services are inadequately available even now, see n. 1, *supra,* such private generosity is unlikely to give many poor women "a meaningful opportunity" to obtain abortions.

[3] Blacks and other nonwhite groups are heavily overrepresented among both abortion patients and Medicaid recipients. In 1975, about 13.1% of the population was nonwhite, Statistical Abstract of the United States, 1976, p. 25, yet 31% of women obtaining abortions were of a minority race. CDC Surveillance 2 and 24, Table 8. Furthermore, nonwhites

40% of minority women—more than five times the proportion of whites—are dependent upon Medicaid for their health care.[4] Even if this strongly disparate racial impact does not alone violate the Equal Protection Clause, see *Washington* v. *Davis,* 426 U. S. 229 (1976); *Jefferson* v. *Hackney,* 406 U. S. 535 (1972), "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant." *Id.,* at 558, 575–576 (MARSHALL, J., dissenting).

Against the brutal effect that the challenged laws will have must be weighed the asserted state interest. The Court describes this as a "strong interest in protecting the potential life of the fetus." *Maher* v. *Roe, post,* at 478. Yet in *Doe* v. *Bolton, supra,* the Court expressly held that any state interest during the first trimester of pregnancy, when 86% of all abortions occur, CDC Surveillance 3, was wholly insufficient to justify state interference with the right to abortion.

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secured abortions at the rate of 476 per 1,000 live births, while the corresponding figure for whites was only 277. *Id.,* at 2, and Tables 8, 9. Abortion is thus a family-planning method of considerably more significance for minority groups than for whites.

[4] Although complete statistics are unavailable (three States, Puerto Rico, and the Virgin Islands having furnished no racial breakdown, and eight States giving incomplete data), nonwhites accounted for some 43.4% of Medicaid recipients during fiscal year 1974 in jurisdictions reporting. U. S. Dept. of HEW, National Center for Social Statistics, Medicaid Recipient Characteristics and Units of Selected Medical Services, Fiscal Year 1974, p. 2 (Feb. 1977). Extrapolating this percentage to cover the entire Medicaid caseload of over 17.6 million, minority racial groups would account for 7,656,000 recipients. Assuming comparability of the HEW and census figures, this amounts to 27.4% of the Nation's nonwhite population. See Statistical Abstract, *supra,* n. 3, at 25. Since there are 1.8 female Medicaid recipients for every male, see Medicaid Recipient Characteristics, *supra,* the proportion of nonwhite women who must rely upon Medicaid is probably far higher, about 38.5%. The comparable figure for white women appears to be about 7%.

410 U. S., at 192–200.[5] If a State's interest in potential human life before the point of viability is insufficient to justify requiring several physicians' concurrence for an abortion, *ibid.*, I cannot comprehend how it magically becomes adequate to allow the present infringement on rights of disfavored classes. If there is any state interest in potential life before the point of viability, it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women.[6]

Thus, taking account of all relevant factors under the flexible standard of equal protection review, I would hold the Connecticut and Pennsylvania Medicaid regulations and the St. Louis public hospital policy violative of the Fourteenth Amendment.

II

When this Court decided *Roe* v. *Wade* and *Doe* v. *Bolton*, it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown* v. *Board of Education*, 347 U. S. 483 (1954). The abortion decisions are sound law and undoubtedly good policy. They have never been questioned by the Court, and we are told that today's cases "signa[l] no retreat from *Roe* or the cases applying it." *Maher* v. *Roe*, *post*, at 475. The logic of those cases inexorably requires invalidation of the present enact-

[5] Requirements that the abortion be performed by a physician exercising his best clinical judgment, and in a facility meeting narrowly tailored health standards, are allowable. *Doe* v. *Bolton*, 410 U. S., at 192–200.

[6] Application of the flexible equal protection standard would allow the Court to strike down the regulations in these cases without calling into question laws funding public education or English language teaching in public schools. See *Maher* v. *Roe*, *post*, at 476–477. By permitting a court to weigh all relevant factors, the flexible standard does not logically require acceptance of any equal protection claim that is "identical in principle" under the traditional approach to those advanced here. See *Maher*, *post*, at 477.

ments. Yet I fear that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions. The effect will be to relegate millions of people to lives of poverty and despair. When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.*

The Court today, by its decisions in these cases, allows the States, and such municipalities as choose to do so, to accomplish indirectly what the Court in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973)—by a substantial majority and with some emphasis, I had thought—said they could not do directly. The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake."

The result the Court reaches is particularly distressing in *Poelker* v. *Doe, post,* p. 519, where a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own

*[This opinion applies also to No. 75–1440, *Maher, Commissioner of Social Services of Connecticut* v. *Roe et al., post,* p. 464, and No. 75–442, *Poelker, Mayor of St. Louis, et al.* v. *Doe, post,* p. 519.]

concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost. This is not the kind of thing for which our Constitution stands.

The Court's financial argument, of course, is specious. To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.

Neither is it an acceptable answer, as the Court well knows, to say that the Congress and the States are free to authorize the use of funds for nontherapeutic abortions. Why should any politician incur the demonstrated wrath and noise of the abortion opponents when mere silence and nonactivity accomplish the results the opponents want?

There is another world "out there," the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.

MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* ROE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 75–1440. Argued January 11, 1977—Decided June 20, 1977

Appellees, two indigent women who were unable to obtain a physician's certificate of medical necessity, brought this action attacking the validity of a Connecticut Welfare Department regulation that limits state Medicaid benefits for first trimester abortions to those that are "medically necessary." A three-judge District Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth. The court found implicit in *Roe* v. *Wade,* 410 U. S. 113, and *Doe* v. *Bolton,* 410 U. S. 179, the view that "abortion and childbirth . . . are simply two alternative medical methods of dealing with pregnancy. . . ." *Held:*

1. The Equal Protection Clause does not require a State participating in the Medicaid program to pay the expenses incident to nontherapeutic abortions for indigent women simply because it has made a policy choice to pay expenses incident to childbirth. Pp. 469–480.

(a) Financial need alone does not identify a suspect class for purposes of equal protection analysis. See *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 29; *Dandridge* v. *Williams,* 397 U. S. 471. Pp. 470–471.

(b) The Connecticut regulation, does not impinge upon the fundamental right of privacy recognized in *Roe, supra,* that protects a woman from unduly burdensome interference with her freedom to decide whether or not to terminate her pregnancy. That right implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds. An indigent woman desiring an abortion is not disadvantaged by Connecticut's decision to fund childbirth; she continues as before to be dependent on private abortion services. Pp. 471–474.

(c) A State is not required to show a compelling interest for its policy choice to favor normal childbirth. Pp. 475–477.

(d) Connecticut's regulation is rationally related to and furthers its "strong and legitimate interest in encouraging normal childbirth,"

Beal v. *Doe, ante,* at 446. The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth. States, moreover, have a wide latitude in choosing among competing demands for limited public funds. Pp. 478–480.

2. Since it is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes, the District Court erred in invalidating the requirements of prior written request by the pregnant woman and prior authorization by the Department of Social Services for abortions. Although similar requirements are not imposed for other medical procedures, such procedures do not involve the termination of a potential human life. P. 480.

408 F. Supp. 660, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring statement, *post,* p. 481. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 482. MARSHALL, J., filed a dissenting opinion, *ante,* p. 454. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *ante,* p. 462.

Edmund C. Walsh, Assistant Attorney General of Connecticut, argued the cause for appellant. With him on the brief was *Carl R. Ajello,* Attorney General.

Lucy V. Katz argued the cause for appellees. With her on the brief were *Kathryn Emmett* and *Catherine Roraback.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Beal* v. *Doe, ante,* p. 438, we hold today that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the

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**William F. Hyland,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Erminie L. Conley,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal.

Sylvia A. Law, Harriet F. Pilpel, and *Eve W. Paul* filed a brief for the American Public Health Assn. et al. as *amici curiae* urging affirmance.

Patricia A. Butler and *Michael A. Wolff* filed a brief for Jane Doe as *amicus curiae.*

joint federal-state Medicaid program established by that statute. In this case, as a result of our decision in *Beal,* we must decide whether the Constitution requires a participating State to pay for nontherapeutic abortions when it pays for childbirth.

I

A regulation of the Connecticut Welfare Department limits state Medicaid benefits for first trimester abortions [1] to those that are "medically necessary," a term defined to include psychiatric necessity. Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, c. III, § 275 (1975).[2] Connecticut enforces this limitation through a system of prior authorization from its Department of Social Services. In order to obtain authorization for a first trimester abortion, the hospital or clinic where the abortion is to be performed must submit, among other things, a certificate from the patient's attending physician stating that the abortion is medically necessary.

This attack on the validity of the Connecticut regulation

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[1] The procedures governing abortions beyond the first trimester are not challenged here.

[2] Section 275 provides in relevant part:

"The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

"1. In the opinion of the attending physician the abortion is medically necessary. The term 'Medically Necessary' includes psychiatric necessity.

"2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. . . .

"3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

. . . . .

"4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services."

See n. 4, *infra.*

was brought against appellant Maher, the Commisioner of Social Services, by appellees Poe and Roe, two indigent women who were unable to obtain a physician's certificate of medical necessity.[3] In a complaint filed in the United States District Court for the District of Connecticut, they challenged the regulation both as inconsistent with the requirements of Title XIX of the Social Security Act, as added, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1970 ed. and Supp. V), and as violative of their constitutional rights, including the Fourteenth Amendment's guarantees of due process and equal protection. Connecticut originally defended its regulation on the theory that Title XIX of the Social Security Act prohibited the funding of abortions that were not medically necessary. After certifying a class of women unable to obtain Medicaid assistance for abortions because of the regulation, the District Court held that the Social Security Act not only allowed state funding of nontherapeutic abortions but also required it. *Roe* v. *Norton,* 380 F. Supp. 726 (1974). On appeal, the Court of Appeals for the Second Circuit read the Social Security Act to allow, but not to require, state funding of such abortions. 522 F. 2d 928 (1975). Upon remand for consideration of the constitutional issues raised in the complaint, a three-judge District Court was convened. That court invalidated the Connecticut regulation. 408 F. Supp. 660 (1975).

[3] At the time this action was filed, Mary Poe, a 16-year-old high school junior, had already obtained an abortion at a Connecticut hospital. Apparently because of Poe's inability to obtain a certificate of medical necessity, the hospital was denied reimbursement by the Department of Social Services. As a result, Poe was being pressed to pay the hospital bill of $244. Susan Roe, an unwed mother of three children, was unable to obtain an abortion because of her physician's refusal to certify that the procedure was medically necessary. By consent, a temporary restraining order was entered by the District Court enjoining the Connecticut officials from refusing to pay for Roe's abortion. After the remand from the Court of Appeals, the District Court issued temporary restraining orders covering three additional women. *Roe* v. *Norton,* 408 F. Supp. 660, 663 (1975).

Although it found no independent constitutional right to a state-financed abortion, the District Court held that the Equal Protection Clause forbids the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth. The court found implicit in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), the view that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . ." 408 F. Supp., at 663 n. 3. Relying also on *Shapiro* v. *Thompson,* 394 U. S. 618 (1969), and *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974), the court held that the Connecticut program "weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right" to a nontherapeutic abortion and "thus infringes upon a fundamental interest." 408 F. Supp., at 663–664. The court found no state interest to justify this infringement. The State's fiscal interest was held to be "wholly chimerical because abortion is the least expensive medical response to a pregnancy." *Id.,* at 664 (footnote omitted). And any moral objection to abortion was deemed constitutionally irrelevant:

> "The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right." *Ibid.*

The District Court enjoined the State from requiring the certificate of medical necessity for Medicaid-funded abortions.[4]

[4] The District Court's judgment and order, entered on January 16, 1976, were not stayed. On January 26, 1976, the Department of Social Services revised § 275 to allow reimbursement for nontherapeutic abortions without

The court also struck down the related requirements of prior written request by the pregnant woman and prior authorization by the Department of Social Services, holding that the State could not impose any requirements on Medicaid payments for abortions that are not "equally applicable to medicaid payments for childbirth, if such conditions or requirements tend to discourage a woman from choosing an abortion or to delay the occurrence of an abortion that she has asked her physician to perform." *Id.*, at 665. We noted probable jurisdiction to consider the constitutionality of the Connecticut regulation. 428 U. S. 908 (1976).

II

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.[5] But when a State decides to alleviate some of the

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prior authorization or consent. The fact that this revision was made retroactive to January 16, 1976, suggests that the revision was made only for the purpose of interim compliance with the District Court's judgment and order, which were entered the same date. No suggestion of mootness has been made by any of the parties, and this appeal was taken and submitted on the theory that Connecticut desires to reinstate the invalidated regulation. Under these circumstances, the subsequent revision of the regulation does not render the case moot. In any event, there would remain the denial of reimbursement to Mary Poe, and similarly situated members of the class, under the prerevision regulation. See 380 F. Supp., at 730 n. 3. The State has asserted no Eleventh Amendment defense to this relief sought by Poe and those whom she represents.

[5] *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), cited by appellees, is not to the contrary. There the Court invalidated under the Due Process Clause "certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process," restricting the ability of indigent persons to bring an action for divorce. *Id.*, at 372. The Court held:

"[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the

hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. Appellees' claim is that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth. This challenge to the classifications established by the Connecticut regulation presents a question arising under the Equal Protection Clause of the Fourteenth Amendment. The basic framework of analysis of such a claim is well settled:

> "We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . . ." *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 17 (1973).

Accord, *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 312, 314 (1976). Applying this analysis here, we think the District Court erred in holding that the Connecticut regulation violated the Equal Protection Clause of the Fourteenth Amendment.

A

This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within

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means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.,* at 374. Because Connecticut has made no attempt to monopolize the means for terminating pregnancies through abortion the present case is easily distinguished from *Boddie.* See also *United States* v. *Kras,* 409 U. S. 434 (1973); *Ortwein* v. *Schwab,* 410 U. S. 656 (1973).

the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis. See *Rodriguez, supra,* at 29; *Dandridge* v. *Williams,* 397 U. S. 471 (1970).[6] Accordingly, the central question in this case is whether the regulation "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." The District Court read our decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and the subsequent cases applying it, as establishing a fundamental right to abortion and therefore concluded that nothing less than a compelling state interest would justify Connecticut's different treatment of abortion and childbirth. We think the District Court misconceived the nature and scope of the fundamental right recognized in *Roe.*

B

At issue in *Roe* was the constitutionality of a Texas law making it a crime to procure or attempt to procure an abortion, except on medical advice for the purpose of saving the life of the mother. Drawing on a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities, we concluded that the Fourteenth Amendment's concept of personal liberty

[6] In cases such as *Griffin* v. *Illinois,* 351 U. S. 12 (1956) and *Douglas* v. *California,* 372 U. S. 353 (1963), the Court held that the Equal Protection Clause requires States that allow appellate review of criminal convictions to provide indigent defendants with trial transcripts and appellate counsel. These cases are grounded in the criminal justice system, a governmental monopoly in which participation is compelled. Cf. n. 5, *supra.* Our subsequent decisions have made it clear that the principles underlying *Griffin* and *Douglas* do not extend to legislative classifications generally.

affords constitutional protection against state interference with certain aspects of an individual's personal "privacy," including a woman's decision to terminate her pregnancy.[7] *Id.*, at 153.

The Texas statute imposed severe criminal sanctions on the physicians and other medical personnel who performed abortions, thus drastically limiting the availability and safety of the desired service. As MR. JUSTICE STEWART observed, "it is difficult to imagine a more complete abridgment of a constitutional freedom . . . ." *Id.*, at 170 (concurring opinion). We held that only a compelling state interest would justify such a sweeping restriction on a constitutionally protected interest, and we found no such state interest during the first trimester. Even when judged against this demanding standard, however, the State's dual interest in the health of the pregnant woman and the potential life of the fetus were deemed sufficient to justify substantial regulation of abortions in the second and third trimesters. "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' " *Id.*, at 162–163. In the second trimester, the State's interest in the health of the pregnant woman justifies state regulation reasonably related to that concern. *Id.*, at 163. At viability, usually in the third trimester, the State's interest in the potential life of the fetus justifies prohibition with criminal penalties, except where the life or health of the mother is threatened. *Id.*, at 163–164.

The Texas law in *Roe* was a stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy. In subsequent cases, we have invalidated

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[7] A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. Indeed, the right of procreation without state interference has long been recognized as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541 (1942).

other types of restrictions, different in form but similar in effect, on the woman's freedom of choice. Thus, in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 70–71, n. 11 (1976), we held that Missouri's requirement of spousal consent was unconstitutional because it "granted [the husband] the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy." Missouri had interposed an "*absolute obstacle* to a woman's decision that *Roe* held to be constitutionally protected from such interference." (Emphasis added.) Although a state-created obstacle need not be absolute to be impermissible, see *Doe* v. *Bolton,* 410 U. S. 179 (1973); *Carey* v. *Population Services International,* 431 U. S. 678 (1977), we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." *Bellotti* v. *Baird,* 428 U. S. 132, 147 (1976). We recognized in *Bellotti* that "not all distinction between abortion and other procedures is forbidden" and that "[t]he constitutionality of such distinction will depend upon its degree and the justification for it." *Id.,* at 149–150. We therefore declined to rule on the constitutionality of a Massachusetts statute regulating a minor's access to an abortion until the state courts had had an opportunity to determine whether the statute authorized a parental veto over the minor's decision or the less burdensome requirement of parental consultation.

These cases recognize a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion. *Whalen* v. *Roe,* 429 U. S. 589, 599–600, and nn. 24 and 26 (1977). As *Whalen* makes clear, the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from

unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.[8]

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[8] Appellees rely on *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974). In those cases durational residence requirements for the receipt of public benefits were found to be unconstitutional because they "penalized" the exercise of the constitutional right to travel interstate.

Appellees' reliance on the penalty analysis of *Shapiro* and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

If Connecticut denied general welfare benefits to all women who had

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Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.[9]

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obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

Sherbert v. *Verner*, 374 U. S. 398 (1963), similarly is inapplicable here. In addition, that case was decided in the significantly different context of a constitutionally imposed "governmental obligation of neutrality" originating in the Establishment and Freedom of Religion Clauses of the First Amendment. *Id.*, at 409.

[9] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), we drew this distinction in sustaining the public financing of the Federal Election Campaign Act of 1971. The Act provided public funds to some candidates but not to others. We rejected an asserted analogy to cases such as *American Party of Texas* v. *White*, 415 U. S. 767 (1974), which involved restrictions on access to the electoral process:

"These cases, however, dealt primarily with state laws requiring a candidate to satisfy certain requirements in order to have his name appear on the ballot. These were, of course, *direct burdens* not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; *the inability, if any, of minority party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.* Any disadvantage suffered by operation of the eligibility formulae under Subtitle H is thus limited to the claimed denial

Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

This distinction is implicit in two cases cited in *Roe* in support of the pregnant woman's right under the Fourteenth Amendment. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), involved a Nebraska law making it criminal to teach foreign languages to children who had not passed the eighth grade. *Id.,* at 396–397. Nebraska's imposition of a criminal sanction on the providers of desired services makes *Meyer* closely analogous to *Roe.* In sustaining the constitutional challenge brought by a teacher convicted under the law, the Court held that the teacher's "right thus to teach and the right of parents to engage him so to instruct their children" were "within the liberty of the Amendment." 262 U. S., at 400. In *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), the Court relied on *Meyer* to invalidate an Oregon criminal law requiring the parent or guardian of a child to send him to a public school, thus precluding the choice of a private school. Reasoning that the Fourteenth Amendment's concept of liberty "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only," the Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U. S., at 534–535.

Both cases invalidated substantial restrictions on constitutionally protected liberty interests: in *Meyer,* the parent's right to have his child taught a particular foreign language; in *Pierce,* the parent's right to choose private rather than public school education. But neither case denied to a State

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of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates." 424 U. S., at 94–95 (emphasis added; footnote omitted).

the policy choice of encouraging the preferred course of action. Indeed, in *Meyer* the Court was careful to state that the power of the State "to prescribe a curriculum" that included English and excluded German in its free public schools "is not questioned." 262 U. S., at 402. Similarly, *Pierce* casts no shadow over a State's power to favor public education by funding it—a policy choice pursued in some States for more than a century. See *Brown* v. *Board of Education,* 347 U. S. 483, 489 n. 4 (1954). Indeed, in *Norwood* v. *Harrison,* 413 U. S. 455, 462 (1973), we explicitly rejected the argument that *Pierce* established a "right of private or parochial schools to share with public schools in state largesse," noting that "[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." Yet, were we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here. We think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education.[10]

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[10] In his dissenting opinion, MR. JUSTICE BRENNAN rejects the distinction between direct state interference with a protected activity and state encouragement of an alternative activity and argues that our previous abortion decisions are inconsistent with today's decision. But as stated above, all of those decisions involved laws that placed substantial state-created obstacles in the pregnant woman's path to an abortion. Our recent decision in *Carey* v. *Population Services International,* 431 U. S. 678 (1977), differs only in that it involved state-created restrictions on access to contraceptives, rather than abortions. MR. JUSTICE BRENNAN simply asserts that the Connecticut regulation "is an obvious impairment of the fundamental right established by *Roe* v. *Wade.*" *Post,* at 484–485. The only suggested source for this purportedly "obvious" conclusion is a quotation

D

The question remains whether Connecticut's regulation can be sustained under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right. This test requires that the distinction drawn between childbirth and nontherapeutic abortion by the regulation be "rationally related" to a "constitutionally permissible" purpose. *Lindsey* v. *Normet,* 405 U. S. 56, 74 (1972); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S., at 314. We hold that the Connecticut funding scheme satisfies this standard.

Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. That interest exists throughout the pregnancy, "grow[ing] in substantiality as the woman approaches term." 410 U. S., at 162–163. Because the pregnant woman carries a potential human being, she "cannot be isolated in her privacy. . . . [Her] privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Id.,* at 159. The State unquestionably has a "strong and legitimate interest in encouraging normal childbirth," *Beal* v. *Doe, ante,* at 446, an interest honored over the centuries.[11] Nor can there be any question that the Connecticut regulation rationally furthers that interest. The medical costs associated with childbirth are substantial, and have increased significantly in recent years. As

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from *Singleton* v. *Wulff,* 428 U. S. 106 (1976). Yet, as MR. JUSTICE BLACKMUN was careful to note at the beginning of his opinion in *Singleton,* that case presented "issues [of standing] not going to the merits of this dispute." *Id.,* at 108. Significantly, MR. JUSTICE BRENNAN makes no effort to distinguish or explain the much more analogous authority of *Norwood* v. *Harrison,* 413 U. S. 455 (1973).

[11] In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.

recognized by the District Court in this case, such costs are significantly greater than those normally associated with elective abortions during the first trimester. The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth.

We certainly are not unsympathetic to the plight of an indigent woman who desires an abortion, but "the Constitution does not provide judicial remedies for every social and economic ill," *Lindsey* v. *Normet, supra,* at 74. Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds.[12] In *Dandridge* v. *Williams,* 397 U. S., at 485, despite recognition that laws and regulations allocating welfare funds involve "the most basic economic needs of impoverished human beings," we held that classifications survive equal protection challenge when a "reasonable basis" for the classification is shown. As the preceding discussion makes clear, the state interest in encouraging normal childbirth exceeds this minimal level.

The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488 (1955), quoted in *Dandridge* v. *Williams, supra,* at 484. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legisla-

[12] See generally Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 998–1017 (1975).

tures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May,* 194 U. S. 267, 270 (1904) (Holmes, J.).[13]

In conclusion, we emphasize that our decision today does not proscribe government funding of nontherapeutic abortions. It is open to Congress to require provision of Medicaid benefits for such abortions as a condition of state participation in the Medicaid program. Also, under Title XIX as construed in *Beal* v. *Doe, ante,* p. 438, Connecticut is free—through normal democratic processes—to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

III

The District Court also invalidated Connecticut's requirements of prior written request by the pregnant woman and prior authorization by the Department of Social Services. Our analysis above rejects the basic premise that prompted invalidation of these procedural requirements. It is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes. The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life. In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52 (1976), we held that the woman's written consent to an abortion was not an impermissible burden under *Roe.* We think that decision is controlling on the similar issue here.

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[13] Much of the rhetoric of the three dissenting opinions would be equally applicable if Connecticut had elected not to fund either abortions or childbirth. Yet none of the dissents goes so far as to argue that the Constitution *requires* such assistance for all indigent pregnant women.

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

It is so ordered.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante,* p. 454.]

[For dissenting opinion of MR. JUSTICE BLACKMUN, see *ante,* p. 462.]

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion. Like the Court, I do not read any decision of this Court as requiring a State to finance a nontherapeutic abortion. The Court's holdings in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it.

From time to time, every state legislature determines that, as a matter of sound public policy, the government ought to provide certain health and social services to its citizens. Encouragement of childbirth and child care is not a novel undertaking in this regard. Various governments, both in this country and in others, have made such a determination for centuries. In recent times, they have similarly provided educational services. The decision to provide any one of these services—or not to provide them—is not required by the Federal Constitution. Nor does the providing of a particular service require, as a matter of federal constitutional law, the provision of another.

Here, the State of Connecticut has determined that it will finance certain childbirth expenses. That legislative deter-

mination places no state-created barrier to a woman's choice to procure an abortion, and it does not require the State to provide it. Accordingly, I concur in the judgment.

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

The District Court held:

> "When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. . . . Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest." *Roe* v. *Norton,* 408 F. Supp. 660, 663–664 (1975).

This Court reverses on the ground that "the District Court misconceived the nature and scope of the fundamental right recognized in *Roe* [v. *Wade,* 410 U. S. 113 (1973)]," *ante,* at 471, and therefore that Connecticut was not required to meet the "compelling interest" test to justify its discrimination against elective abortion but only "the less demanding test of rationality that applies in the absence of . . . the impingement of a fundamental right," *ante,* at 477, 478. This holding, the Court insists, "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion"; she is still at liberty to finance the abortion from "private sources." *Ante,* at 474. True, "the State may [by funding childbirth] have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Ibid.* True, also, indigency "may make it difficult—and in some cases,

perhaps impossible—for some women to have abortions," but that regrettable consequence "is neither created nor in any way affected by the Connecticut regulation." *Ibid.*

But a distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis. The stark reality for too many, not just "some," indigent pregnant women is that indigency makes access to competent licensed physicians not merely "difficult" but "impossible." As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure. Mr. Justice Frankfurter's words are apt:

> "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by the State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'. . . ." *Griffin* v. *Illinois,* 351 U. S. 12, 23 (1956) (concurring opinion).

None can take seriously the Court's assurance that its "conclusion signals no retreat from *Roe* [v. *Wade*] or the cases applying it," *ante,* at 475. That statement must occasion great surprise among the Courts of Appeals and District Courts that, relying upon *Roe* v. *Wade* and *Doe* v. *Bolton,* 410 U. S. 179 (1973), have held that States are constitutionally required to fund elective abortions if they fund pregnancies carried to

term. See *Doe* v. *Rose,* 499 F. 2d 1112 (CA10 1974); *Wulff* v. *Singleton,* 508 F. 2d 1211 (CA8 1974), rev'd and remanded on other grounds, 428 U. S. 106 (1976); *Doe* v. *Westby,* 383 F. Supp. 1143 (WDSD 1974), vacated and remanded (in light of *Hagans* v. *Lavine,* 415 U. S. 528 (1974)), 420 U. S. 968, on remand, 402 F. Supp. 140 (1975); *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (WD Pa. 1974), aff'd on statutory grounds *sub nom. Doe* v. *Beal,* 523 F. 2d 611 (CA3 1975), rev'd and remanded, *ante,* p. 438; *Doe* v. *Rampton,* 366 F. Supp. 189 (Utah 1973); *Klein* v. *Nassau County Medical Center,* 347 F. Supp. 496 (EDNY 1972), vacated and remanded (in light of *Roe* v. *Wade* and *Doe* v. *Bolton,* 412 U. S. 925 (1973)), on remand, 409 F. Supp. 731 (1976). Indeed, it cannot be gainsaid that today's decision seriously erodes the principles that *Roe* and *Doe* announced to guide the determination of what constitutes an unconstitutional infringement of the fundamental right of pregnant women to be free to decide whether to have an abortion.

The Court's premise is that only an equal protection claim is presented here. Claims of interference with enjoyment of fundamental rights have, however, occupied a rather protean position in our constitutional jurisprudence. Whether or not the Court's analysis may reasonably proceed under the Equal Protection Clause, the Court plainly errs in ignoring, as it does, the unanswerable argument of appellees, and the holding of the District Court, that the regulation unconstitutionally impinges upon their claim of privacy derived from the Due Process Clause.

Roe v. *Wade* and cases following it hold that an area of privacy invulnerable to the State's intrusion surrounds the decision of a pregnant woman whether or not to carry her pregnancy to term. The Connecticut scheme clearly impinges upon that area of privacy by bringing financial pressures on indigent women that force them to bear children they would not otherwise have. That is an obvious impairment of the

fundamental right established by *Roe* v. *Wade*. Yet the Court concludes that "the Connecticut regulation does not impinge upon [that] fundamental right." *Ante*, at 474. This conclusion is based on a perceived distinction, on the one hand, between the imposition of criminal penalties for the procurement of an abortion present in *Roe* v. *Wade* and *Doe* v. *Bolton* and the absolute prohibition present in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), and, on the other, the assertedly lesser inhibition imposed by the Connecticut scheme. *Ante*, at 472–474.

The last time our Brother POWELL espoused the concept in an abortion case that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," *ante*, at 475, the Court refused to adopt it. *Singleton* v. *Wulff*, 428 U. S. 106, 122 (1976). This was made explicit in Part II of our Brother BLACKMUN'S opinion for four of us and is implicit in our Brother STEVENS' essential agreement with the analysis of Part II–B. *Id.*, at 121–122 (concurring in part). Part II–B stated:

> "MR. JUSTICE POWELL would so limit *Doe* and the other cases cited, explaining them as cases in which the State 'directly interfered with the abortion decision' and 'directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures,' [428 U. S.,] at 128. There is no support in the language of the cited cases for this distinction . . . . Moreover, a 'direct interference' or 'interdiction' test does not appear to be supported by precedent. . . . For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary. Furthermore, since the right . . . is not simply the right to have an abortion, but the right to have abortions nondiscriminatorily funded,

the denial of such funding is as complete an 'interdiction' of the exercise of the right as could ever exist." *Id.*, at 118 n. 7.

We have also rejected this approach in other abortion cases. *Doe* v. *Bolton,* the companion to *Roe* v. *Wade,* in addition to striking down the Georgia criminal prohibition against elective abortions, struck down the procedural requirements of certification of hospitals, of approval by a hospital committee, and of concurrence in the abortion decision by two doctors other than the woman's own doctor. None of these requirements operated as an absolute bar to elective abortions in the manner of the criminal prohibitions present in the other aspect of the case or in *Roe,* but this was not sufficient to save them from unconstitutionality. In *Planned Parenthood, supra,* we struck down a requirement for spousal consent to an elective abortion which the Court characterizes today simply as an "absolute obstacle" to a woman's obtaining an abortion. *Ante,* at 473. But the obstacle was "absolute" only in the limited sense that a woman who was unable to persuade her spouse to agree to an elective abortion was prevented from obtaining one. Any woman whose husband agreed, or could be persuaded to agree, was free to obtain an abortion, and the State never imposed directly any prohibition of its own. This requirement was qualitatively different from the criminal statutes that the Court today says are comparable, but we nevertheless found it unconstitutional.

Most recently, also in a privacy case, the Court squarely reaffirmed that the right of privacy was fundamental, and that an infringement upon that right must be justified by a compelling state interest. *Carey* v. *Population Services International,* 431 U. S. 678 (1977). That case struck down in its entirety a New York law forbidding the sale of contraceptives to minors under 16 years old, limiting persons who could sell contraceptives to pharmacists, and forbidding ad-

vertisement and display of contraceptives. There was no New York law forbidding *use* of contraceptives by anyone, including minors under 16, and therefore no "absolute" prohibition against the exercise of the fundamental right. Nevertheless the statute was declared unconstitutional as a burden on the right to privacy. In words that apply fully to Connecticut's statute, and that could hardly be more explicit, *Carey* stated: " 'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.*, at 686. *Carey* relied specifically upon *Roe, Doe,* and *Planned Parenthood,* and interpreted them in a way flatly inconsistent with the Court's interpretation today: "The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." 431 U. S., at 688.

Finally, cases involving other fundamental rights also make clear that the Court's concept of what constitutes an impermissible infringement upon the fundamental right of a pregnant woman to choose to have an abortion makes new law. We have repeatedly found that infringements of fundamental rights are not limited to outright denials of those rights. First Amendment decisions have consistently held in a wide variety of contexts that the compelling-state-interest test is applicable not only to outright denials but also to restraints that make exercise of those rights more difficult. See, *e. g.*, *Sherbert* v. *Verner,* 374 U. S. 398 (1963) (free exercise of religion); *NAACP* v. *Button,* 371 U. S. 415 (1963) (freedom of expression and association), *Linmark Associates* v. *Township of Willingboro,* 431 U. S. 85 (1977) (freedom of expres-

sion). The compelling-state-interest test has been applied in voting cases, even where only relatively small infringements upon voting power, such as dilution of voting strength caused by malapportionment, have been involved. See, *e. g., Reynolds* v. *Sims,* 377 U. S. 533, 562, 566 (1964); *Chapman* v. *Meier,* 420 U. S. 1 (1975); *Connor* v. *Finch,* 431 U. S. 407 (1977). Similarly, cases involving the right to travel have consistently held that statutes penalizing the fundamental right to travel must pass muster under the compelling-state-interest test, irrespective of whether the statutes actually deter travel. *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 257–258 (1974); *Dunn* v. *Blumstein,* 405 U. S. 330, 339–341 (1972); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). And indigents asserting a fundamental right of access to the courts have been excused payment of entry costs without being required first to show that their indigency was an absolute bar to access. *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Douglas* v. *California,* 372 U. S. 353 (1963); *Boddie* v. *Connecticut,* 401 U. S. 371 (1971).

Until today, I had not thought the nature of the fundamental right established in *Roe* was open to question, let alone susceptible of the interpretation advanced by the Court. The fact that the Connecticut scheme may not operate as an absolute bar preventing all indigent women from having abortions is not critical. What is critical is that the State has inhibited their fundamental right to make that choice free from state interference.

Nor does the manner in which Connecticut has burdened the right freely to choose to have an abortion save its Medicaid program. The Connecticut scheme cannot be distinguished from other grants and withholdings of financial benefits that we have held unconstitutionally burdened a fundamental right. *Sherbert* v. *Verner, supra,* struck down a South Carolina statute that denied unemployment compensation to a woman who for religious reasons could not

work on Saturday, but that would have provided such compensation if her unemployment had stemmed from a number of other nonreligious causes. Even though there was no proof of indigency in that case, *Sherbert* held that "the pressure upon her to forgo [her religious] practice [was] unmistakable," 374 U. S., at 404, and therefore held that the effect was the same as a fine imposed for Saturday worship. Here, though the burden is upon the right to privacy derived from the Due Process Clause and not upon freedom of religion under the Free Exercise Clause of the First Amendment, the governing principle is the same, for Connecticut grants and withholds financial benefits in a manner that discourages significantly the exercise of a fundamental constitutional right. Indeed, the case for application of the principle actually is stronger than in *Verner* since appellees are all indigents and therefore even more vulnerable to the financial pressures imposed by the Connecticut regulation.

Bellotti v. *Baird,* 428 U. S. 132, 147 (1976), held, and the Court today agrees, *ante,* at 473, that a state requirement is unconstitutional if it "unduly burdens the right to seek an abortion." Connecticut has "unduly" burdened the fundamental right of pregnant women to be free to choose to have an abortion because the State has advanced no compelling state interest to justify its interference in that choice.

Although appellant does not argue it as justification, the Court concludes that the State's interest "in protecting the potential life of the fetus" suffices, *ante,* at 478.* Since only the first trimester of pregnancy is involved in this case, that justification is totally foreclosed if the Court is not overruling

*The Court also suggests, *ante,* at 478 n. 11, that a "State may have legitimate demographic concerns about its rate of population growth" which might justify a choice to favor live births over abortions. While it is conceivable that under some circumstances this might be an appropriate factor to be considered as part of a State's "compelling" interest, no one contends that this is the case here, or indeed that Connecticut has any demographic concerns at all about the rate of its population growth.

the holding of *Roe* v. *Wade* that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability," occurring at about the end of the second trimester. 410 U. S., at 163. The appellant also argues a further justification not relied upon by the Court, namely, that the State needs "to control the amount of its limited public funds which will be allocated to its public welfare budget." Brief for Appellant 22. The District Court correctly held, however, that the asserted interest was "wholly chimerical" because the "state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts." 408 F. Supp., at 664.

Finally, the reasons that render the Connecticut regulation unconstitutional also render invalid, in my view, the requirement of a prior written certification by the woman's attending physician that the abortion is "medically necessary," and the requirement that the hospital submit a Request for Authorization of Professional Services including a "statement indicating the medical need for the abortion." Brief for Appellees 2–3. For the same reasons, I would also strike down the requirement for prior authorization of payment by the Connecticut Department of Social Services.

Syllabus

MORRIS ET AL. *v.* GRESSETTE, PRESIDENT PRO TEM, SOUTH CAROLINA SENATE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 75–1583. Argued April 18–19, 1977—Decided June 20, 1977

Section 5 of the Voting Rights Act of 1965 establishes two alternative methods by which States subject to the Act can obtain federal preclearance review of a change in their voting laws: (1) the State may file a declaratory judgment action in the District Court for the District of Columbia and subsequently may implement such change if that court declares that the change has no racially discriminatory purpose or effect; or (2) the State may submit the change to the Attorney General and subsequently may enforce the change if the Attorney General has not interposed an objection within 60 days. A plan reapportioning the South Carolina Senate, enacted into law on May 6, 1972, and filed with the District Court for the District of South Carolina, which had invalidated a previous plan in a consolidated action challenging its constitutionality, was submitted to the Attorney General on May 12 for preclearance review under § 5. On May 23 the District Court found the new plan constitutional, and on June 30 the Attorney General notified South Carolina that he would interpose no objection but would defer to the court's determination. Thereafter, another suit was brought in the District Court for the District of Columbia, challenging the Attorney General's failure to object to the new plan, and in response to that court's order of May 16, 1973, to make a reasoned determination as to the constitutionality of the new plan, the Attorney General stated that in his view it was unconstitutional but that he still refused to interpose an objection in deference to the ruling of the District Court for the District of South Carolina. However, on July 19, 1973, the District Court for the District of Columbia directed the Attorney General to consider the new plan without regard to the other District Court's decision, and the next day the Attorney General interposed an objection to the plan. The Court of Appeals for the District of Columbia Circuit affirmed, holding that the Attorney General's initial failure to interpose an objection was reviewable and that § 5 required him to make an independent determination on the merits of the § 5 issues. The present suit was then filed by appellant South Carolina voters in the District Court for the District of South Carolina, seeking to enjoin implementa-

tion of the new plan on the ground that the Attorney General had interposed an objection and the State had not subsequently obtained a favorable declaratory judgment from the District Court for the District of Columbia. A three-judge court dismissed the complaint, holding that the collateral-estoppel doctrine did not preclude it from considering the State's contention that, notwithstanding the Court of Appeals' decision in the previous action, the requirements of § 5 were satisfied when the Attorney General failed to interpose an objection within 60 days after submission of the new plan to him, and that the Administrative Procedure Act did not authorize judicial review of the Attorney General's initial determination to defer to the ruling that the new plan was constitutional, and that therefore the Attorney General's failure to interpose a timely objection left South Carolina free to implement the new plan. *Held:* The objection interposed by the Attorney General to the new plan on July 20, 1973, *nunc pro tunc,* is invalid, and therefore South Carolina is free to implement such plan. Pp. 499–507.

(a) The nature of the § 5 remedy, which has been characterized as an "unusual" and "severe" procedure, strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review. Unlike the first alternative method of obtaining a declaratory judgment, § 5 does not condition implementation of changes in voting laws under the second method of compliance on an affirmative statement by the Attorney General that the change is without racially discriminatory purpose or effect, but, to the contrary, compliance with § 5 under this second method is measured solely by the *absence,* for whatever reason, of a timely objection on the Attorney General's part. Pp. 501–503.

(b) In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, it is clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions by providing submission to the Attorney General as such an alternative. Since judicial review of the Attorney General's action would unavoidably extend the period specified in the statute, it is necessarily precluded. Pp. 504–505.

(c) Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation, but it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period. Pp. 505–507.

425 F. Supp. 331, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 507. BLACKMUN, J., filed a dissenting opinion, *post*, p. 517.

J. Roger Wollenberg argued the cause for appellants. With him on the brief were *Armand Derfner, Max O. Truitt, Jr., Timothy N. Black, William L. Lake, Frank Epstein, Ray P. McClain, Robert A. Murphy,* and *William E. Caldwell.*

Randall T. Bell argued the cause for appellees. With him on the brief were *Daniel R. McLeod,* Attorney General of South Carolina, and *Treva G. Ashworth, Kenneth L. Childs,* and *Katherine W. Hill,* Assistant Attorneys General.

Deputy Assistant Attorney General Turner argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Howard E. Shapiro,* and *John C. Hoyle.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case concerns the scope of judicial review of the Attorney General's failure to interpose a timely objection under § 5 of the Voting Rights Act of 1965 to a change in the voting laws of a jurisdiction subject to that Act.

I

The events leading up to this litigation date back to November 11, 1971, when South Carolina enacted Act 932 reapportioning the State Senate.[1] South Carolina promptly submitted Act 932 to the Attorney General of the United States for preclearance review pursuant to § 5 of the Voting

[1] Act 932 provided for multimember districts, required each candidate to run for a single, numbered post, and specified that primary elections be decided by a majority vote. See *Harper* v. *Levi,* 171 U. S. App. D. C. 321, 325–326, 520 F. 2d 53, 57–58 (1975).

Rights Act. 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V).[2] That section forbids States subject to the Act to implement any change in "any voting qualification

[2] Section 5, as set forth in 42 U. S. C. § 1973c (1970 ed., Supp. V), provides in pertinent part:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of

or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first (i) obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (ii) submitting the change to the Attorney General and receiving no objection within 60 days.[3] While the Attorney General had Act 932 under review, several suits were filed in the United States District Court for the District of South Carolina challenging that Act as violative of the Fourteenth and Fifteenth Amendments and seeking to enjoin its enforcement until preclearance had been obtained under § 5. The cases were consolidated and a three-judge District Court was convened.

On March 6, 1972, the Attorney General interposed an objection to Act 932.[4] Although the South Carolina District Court was aware of this objection—an objection that, standing

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three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The constitutionality of this procedure was upheld in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). It has been held applicable when a State or political subdivision adopts a legislative reapportionment plan. *Beer* v. *United States,* 425 U. S. 130 (1976); *Georgia* v. *United States,* 411 U. S. 526 (1973); *Allen* v. *State Bd. of Elections,* 393 U. S. 544 (1969).

[3] See *South Carolina* v. *Katzenbach, supra,* at 319–320; *Allen* v. *State Bd. of Elections, supra,* at 548–550; *Hadnott* v. *Amos,* 394 U. S. 358, 366, and n. 5 (1969); *Perkins* v. *Matthews,* 400 U. S. 379, 380–382 (1971); *Georgia* v. *United States, supra,* at 529; *City of Richmond* v. *United States,* 422 U. S. 358, 361–362 (1975); *Beer* v. *United States, supra,* at 131–133; *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 147–148 (1977) (plurality opinion).

[4] The objection was entered within the 60-day statutory period since the submission on Act 932 was not considered to be complete until January 5, 1972. See *Georgia* v. *United States, supra,* at 539–541; n. 19, *infra.* The Attorney General interposed an objection because he had been "unable to conclude . . . that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina." App. 27.

alone, would have justified an injunction against enforcement of the Act—the court proceeded to address the constitutional validity of the reapportionment plan.[5] That court rejected the Fifteenth Amendment claim for lack of evidence that Act 932 was racially motivated, but held that the Act violated the Fourteenth Amendment due to malapportionment. The court retained jurisdiction and allowed South Carolina 30 days to enact an acceptable substitute reapportionment plan. *Twiggs* v. *West*, Civ. No. 71–1106 (SC, Apr. 7, 1972).

On May 6, 1972, a new senate reapportionment plan was enacted into law as § 2 of Act 1205.[6] This new plan was filed with the District Court, and it was submitted to the Attorney General on May 12 for preclearance review. On May 23 the District Court found the plan constitutional.[7] By letter dated

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[5] The District Court declined to rule on the claims under § 5 of the Voting Rights Act:

"Prior to final arguments, the Attorney General of the United States had refused to approve the Act under the terms of the Voting Rights Act of 1965. The defendants stated, during argument, that they intended to contest that decision of the Attorney General in the District Court of the District of Columbia, which, by law, is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff McCollum, under the Voting Rights Act, but shall confine our consideration to the claims of invalidity under the Fourteenth and Fifteenth Amendments, which admittedly are properly before this Court." App. to Jurisdictional Statement 30a.

[6] Section 2 reapportioned the State's senatorial districts. It established two alternative reapportionments—Plan A and Plan B—and provided that if Plan A did not meet the constitutional guidelines as set forth by the District Court, Plan B would be put into effect. Act 1205 retained the provisions of Act 932 calling for multimember districts, numbered posts, and a majority vote in primaries. See *Harper* v. *Levi*, 171 U. S. App. D. C., at 326, 520 F. 2d, at 58.

Section 3 of Act 1205 extended the numbered-post requirement to existing multimember districts in the State's House of Representatives, the other chamber of the South Carolina General Assembly.

[7] This Court summarily affirmed the decision of the District Court. *Powell* v. *West*, 413 U. S. 901 (1973).

June 30, the Attorney General notified South Carolina that he would not interpose an objection to the new plan because he felt "constrained to defer to the . . . determination of the three-judge District Court" in *Twiggs* v. *West, supra.*[8] App. 48. Thus, as of June 30, 1972, § 2 of Act 1205 had been declared constitutional by a three-judge District Court, and the Attorney General had declined to interpose an objection under § 5 of the Voting Rights Act.[9]

Not content with the Attorney General's decision to defer to the judicial determination of the three-judge District Court, several of the named plaintiffs in the consolidated *Twiggs* action commenced another suit in the United States District Court for the District of Columbia on August 10, 1972, in which they challenged the Attorney General's failure to object to the new senate reapportionment plan. On May 16, 1973, that court ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Harper* v. *Kleindienst,* 362 F. Supp. 742, 746 (1973). In

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[8] This Court held in *Connor* v. *Waller,* 421 U. S. 656 (1975), that reapportionment legislation adopted by the legislature on its own authority in the course of litigation is not effective in a covered jurisdiction until after compliance with § 5's preclearance review provisions. (Such legislation is to be distinguished from a "reapportionment scheme . . . submitted and adopted pursuant to court order," for which preclearance is not required. *East Carroll Parish School Bd.* v. *Marshall,* 424 U. S. 636, 638 n. 6 (1976).) In light of the decision in *Waller,* the Attorney General has now abandoned his earlier policy of deference to district court decisions on constitutionality. Brief for United States as *Amicus Curiae* 10, 16.

[9] While the Attorney General was considering Act 1205, South Carolina submitted for preclearance review Act 1204, which extended the numbered-post requirement to "all multi-member elective districts" in the State. See *Harper* v. *Levi, supra,* at 326, 520 F. 2d, at 58. On the same day that he declined to interpose an objection to § 2 of Act 1205, the Attorney General did interpose an objection to Act 1204 and to that portion of Act 1205 that required numbered posts for the State's House of Representatives. See n. 6, *supra.* The District Court in *Twiggs* v. *West* had not considered any provisions relating to the House.

response to this order, the Attorney General stated that in his view the plan violated the Fifteenth Amendment, but he reaffirmed his refusal to interpose an objection on the ground that he was constrained to defer to the ruling of the District Court in *Twiggs* v. *West*. App. to Brief for Appellants 4a. On July 19, 1973, the District of Columbia District Court directed the Attorney General to consider Act 1205 without regard to the decision in *Twiggs* v. *West*. The next day the Attorney General interposed an objection because he was "unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race." App. 52.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed. It held that the Attorney General's decision not to interpose an objection was reviewable under the circumstances of this case,[10] and that § 5 requires him to make an independent determination on the merits of § 5 issues. *Harper* v. *Levi,* 171 U. S. App. D. C. 321, 520 F. 2d 53 (1975).

Armed with the decision of the Court of Appeals and the belated objection interposed by the Attorney General, two South Carolina voters filed the present suit in the United States District Court for the District of South Carolina as a class action under § 5 of the Voting Rights Act. See *Allen* v. *State Bd. of Elections,* 393 U. S. 544, 557–563 (1969). The plaintiffs, appellants here, sought an injunction against implementation of § 2 of Act 1205 on the ground that the Attorney General had interposed an objection and the State had not

[10] The Court of Appeals stressed that the *Harper* plaintiffs contended only that "the Attorney General improperly relinquished his responsibility to independently evaluate the submitted legislation . . . ." Since they were "not challenging findings by the Attorney General on issues of fact, or an ultimate decision as to whether the submitting authority has discharged its burden of proving lack of discriminatory purpose or effect," the court found it unnecessary to decide whether such findings and decisions would be reviewable. 171 U. S. App. D. C., at 335, 520 F. 2d, at 67. See also n. 24, *infra*.

subsequently obtained a favorable declaratory judgment from the United States District Court for the District of Columbia. The three-judge District Court convened under § 5 dismissed the complaint. 425 F. Supp. 331 (1976). It held that the doctrine of collateral estoppel did not preclude it from considering South Carolina's contention that, notwithstanding the decision in *Harper* v. *Levi, supra,* the requirements of § 5 were satisfied when the Attorney General failed to interpose an objection within 60 days after submission to him of Act 1205.[11] The District Court also ruled that the Administrative Procedure Act did not authorize judicial review of the Attorney General's initial determination to defer to the ruling of the three-judge District Court in *Twiggs* v. *West.* In light of these considerations, the District Court concluded that the failure of the Attorney General to interpose an objection within the applicable 60-day period left South Carolina free to implement the new senate reapportionment plan.

We noted probable jurisdiction to determine the reviewability of the Attorney General's failure to interpose a timely objection under § 5 of the Voting Rights Act. 429 U. S. 997 (1976). For the reasons stated below, we affirm.

II

The ultimate issue in this case concerns the implementation of South Carolina's reapportionment plan for the State Senate. Since that plan has not been declared by the District Court for the District of Columbia to be without racially discriminatory purpose or effect, it can be implemented only if the Attorney General "has not interposed an objection" to the plan within the meaning of § 5 of the Voting Rights Act.[12] It

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[11] Appellants have not pressed the collateral-estoppel argument in this Court. See Brief for Appellants 17–20.

[12] Although appellants at one point argued in the District Court that Act 1205 was a court-ordered plan outside the scope of § 5, see *East Carroll Parish School Bd.* v. *Marshall, supra;* n. 8, *supra,* the parties now

is conceded that no objection was entered within the 60-day period. 425 F. Supp., at 333. But appellants insist that the Attorney General's *nunc pro tunc* objection of July 20, 1973, is effective under the Act and thus bars implementation of the reapportionment plan. Since that objection was interposed pursuant to the District Court's order in *Harper* v. *Kleindienst,* its validity depends on whether the *Harper* court had jurisdiction under the Administrative Procedure Act to review the Attorney General's failure to object.[13]

The Administrative Procedure Act stipulates that the provisions of that Act authorizing judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

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agree that § 5 is applicable. Brief for Appellants 3 n. 1; Brief for Appellees 14, and n. 7. See also Brief for United States as *Amicus Curiae* 14 n. 8.

[13] Appellants suggest that it is unnecessary for this Court to reach the issue of reviewability since the single-judge District Court in *Harper* v. *Kleindienst,* 362 F. Supp. 742 (DC 1973), issued an interlocutory order on August 11, 1972, declaring that the Attorney General's time to object had not expired and extending the time until the Attorney General acted or until further order of the District Court. Relying on *United States* v. *Mine Workers,* 330 U. S. 258, 289–295 (1947), appellants contend that the Attorney General's objection of July 20, 1973, is valid regardless of the District Court's jurisdiction since it was entered pursuant to that court's order preserving the status quo pending its determination of jurisdiction.

The *Mine Workers* case involved the power of a district court to hold a party in contempt for disobedience of an order directed to that party. Appellants' reliance on that case is misplaced, for South Carolina was not a party to the *Harper* litigation and was not under a court order restraining enforcement of § 2 of Act 1205. Here the validity of the District Court's interlocutory order in *Harper* v. *Kleindienst* eventually turns on the reviewability of the Attorney General's initial decision not to enter an objection to § 2 of Act 1205. If Congress has precluded judicial review of the Attorney General's actions under § 5, the *Harper* court's interlocutory order cannot validate the Attorney General's *nunc pro tunc* objection of July 20, 1973.

5 U. S. C. § 701 (a).[14] It is now well settled that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967).[15] The reviewing court must determine whether "Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins,* 397 U. S. 159, 165 (1970).

As no provision of the Voting Rights Act expressly precludes judicial review of the Attorney General's actions under § 5, it is necessary to determine "whether nonreviewability can fairly be inferred." 397 U. S., at 166. See *Association of Data Processing Service Orgs.* v. *Camp,* 397 U. S. 150, 157 (1970); *Switchmen* v. *National Mediation Board,* 320 U. S. 297 (1943). That inquiry must address the role played by the Attorney General within "the context of the entire legislative scheme." *Abbott Laboratories* v. *Gardner, supra,* at 141.

The nature of the § 5 remedy, which this Court has characterized as an "unusual" and "severe" procedure, *Allen* v. *State Bd. of Elections,* 393 U. S. 544, 556 (1969), strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review. Section 5 requires covered jurisdictions to delay implementation of validly enacted state legislation until federal authorities have had an opportunity to determine whether that

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[14] With several exceptions not relevant here, the Act defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." 5 U. S. C. § 701 (b) (1).

[15] Accord, *Dunlop* v. *Bachowski,* 421 U. S. 560, 567 (1975); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 410 (1971); *Tooahnippah* v. *Hickel,* 397 U. S. 598, 606 (1970); *Association of Data Processing Service Orgs.* v. *Camp,* 397 U. S. 150, 156–157 (1970); *Barlow* v. *Collins,* 397 U. S. 159, 166 (1970).

legislation conforms to the Constitution and to the provisions of the Voting Rights Act. See *South Carolina* v. *Katzenbach,* 383 U. S. 301, 334 (1966). Section 5 establishes two alternative methods by which covered jurisdictions can comply with this severe requirement of federal preclearance review. First, a covered jurisdiction may file a declaratory judgment action in the District Court for the District of Columbia and subsequently may implement the change in voting laws if that court declares that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c (1970 ed., Supp. V). Second, a covered jurisdiction may submit a change in voting laws to the Attorney General and subsequently may enforce the change if "the Attorney General has not interposed an objection within sixty days after such submission." *Ibid.*

According to the terms of § 5, a covered jurisdiction is in compliance pursuant to the latter alternative once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days. This second method of compliance under § 5 is unlike the first in that implementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect.[16] To the contrary, compliance with § 5 is measured solely by the *absence,* for whatever reason, of a timely objection on the part of the Attorney General.[17] And this Court

[16] Nor has this Court read § 5 to condition the interposition of an objection by the Attorney General on an affirmative finding that he has reason to believe that the change in voting laws has the prohibited purpose or effect. Compare *Georgia* v. *United States,* 411 U. S., at 540–541, with *id.,* at 544–545 (WHITE, J., dissenting), and *id.,* at 545 (POWELL, J., dissenting).

[17] Our prior cases have so described the statutory scheme. See, *e. g., City of Richmond* v. *United States,* 422 U. S., at 362 (change in

has recognized that "[o]nce the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen* v. *State Bd. of Elections, supra,* at 549–550.

Although there is no legislative history bearing directly on the issue of reviewability of the Attorney General's actions under § 5, the legislative materials do indicate a desire to provide a speedy alternative method of compliance to covered States. Section 8 of the original bill provided for preclearance review only by means of a declaratory judgment action in the District Court for the District of Columbia. Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereafter Senate Hearings). Justified concerns arose that the time required to pursue such litigation would unduly delay the implementation of validly enacted, nondiscriminatory state legislation. Cognizant of the problem, Attorney General Katzenbach suggested that the declaratory judgment procedure "could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time." Senate Hearings 237. The legislation was changed to incorporate this suggestion.[18]

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voting laws cannot be implemented unless "such change has either been approved by the Attorney General or that officer has failed to act within 60 days after submission to him"); *Georgia* v. *United States, supra,* at 529 (change in voting laws can be implemented upon "submitting the plan to the Attorney General of the United States and receiving no objection within 60 days").

[18] Compliance by means of submission to the Attorney General was added to the bill, but neither the Committee Reports nor the debates discussed the addition. S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H. R. Conf. Rep. No. 711, 89th Cong., 1st Sess. (1965). The legislative history is summarized in *Harper* v. *Levi,* 171 U. S. App. D. C., at 333, 520 F. 2d, at 65.

In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission.[19] Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute. *Switchmen* v. *National Mediation Board,* 320 U. S., at 305. Since judicial review of the Attorney General's

[19] The Attorney General has promulgated regulations providing that the 60-day period shall commence from the time that the Department of Justice receives a submission satisfying certain enumerated requirements. 28 CFR § 51.3 (b)–(d) (1976). These regulations were reviewed and found valid by this Court in *Georgia* v. *United States, supra.* The Court noted that "[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." 411 U. S., at 540. To deny the Attorney General the power to suspend the 60-day period until a complete submission was tendered would leave him no choice but to interpose an objection to incomplete submissions, a result which "would only add acrimony to the administration of § 5." *Id.,* at 541.

Nothing in our opinion in *Georgia* v. *United States* suggests that Congress did not intend to preclude judicial review of the Attorney General's failure to interpose an objection within 60 days of a complete submission. The factors relied on in that case are inapplicable once a complete submission has been pending before the Attorney General for 60 days. Indeed, subsequent judicial review of the Attorney General's failure to interpose a timely objection to a complete submission would itself "add acrimony" by denying covered jurisdictions the statutorily prescribed "rapid method of rendering a new state election law enforceable." *Allen* v. *State Bd. of Elections,* 393 U. S., at 549; see *Georgia* v. *United States, supra,* at 538.

actions would unavoidably extend this period, it is necessarily precluded.[20]

Our conclusions in this respect are reinforced by the fact that the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation.[21] The statute expressly provides that neither "an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement" of the newly enacted legislation or voting regulation. Cf. *Dunlop* v. *Bachowski,* 421 U. S. 560, 569–570 (1975). It is true that it was the perceived inadequacy of private suits under the Fifteenth Amendment that prompted Congress to pass the Voting Rights Act. *Allen* v. *State Bd. of Elections,* 393 U. S., at 556 n. 21; *South Carolina* v. *Katzenbach,*

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[20] MR. JUSTICE MARSHALL'S dissent voices concern over a perceived "unique[ness]" of today's decision. *Post,* at 514, and n. 10. But the decision is unique only in the sense that every judicial holding with respect to implied preclusion of judicial review is unique; "the context of the entire legislative scheme," *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 141 (1967), differs from statute to statute. *Dunlop* v. *Bachowski,* 421 U. S. 560 (1975), the case cited by the dissent, illustrates the point. In that case, the Court did not confront anything analogous to the potential severity of the § 5 remedy at issue here. See *supra,* at 504. Moreover, the statute at issue in *Dunlop* provided that suit by the Secretary of Labor would be the *exclusive* post-election remedy. In the instant case, on the other hand, objection by the Attorney General is not the exclusive method of challenging changes in a State's voting laws, since the Attorney General's failure to object is not conclusive with respect to the constitutionality of submitted state legislation. See *infra,* this page.

[21] Similarly, an objection on the part of the Attorney General is not conclusive with respect to the invalidity of the submitted state legislation under the Constitution or the Voting Rights Act. After receiving an objection from the Attorney General, a covered jurisdiction retains the option of seeking a favorable declaratory judgment from the District Court for the District of Columbia. See *Beer* v. *United States, supra; City of Petersburg* v. *United States,* 410 U. S. 962 (1973), summarily aff'g 354 F. Supp. 1021 (DC 1972).

383 U. S., at 309. But it does not follow that Congress did not intend to preclude judicial review of Attorney General actions under § 5.[22] The initial alternative requirement of submission to the Attorney General substantially reduces the likelihood that a discriminatory enactment will escape detection by federal authorities.[23] Where the discriminatory char-

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[22] Relying on the fact that § 4 of the Voting Rights Act expressly precludes judicial review of the Attorney General's actions under that section, *post,* at 509–510, and n. 3, see *Briscoe* v. *Bell, ante,* p. 404, MR. JUSTICE MARSHALL's dissent would formulate a new mechanical rule of statutory construction: If one section of a statute expressly forbids judicial review, it would not be open for the courts to inquire whether Congress also intended to preclude review under other sections of the same statute. Application of such a rule of statutory construction would prevent a court from giving effect to congressional intent that otherwise was clear from "the context of the entire legislative scheme." *Abbott Laboratories* v. *Gardner, supra,* at 141. The existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute. Here, we simply conclude that other factors—the harsh nature of the § 5 remedy, the statutory language, and the legislative materials—are sufficiently strong indications of congressional intent to override any contrary inference that might be drawn from the fact that Congress expressly precluded judicial review in a different section of the same statute.

[23] MR. JUSTICE MARSHALL's dissent opens with a "floodgates" argument: If there is no judicial review when the Attorney General misunderstands his legal duty, there also will be no judicial review when at sometime in the future the Attorney General bargains acquiescence in a discriminatory change in a covered State's voting laws in return for that State's electoral votes. *Post,* at 508, and n. 1. That "floodgates" concern is equally applicable to Congress' express preclusion of judicial review under § 4 of the Act, see n. 22, *supra,* a fact which suggests that Congress—like the courts—operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities. In determining whether preclusion of judicial review can fairly be inferred from the context of the entire legislative scheme, we place no weight on the prospect that an Attorney General someday will trade electoral votes for preclearance under § 5.

acter of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period.[24]

III

For these reasons, we hold that the objection interposed by the Attorney General to § 2 of Act 1205 on July 20, 1973, *nunc pro tunc,* is invalid.[25] South Carolina is therefore free to implement its reapportionment plan for the State Senate.

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court holds today that an Attorney General's failure to object within 60 days to the implementation of a voting law that has been submitted to him under § 5 of the Voting

[24] The United States suggests that there should be limited judicial reveiw only when the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the standards established by § 5. Brief for United States as *Amicus Curiae* 30–31. For the reasons stated in text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act. We note, however, that there is no evidence in this case that the Attorney General improperly "relinquished" his statutory responsibilities. The record is clear that the Attorney General reviewed the submitted legislation as well as the judicial determination in *Twiggs* v. *West* and *decided* not to interpose an objection to § 2 of Act 1205. That decision may have been erroneous, see n. 8, *supra,* but it nonetheless was a decision exercised pursuant to the Attorney General's § 5 responsibilities.

[25] In light of this disposition of the case, we find it unnecessary to address the argument advanced by South Carolina that the single judge in *Harper* v. *Kleindienst,* 362 F. Supp. 742 (DC 1973), had no jurisdiction to determine questions arising under § 5 of the Voting Rights Act. See *Allen* v. *State Bd. of Elections,* 393 U. S., at 560–563.

Rights Act, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V), cannot be questioned in any court. Under the Court's ruling, it matters not whether the Attorney General fails to object because he misunderstands his legal duty, as in this case; because he loses the submission; or because he seeks to subvert the Voting Rights Act. Indeed, the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State's voting laws in return for that State's electoral votes.[1] Cf. J. Randall & D. Donald, The Civil War and Reconstruction 678–701 (2d ed. 1961) (settlement of the election of 1876).

Common sense proclaims the error of this result. It is simply implausible that Congress, which devoted unusual attention to this Act in recognition of its stringency and importance, see *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–309 (1966), intended to allow the Act's primary enforce-

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[1] "QUESTION: . . . I thought it was your position that even if he [the Attorney General] had said, we're interposing no objection because South Carolina voted Republican at the last election, that even that wouldn't be reviewable.

"[Counsel]: We think—

"QUESTION: Isn't that your position in its ultimate effect?

"[Counsel]: If that were his objection, we would be quite confident in coming to the District Court of the District of Columbia ourselves, if he had objected on that basis.

"QUESTION: No, I said, he didn't object; he says, we're interposing no objection because your state voted right at the last election. Now what if he did that? Would that be reviewable? In your submission, it would not be; isn't that correct?

"[Counsel]: It would not—it would not fall within the kind of review being sought here.

"QUESTION: Exactly.

"[Counsel]: I don't think we want to go so far as to say that what the Attorney General—

"QUESTION: Well, your argument does go, and necessarily goes that far, as I understand it; and I don't find that shocking." Tr. of Oral Arg. 52–53.

ment mechanism to be vitiated at the whim of an Attorney General. Legal analysis supports the conclusion that Congress did no such thing. But today, the majority puts aside both common sense and legal analysis, relying instead on fiat. I dissent.

I

A

I agree with the majority that the dispositive issue in this case is whether Congress has precluded all judicial review of the Attorney General's failure to enter an objection to implementation of a state statute submitted to him for review under § 5.[2] And, as the majority notes, it is indeed "well settled that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Ante,* at 501, quoting *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967). If the Court applied rather than merely acknowledged this standard, the judgment below would be reversed.

The Voting Rights Act does not explicitly preclude review of the Attorney General's actions under § 5. The absence

[2] The court below, in addition to finding that Congress had barred review, held that the Attorney General's actions under § 5 are not reviewable because they are not "adjudicatory" and because objecting voters have an adequate remedy in their right to challenge the constitutionality of state laws to which the Attorney General has failed to object. The court also concluded that the possibility of bringing a constitutional action prevents voters from attaining the status of persons "adversely affected or aggrieved," 5 U. S. C. § 702, by the Attorney General's failure to object. 425 F. Supp. 331, 337–339.

I take the majority to have rejected these holdings, since the Court would not need to consider whether Congress had precluded review if it agreed with the District Court that appellants did not have standing or that the failure to object is not a reviewable agency action under the Administrative Procedure Act, 5 U. S. C. § 704. Since the majority rejects these holdings, I merely note that in my view, these alternative holdings of the District Court are patently erroneous.

of such a provision places on appellees "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the Attorney General's] decision[s]." *Dunlop* v. *Bachowski,* 421 U. S. 560, 567 (1975). The normal "strong" presumption is strengthened still further in this case by the express prohibition, contained in § 4 (b) of the Act, 42 U. S. C. § 1973b (b), of judicial review of the Attorney General's determinations under that section as to which States are covered by the Act.[3] If the Congress that wrote § 4 had also intended to preclude review of the same officer's actions under § 5, it would certainly have said so. The Court makes no effort to explain why the congressional silence in § 5 should be treated as the equivalent of the congressional statement in § 4.

Not only is there nothing in § 5 precluding review, there is also, as the Court admits, "no legislative history bearing directly on the issue of reviewability of the Attorney General's actions under § 5." *Ante,* at 503. Thus, all the Court offers in support of its conclusion that the strengthened presumption of reviewability should be disregarded in this case is an inference that review must be foreclosed to serve the assertedly primary congressional purpose of limiting the time during which covered States are prevented from implementing new legislation. That inference is purportedly drawn from an inquiry into "the role played by the Attorney General within 'the context of the entire legislative scheme.'" *Ante,* at 501, quoting *Abbott Laboratories* v. *Gardner, supra,* at 141. In fact, however, the Court completely ignores the Attorney General; the majority's version of § 5 requires a covered State to submit its statutes to a mailing address at the Department of Justice and to wait for 60 days before implementing

[3] This explicit statutory preclusion was decisive in *Briscoe* v. *Bell, ante,* p. 404. The conclusion in that case that review is precluded when Congress says so obviously does not support the conclusion that review is also precluded when Congress has not said so.

the submitted laws, but it does not impose any duties on the Attorney General. The time limit on the Attorney General's action, and not any requirement that he review submitted laws for compliance with the Voting Rights Act is, according to the Court, the key aspect of the part of § 5 with which we are concerned.

We have previously taken a much different view of § 5. Just four years ago, in *Georgia* v. *United States,* 411 U. S. 526 (1973), we were required to consider the Attorney General's role in § 5. We recognized that in doing so,

> "it is important to focus on the entire scheme of § 5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General '*merely* gives the covered State a rapid method of rendering a new state election law enforceable.' *Allen* v. *State Board of Elections,* 393 U. S. [544,] 549." 411 U. S., at 538 (emphasis added).

Because the provision for submission to the Attorney General was meant only to ameliorate and not to change the "essential" burden of § 5, we upheld regulations that deferred the beginning of the 60-day review period created by the Act until a submission satisfied certain criteria. We noted that "[t]he judgment that the Attorney General *must* make is a difficult and complex one," 411 U. S., at 540 (emphasis added), and that if he could not await complete information, "his only plausible response to an inadequate or incomplete submission would be simply to object to it." [4] *Ibid.* We also upheld

[4] Under today's holding, of course, the Attorney General is now granted license to make the entirely "implausible" response of failing to enter an objection no matter how incomplete or inadequate the State's submission may be.

the Attorney General's placement of the burden of proof on States submitting legislation for approval, because

> "[a]ny less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Id.*, at 538.

In contrast to today's ruling, we held that providing such a path was not the function of the proviso to § 5 which established clearance by the Attorney General as an alternative to the declaratory judgment action.

Our description in *Georgia* v. *United States* of the very limited function of the proviso supports the conclusion that the Attorney General should respond to a submitted statute as would the District Court for the District of Columbia if the State brought a declaratory judgment action seeking approval of that statute. The regulation approved by the Court in *Georgia* v. *United States* explicitly imposes that obligation on the Attorney General. 28 CFR § 51.19 (1976).[5] Moreover, the regulation also specifies the actions the Attorney General must take:

> "If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General

[5] Curiously, the Court never mentions this regulation. The portion of the regulation not quoted in text reads as follows:

"Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice."

> determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof [on the State] applicable in the District Court, enter an objection and so notify the submitting authority." *Ibid.*

This validly adopted regulation, which clearly requires the Attorney General to enter an objection *unless* he determines the submitted legislation has neither the proscribed purpose nor the forbidden effect, is binding on the Attorney General. See *United States* v. *Nixon,* 418 U. S. 683, 695–696 (1974); *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959); *Service* v. *Dulles,* 354 U. S. 363 (1957); *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

Thus, both the statute and the regulation impose on the Attorney General a duty to review submitted statutes and disapprove them unless he is satisfied that they meet the standards established by the Act. It is undisputed in this case that the Attorney General, after reviewing the reapportionment legislation submitted by South Carolina, was unable to make that determination.[6] It was, therefore, his duty to

[6] As the majority notes, the Attorney General objected to Act 932 because of the combination of multimember districts, numbered posts, and a majority-runoff requirement. *Ante,* at 495, and n. 4. The same objectionable features are contained in the senate reapportionment plan of Act 1205. The Attorney General did not object to that plan solely because he felt "constrained to defer" to the holding in *Twiggs* v. *West,* Civ. No. 71–1106 (SC, Apr. 7, 1972), that the aspects of the reapportionment plan to which he had objected did not establish a violation of the Fifteenth Amendment because they were not racially motivated. *Ante,* at 496–497. That the Attorney General nevertheless maintained his belief that these features are inconsistent with the Voting Rights Act is shown by his simultaneous action in objecting to their extension to all other multimember

object to implementation of that legislation. He did not perform that duty,[7] deferring instead to a District Court judgment that the majority concedes should not have been entered.[8]

The majority holds that this failure is insulated from judicial review under the provision of the Administrative Procedure Act expressly designed for such defaults, 5 U. S. C. § 706 (1),[9] for one reason only: The statute contains a deadline within which the Attorney General must act. This holding that the existence of a deadline for the performance of an administrative duty is a "persuasive reason" to believe that failure to perform that duty cannot be reviewed is unique among our decisions.[10] I trust it will remain unique. Nothing

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districts in the State. App. 47. The Attorney General felt himself free to enter that objection because the *Twiggs* court had approved only the legislation relating to the Senate. See also App. to Brief for Appellants 4a (memorandum submitted by Attorney General to court in *Harper* v. *Kleindienst,* 362 F. Supp. 742 (DC 1973), reiterating that Act 1205 would be objectionable but for the holding in *Twiggs* v. *West, supra*); App. 51 (letter from Assistant Attorney General indicating that on behalf of the Attorney General he would have objected to Act 1205 but for the decision in *Twiggs*).

[7] The majority halfheartedly argues that the Attorney General did not relinquish his responsibility because it is clear that he reviewed Act 1205 and decided not to enter an objection to its implementation. *Ante,* at 507 n. 24. But it is clear, see n. 6, *supra,* that the only decision made by the Attorney General was the decision to defer to the views of the District Court in *Twiggs* v. *West, supra.* The Attorney General did not perform the duty imposed on him by the statute and his own regulations, which was to evaluate Act 1205 and enter an objection to it unless he was satisfied that it met the criteria of the Voting Rights Act.

[8] See *ante,* at 495–496. See also *United States* v. *Board of Supervisors,* 429 U. S. 642 (1977); *Connor* v. *Waller,* 421 U. S. 656 (1975).

[9] "The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed."

[10] In *Dunlop* v. *Bachowski,* 421 U. S. 560 (1975), we held reviewable the Secretary of Labor's decision not to challenge the validity of a union

in the existence of a deadline for the performance of an administrative duty provides persuasive reason—or indeed any reason at all—to believe that failure to perform that duty cannot be reviewed.[11] The illogic of the Court's argument transmogrifies a deadline for action into an impenetrable shield for inaction.

B

The Court's conclusion is not only inconsistent with our description of § 5 in *Georgia* v. *United States,* it is also flatly inconsistent with our holding in that case. For in *Georgia* v. *United States,* we reviewed the standard by which the Attorney General determined to object to implementation of a submitted statute. The majority approved of the standard, and the dissenters objected to it,[12] but the Court unanimously

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election under 29 U. S. C. § 482. Section 482, like § 5 of the Voting Rights Act, contains a 60-day deadline.

[11] The majority's argument appears to be that review would defeat the congressional purpose of providing a speedier way than the declaratory judgment action for States to gain permission to implement new voting laws. Of course, this concern would only be relevant if it were necessarily true that the State could not implement the new law between the expiration of the 60-day period and the final judicial determination requiring the Attorney General to re-examine the statute. As this case illustrates, allowing review is not the same as requiring suspension of the challenged law until the review of the Attorney General's action has been completed.

[12] My BROTHER WHITE protested:

"Surely, objections by the Attorney General would not be valid if that officer considered himself too busy to give attention to § 5 submissions and simply decided to object to all of them, to one out of 10 of them or to those filed by States with governors of a different political persuasion. Neither, I think, did Congress anticipate that the Attorney General could discharge his statutory duty by simply stating that he had not been persuaded that a proposed change in election procedures would not have the forbidden discriminatory effect. It is far more realistic and reasonable to assume that Congress expected the Attorney General to give his careful and good-faith consideration to § 5 submissions and, within 60 days after receiving all information he deemed necessary, *to make up his mind as to*

rejected the Government's argument that the propriety of the objection was "outside the permissible scope of judicial inquiry." Brief for United States in *Georgia* v. *United States*, O. T. 1972, No. 72–75, p. 38.

The Court simply ignores this glaring contradiction between our action in *Georgia* v. *United States* and its holding today. Since the Court does not overrule *Georgia* v. *United States*, I can only conclude that the law now allows review of the Attorney General's decision to object to implementation of a statute, but it does not allow review of his failure to object.[13] I can find no support for such a bizarre rule. I am sure that others, especially members of the Congress whose intent the Court is supposedly following, will be equally baffled.

II

Perhaps out of justifiable embarrassment, the majority never mentions the effect of its ruling. That effect is easy to describe: The Court today upholds a system of choosing members of the South Carolina Senate that has prevented the election of any black senators, despite the fact that 25% of South Carolina's population is black.[14] Thus, South Caro-

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whether the proposed change did or did not have a discriminatory purpose or effect, and if it did, to object thereto." 411 U. S., at 543 (emphasis added).

Under the majority's holding today, of course, failure to object for any of the reasons my Brother considered clearly invalid would not be subject to judicial correction.

[13] But cf. *ante*, at 505 n. 21 and 507 n. 24.

[14] The majority argues that preclusion of review is consistent with the congressional purpose because even if one or two bad laws slip by the Attorney General, the requirement that the laws be submitted to him will result in the interception of most discriminatory legislation. *Ante*, at 506–507. The effect of today's ruling, which allows South Carolina to keep its senate closed to blacks, demonstrates the fatuousness of this quantitative argument. Moreover, the Voting Rights Act, as restructured by the Court, now imposes no enforceable restraint on an Attorney General's decision not to object to any discriminatory laws.

lina, which was a leader of the movement to deprive the former slaves of their federally guaranteed right to vote, *South Carolina* v. *Katzenbach,* 383 U. S., at 310–311, and n. 9, 333–334, is allowed to remain as one of the last successful members of that movement. It would take much more evidence than the Court can muster to convince me that this result is consistent with "Congress' firm intention to rid the country of racial discrimination in voting." *Id.,* at 315. Certainly the Court has failed to identify " 'clear and convincing evidence,' " *Abbott Laboratories* v. *Gardner,* 387 U. S., at 141, that this result is compelled by the Act Congress passed to implement that intention.

It is true that today's decision does not quite spell the end of all hope that the South Carolina Senate will someday be representative of the entire citizenry of South Carolina. If the Decennial Census in 1980 requires substantial reapportionment, and if the Voting Rights Act is still in effect when that reapportionment takes place, and if the then Attorney General is conscientious, the devices approved today will be rejected under the strict standards of § 5. See *Georgia* v. *United States,* 411 U. S., at 531. But see *Beer* v. *United States,* 425 U. S. 130 (1976). This highly contingent possibility that the promise of the Fifteenth Amendment will be realized in South Carolina, some 110 years after that Amendment was ratified, is apparently sufficient in the eyes of the majority. It is not sufficient for me, as it was not for Congress, which wrote the Voting Rights Act in 1965 to put an end to what was then "nearly a century of widespread resistance to the Fifteenth Amendment." *South Carolina* v. *Katzenbach, supra,* at 337.

MR. JUSTICE BLACKMUN, dissenting.

In *Harper* v. *Levi,* 171 U. S. App. D. C. 321, 520 F. 2d 53 (1975), the United States Court of Appeals for the District of Columbia Circuit held that the Attorney Gen-

eral's decision not to make an independent assessment of South Carolina Act 1205 is reviewable under the circumstances of this case, and that § 5 of the Voting Rights Act of 1965 requires him to make an independent determination on the merits of the § 5 issues. See *ante,* at 497–498. For the reasons stated by the majority opinion in *Harper* v. *Levi,* I dissent.

POELKER, MAYOR OF ST. LOUIS, ET AL. *v.* DOE

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

No. 75–442. Argued January 11, 1977—Decided June 20, 1977

The city of St. Louis, in electing, as a policy choice, to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions, *held* not to violate any constitutional rights. *Maher* v. *Roe*, *ante*, p. 464.

515 F. 2d 541, reversed and remanded.

Eugene P. Freeman argued the cause for petitioners. With him on the brief was *Jack L. Koehr*.

Frank Susman argued the cause and filed a brief for respondent.*

PER CURIAM.

Respondent Jane Doe, an indigent, sought unsuccessfully to obtain a nontherapeutic abortion at Starkloff Hospital, one of two city-owned public hospitals in St. Louis, Mo. She subsequently brought this class action under 42 U. S. C. § 1983 against the Mayor of St. Louis and the Director of Health and Hospitals, alleging that the refusal by Starkloff Hospital to provide the desired abortion violated her constitutional rights. Although the District Court ruled against Doe following a trial, the Court of Appeals for the Eighth Circuit reversed in

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*Briefs of *amici curiae* urging affirmance were filed by *Leo Pfeffer* for the American Jewish Congress et al.; and by *Sylvia A. Law*, *Harriet F. Pilpel*, and *Eve W. Paul* for the American Public Health Assn. et al.

Briefs of *amici curiae* were filed by *Dennis J. Horan*, *Dolores V. Horan*, and *Victor G. Rosenblum* for Americans United for Life, Inc.; by *Jerome M. McLaughlin* for Missouri Doctors for Life; and by *Robert E. Ratermann* for James R. Butler et al.

an opinion that accepted both her factual and legal arguments. 515 F. 2d 541 (1975).[1]

The Court of Appeals concluded that Doe's inability to obtain an abortion resulted from a combination of a policy directive by the Mayor and a longstanding staffing practice at Starkloff Hospital. The directive, communicated to the Director of Health and Hospitals by the Mayor, prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother. Under the staffing practice, the doctors and medical students at the obstetrics-gynecology clinic at the hospital are drawn from the faculty and students at the St. Louis University School of Medicine, a Jesuit-operated institution opposed to abortion. Relying on our decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), the Court of Appeals held that the city's policy and the hospital's staffing practice denied the "constitutional rights of indigent pregnant women . . . long after those rights had been clearly enunciated" in *Roe* and *Doe.* 515 F. 2d, at 547. The court cast the issue in an equal protection mold, finding that the provision of publicly financed hospital services for childbirth but not for elective abortions constituted invidious discrimination. In support of its equal protection analysis, the court also emphasized the contrast between nonindigent women who can afford to obtain abortions in private hospitals and indigent women who cannot. Particular reliance was placed upon the previous decision in *Wulff* v. *Singleton,* 508 F. 2d 1211 (CA8 1974), reversed on other grounds, 428 U. S. 106 (1976), in which the Court of Appeals

[1] The facts concerning Doe's visit to the hospital and the reason for her inability to obtain an abortion are hotly disputed. Our view that the Court of Appeals erred in the application of the law to the facts as stated in its opinion makes it unnecessary to describe or resolve this conflict.

had held unconstitutional a state Medicaid statute that provided benefits for women who carried their pregnancies to term but denied them for women who sought elective abortions. The court stated that "[t]here is no practical distinction between that case and this one." 515 F. 2d, at 545.

We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maher* v. *Roe, ante,* p. 464. For the reasons set forth in our opinion in that case, we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

In the decision of the Court of Appeals and in the briefs supporting that decision, emphasis is placed on Mayor Poelker's personal opposition to abortion, characterized as "a wanton, callous disregard" for the constitutional rights of indigent women. 515 F. 2d, at 547. Although the Mayor's personal position on abortion is irrelevant to our decision, we note that he is an elected official responsible to the people of St. Louis. His policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold, for the reasons stated in *Maher,* that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done.[2]

The judgment of the Court of Appeals for the Eighth Circuit

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[2] The Court of Appeals awarded attorney's fees to respondent under the "bad faith" exception to the traditional American Rule disfavoring allowance of such fees to the prevailing party. See *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U. S. 240 (1975). It follows from our decision on the constitutional merits that it was an error to award attorney's fees to respondent.

is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 454.]

[For dissenting opinion of MR. JUSTICE BLACKMUN, see *ante*, p. 462.]

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

The Court holds that St. Louis may constitutionally refuse to permit the performance of elective abortions in its city-owned hospitals while providing hospital services to women who carry their pregnancies to term. As stated by the Court of Appeals:

> "Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth." 515 F. 2d 541, 544 (1975).

The Court of Appeals held that St. Louis could not in this way "interfer[e] in her decision of whether to bear a child or have an abortion simply because she is indigent and unable to afford private treatment," *ibid.*, because it was constitutionally impermissible that indigent women be " 'subjected to State coercion to bear children which they do not wish to bear [while] no other women similarly situated are so coerced,' " *id.*, at 545.

For the reasons set forth in my dissent in *Maher* v. *Roe*, *ante*, p. 482, I would affirm the Court of Appeals. Here the fundamental right of a woman freely to choose to terminate her pregnancy has been infringed by the city of St. Louis through a deliberate policy based on opposition to elective abortions on moral grounds by city officials. While it may still be possible for some indigent women to obtain abortions in clinics or private hospitals, it is clear that the city policy is a significant, and in some cases insurmountable, obstacle to indigent pregnant women who cannot pay for abortions in those private facilities. Nor is the closing of St. Louis' public hospitals an isolated instance with little practical significance. The importance of today's decision is greatly magnified by the fact that during 1975 and the first quarter of 1976 only about 18% of all public hospitals in the country provided abortion services, and in 10 States there were no public hospitals providing such services.[1]

A number of difficulties lie beneath the surface of the Court's holding. Public hospitals that do not permit the performance of elective abortions will frequently have physicians on their staffs who would willingly perform them. This may operate in some communities significantly to reduce the number of physicians who are both willing and able to perform abortions in a hospital setting. It is not a complete answer that many abortions may safely be performed in clinics, for some physicians will not be affiliated with those clinics, and some abortions may pose unacceptable risks if performed outside a hospital. Indeed, such an answer would be ironic, for if the result is to force some abortions to be performed in a clinic that properly should be performed in a hospital, the city policy will have operated to increase rather than reduce health risks associated with abortions; and in *Roe* v. *Wade*,

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[1] Sullivan, Tietze, & Dryfoos, Legal Abortion in the United States, 1975–1976, 9 Family Planning Perspectives 116, 121, 128 (1977).

410 U. S. 113, 163 (1973), the Court permitted regulation by the State solely to *protect* maternal health.

The Court's holding will also pose difficulties in small communities where the public hospital is the only nearby health care facility. If such a public hospital is closed to abortions, any woman—rich or poor—will be seriously inconvenienced; and for some women—particularly poor women—the unavailability of abortions in the public hospital will be an insuperable obstacle. Indeed, a recent survey suggests that the decision in this case will be felt most strongly in rural areas, where the public hospital will in all likelihood be closed to elective abortions, and where there will not be sufficient demand to support a separate abortion clinic.[2]

Because the city policy constitutes "coercion [of women] to bear children which they do not wish to bear," *Roe* v. *Wade* and the cases following it require that the city show a compelling state interest that justifies this infringement upon the fundamental right to choose to have an abortion. "[E]xpressing a preference for normal childbirth," *ante*, at 521, does not satisfy that standard. *Roe* explicitly held that during the first trimester no state interest in regulating abortions was compelling, and that during the second trimester the State's interest was compelling only insofar as it protected maternal health. 410 U. S., at 162–164. Under *Roe*, the State's "important and legitimate interest in potential life," *id.*, at

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[2] "The concentration of services among relatively few providers—mostly clinics—in the nation's larger cities is clearly associated with the failure of hospitals—especially the smaller hospitals that are the major health institutions in small cities and nonmetropolitan areas—to offer abortions along with their other health services. Since public hospitals are even less likely than private hospitals to provide abortions, it is poor, rural and very young women who are most likely to be denied abortions as a result of the need to travel outside their own communities to obtain terminations. It is these women who are least likely to have the funds, the time or the familiarity with the medical system that they need to be able to cope with the problems associated with such travel." *Id.*, at 121.

163—which I take to be another way of referring to a State's "preference for normal childbirth"—becomes compelling only at the end of the second trimester. Thus it is clear that St. Louis' policy preference is insufficient to justify its infringement on the right of women to choose to have abortions during the first two trimesters of pregnancy without interference by the State on the ground of moral opposition to abortions. St. Louis' policy therefore "unduly burdens the right to seek an abortion," *Bellotti* v. *Baird,* 428 U. S. 132, 147 (1976).

I would affirm the Court of Appeals.

MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* DOE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 76–878. Decided June 20, 1977

The District Court's holding that a Connecticut statute requiring that mothers of illegitimate children, as a condition to receiving Aid to Families with Dependent Children benefits, disclose to appellant Commissioner of Social Services the names of the children's fathers, was valid provided that the state authorities first determine, in accordance with § 402 (a) of the Social Security Act, that appellee mothers of illegitimate children did not have "good cause" for refusing to disclose the fathers' names, taking into account the "best interests of the child," is vacated, and the case is remanded in light of an intervening amendment to the Connecticut statute so that the District Court can clarify whether appellant is free to make his own "good cause" and "best interests of the child" determinations in the absence of effective regulations of the Department of Health, Education, and Welfare.

414 F. Supp. 1368, vacated and remanded.

PER CURIAM.

The motion of appellees for leave to proceed *in forma pauperis* is granted.

Appellees are mothers of illegitimate children who receive welfare benefits from the State of Connecticut under the Aid to Families with Dependent Children program administered for the Federal Government by the Department of Health, Education, and Welfare (HEW). They are prosecuting this litigation to challenge the constitutionality of § 52–440b, Conn. Gen. Stat. Ann. (1977), which would require them, under pain of contempt, to divulge to appellant the names of the fathers of their children.

In 1975, after a three-judge District Court upheld the constitutionality of § 52–440b, we vacated the judgment and remanded for further consideration in light of an intervening

amendment to § 402 (a) of the Social Security Act,* and, if a relevant state proceeding was pending, in light of *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975). *Roe* v. *Norton,* 422 U. S. 391.

On remand the District Court held that the *Younger/Huffman* doctrine did not prohibit the issuance of an injunction in this case. 414 F. Supp. 1368 (Conn. 1976). The court also held that § 52–440b remained valid provided the Connecticut welfare authorities first determine, in accordance with § 402 (a) of the federal statute, that the appellees did not have "good cause" for refusing to cooperate, under standards which take into account the "best interests of the child." 414 F. Supp., at 1381.

Noting that the Secretary of HEW has not yet promulgated regulations defining "good cause" and "best interests of the child," appellant reads the District Court's opinion as enjoining any state proceedings under § 52–440b until such guidance is forthcoming. But the court's opinion contains the following passage in a footnote:

> "HEW has taken the position that the entire amendment [to § 402 (a)] will not become effective until the new regulations have been approved. We do not believe that this is the proper construction of the act.
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> . . . . .
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> ". . . [T]he wiser course is to require the Commissioner, if he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child, to postpone any enforcement until the new regulations have been issued and approved." 414 F. Supp., at 1381 n. 20.

Though it is somewhat ambiguous, the quoted portion can be read to require appellant to make his own determination

*Pub. L. 93–647, 88 Stat. 2359, amending 42 U. S. C. § 602 (a) (26) (1970 ed., Supp. V). The District Court also considered a second, subsequent, change in § 402 (a), Pub. L. 94–88, 89 Stat. 436.

of "good cause" and "best interests of the child" *if* he is able to do so without the aid of the HEW regulations. If this is the correct reading, appellant's apprehension that he is presently barred from proceeding in accordance with § 52–440b would be erroneous.

The day after the District Court issued its opinion on remand a new Connecticut statute became effective, 1976 Conn. Pub. Act No. 76–334, amending Conn. Gen. Stat. Ann. § 17–82b. In pertinent part that statute provides:

> "All information required to be provided to the commissioner as a condition of such eligibility [for welfare assistance] under federal law shall be so provided by the supervising relative, provided, no person shall be determined to be ineligible if the supervising relative has good cause for the refusal to provide information concerning the absent parent or if the provision of such information would be against the best interests of the dependent child or children, or any of them. The commissioner of social services shall adopt by regulation . . . standards as to good cause and best interests of the child. Any person aggrieved by a decision of the commissioner as to the determination of good cause or the best interests of such child or children may request a fair hearing in accordance with the provisions of sections 17–2a and 17–2b."

While it is obvious that this pronouncement is intended to have some effect in the general area of this litigation, its impact on § 52–440b is not clear.

Therefore, we must once again vacate the judgment of the District Court and remand this case. That court must now consider its interpretation of § 52–440b in light of the amendment to § 17–82b, and clarify whether appellant is free to make his own "good cause" and "best interests of the child" determinations in the absence of effective HEW regulations.

It is so ordered.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 528 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 14 THROUGH JUNE 20, 1977

JUNE 14, 1977

Certiorari Granted—Reversed and Remanded. (See No. 76–1786, *ante*, p. 43.)

JUNE 20, 1977

Appeals Dismissed

No. 76–1423. SIGETY, DBA FLORENCE NIGHTINGALE NURSING HOME *v.* HORAN, WELFARE INSPECTOR GENERAL OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 40 N. Y. 2d 1085, 360 N. E. 2d 1103.

No. 76–1490. LEWIS ET AL. *v.* ALASKA ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 559 P. 2d 630.

No. 76–6675. MCDONALD *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–1509. JOSEPH E. SEAGRAM & SONS, INC. *v.* JONES ET AL. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question. Reported below: 548 S. W. 2d 667.

No. 76–6671. LEE *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 87 Wash. 2d 932, 558 P. 2d 236.

Vacated and Remanded on Appeal

No. 76–366. REINHARD, STATE'S ATTORNEY OF WINNEBAGO COUNTY, ET AL. *v.* EAGLE BOOKS, INC., ET AL. Appeal from D. C. N. D. Ill. Judgment vacated and case remanded for further consideration in light of *Ward* v. *Illinois,* 431 U. S. 767 (1977). MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would affirm the judgment. Reported below: 418 F. Supp. 345.

Certiorari Granted—Vacated and Remanded

No. 75–1695. CARINI ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Larionoff,* 431 U. S. 864 (1977). Reported below: 528 F. 2d 738.

No. 75–6657. BARTEMIO *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Abney* v. *United States,* 431 U. S. 651, 664 n. 9 (1977).

No. 75–6905. ALLEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Roberts* v. *Louisiana,* 431 U. S. 633 (1977), and *State* v. *Rumsey,* 267 S. C. 236, 226 S. E. 2d 894 (1976). Reported below: 266 S. C. 175, 222 S. E. 2d 287.

No. 76–211. MONROE COUNTY PROBATE COURT ET AL. *v.* WELDON ET AL. C. A. 6th Cir. Motion of Michigan Probate and Juvenile Judges Assn. et al. for leave to file a brief as *amici curiae* granted. Motions of respondent Weldon and Bettye S. Elkins, guardian *ad litem* for respondent Weldon, for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trainor* v. *Hernandez,* 431 U. S. 434

(1977), and *Juidice* v. *Vail*, 430 U. S. 327 (1977). Reported below: 529 F. 2d 528.

No. 76–1107. CROUCH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Abney* v. *United States*, 431 U. S. 651, 664 n. 9 (1977).

No. 76–677. SAYLORS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Larionoff*, 431 U. S. 864 (1977). Reported below: 542 F. 2d 1109.

No. 76–1297. MILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Abney* v. *United States*, 431 U. S. 651, 664 n. 9 (1977).

Miscellaneous Orders

No. A–976. BARKER *v.* UNITED STATES. Application for reduction of bail pending appeal to the United States Court of Appeals for the Tenth Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–1029. MCDONALD *v.* THOMPSON, WARDEN. Application for supersedeas bond pending appeal to the United States Court of Appeals for the Sixth Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–1036. ELLERS *v.* REDMAN, CORRECTION COMMISSIONER, ET AL. Application for writ of habeas corpus and other relief, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 76–419. VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–528. CONSUMERS POWER CO. *v.* AESCHLIMAN ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 1090.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of Hans A. Bethe et al., for leave to file a brief as *amici curiae* in No. 76–528 granted. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 72, Orig. SOUTH DAKOTA *v.* NEBRASKA. Report of Special Master on motion of Robert J. Foley et al. for leave to intervene as defendants is received and ordered filed. Exceptions, if any, with supporting briefs to Report may be filed by the parties within 30 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier orders herein, see, *e. g.*, 429 U. S. 996.]

No. 76–1172. FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS. Sup. Jud. Ct. Mass. [Probable jurisdiction postponed, 430 U. S. 964.] Motion of Northeastern Legal Foundation et al. for leave to file a brief as *amici curiae* denied.

No. 76–1403. HUNT ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 76–5761. SIMPSON ET AL. *v.* UNITED STATES; and

No. 76–5796. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 430 U. S. 964.] Motion for appointment of counsel granted, and it is ordered that Robert W. Willmott, Jr., Esquire, of Lexington, Ky., is appointed to serve as counsel for petitioners in these cases.

No. 76–1662. UNITED STATES *v.* BOARD OF COMMISSIONERS OF SHEFFIELD, ALABAMA, ET AL. Appeal from D. C. N. D. Ala. Motion to expedite consideration of the appeal granted.

No. 76–6694. BLAKE *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 76–1427. MCDANIEL *v.* PATY ET AL. Appeal from Sup. Ct. Tenn. Probable jurisdiction noted. Reported below: 547 S. W. 2d 897.

Certiorari Granted

No. 75–1892. UNITED STATES *v.* MACDONALD. C. A. 4th Cir. Certiorari granted. Reported below: 531 F. 2d 196.

No. 76–1383. CHRISTIANSBURG GARMENT CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari granted. Reported below: 550 F. 2d 949.

No. 76–1500. MASSACHUSETTS *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Reported below: 548 F. 2d 33.

No. 76–6617. GREENE *v.* MASSEY, CORRECTIONAL SUPERINTENDENT. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 546 F. 2d 51.

Certiorari Denied. (See also Nos. 76–1423, 76–1490, and 76–6675, *supra;* and No. 75–1182, *ante,* at 424 n. 7.)

No. 76–220. GENERAL DYNAMICS CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 F. 2d 489.

No. 76–984. DRUMMOND ET UX. *v.* FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 449, 228 S. E. 2d 839.

No. 76–1231. LOVELADIES PROPERTY OWNERS ASSN., INC., ET AL. *v.* RAAB ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1162.

No. 76–1269. BERKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 302.

No. 76–1273. POPKIN *v.* NEW YORK STATE HEALTH & MENTAL HYGIENE FACILITIES IMPROVEMENT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 18.

No. 76–1287. STONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 95.

No. 76–1393. RINGWALT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 89.

No. 76–1421. MARTIN, ADMINISTRATOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 1355.

No. 76–1473. KNOX ET AL. *v.* BROWN. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 900.

No. 76–1477. JOHNSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 140 Ga. App. 284, 231 S. E. 2d 87.

No. 76–1492. JACKSON *v.* REILING. Sup. Ct. Minn. Certiorari denied. Reported below: —— Minn. ——, 249 N. W. 2d 896.

No. 76–1495. STROBL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 76–1507. SANDOVAL *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 114 Ariz. 132, 559 P. 2d 688.

No. 76–1516. MIRIN, DBA STRIP CAB CO., ET AL. *v.* NEVADA EX REL. PUBLIC SERVICE COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 91.

No. 76–1512. CLOWES, SUPERINTENDENT OF SCHOOLS OF LOS ANGELES COUNTY, ET AL. *v.* SERRANO ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 18 Cal. 3d 728, 557 P. 2d 929.

No. 76–1522. HARMER ET AL. *v.* MOTION PICTURE FILM ENTITLED "DEEP THROAT," ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1529. SPENCER *v.* AYOUB ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 550 F. 2d 164.

No. 76–1527. CHESNEY *v.* GRESHAM, TAX COLLECTOR OF MERCED COUNTY, ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 64 Cal. App. 3d 120, 134 Cal. Rptr. 238.

No. 76–1568. JOYOUS JUNQUES, INC. *v.* WHITEHURST ASSOCIATES. Ct. App. D. C. Certiorari denied.

No. 76–1576. HELMS ET AL. *v.* VANCE, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–5889. EASON *v.* MALONEY ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 171 Conn. 630, 370 A. 2d 1082.

No. 76–6350. PROFFITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6365. STOKES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 804.

No. 76–6366. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 182 U. S. App. D. C. 383, 561 F. 2d 832.

No. 76–6388. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 1322.

No. 76–6406. PILLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 550 F. 2d 1085.

No. 76–6420. McClain *v.* United States; and
No. 76–6422. Watson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–6433. Walton *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 76–6439. Griffin *v.* South Carolina. Sup. Ct. S. C. Certiorari denied.

No. 76–6455. Hinkley *v.* United States; and
No. 76–6473. Legere *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–6456. Steele *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 179 U. S. App. D. C. 128, 549 F. 2d 830.

No. 76–6463. Grant *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 942.

No. 76–6532. Milligan *v.* Stone, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 878.

No. 76–6569. Allotey *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76–6608. Saverese *v.* United States; and
No. 76–6618. Robinson *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 76–6659. Mullen *v.* Jennings. C. A. 3d Cir. Certiorari denied.

No. 76–6667. Zatko *v.* California et al. Sup. Ct. Cal. Certiorari denied.

No. 76–6668. Warren *v.* Black, Reformatory Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–6669. JONES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76–6672. CHERRY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 516.

No. 76–6674. PERKINS *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 76–6676. WHITE *v.* YOCHELSON. Ct. App. D. C. Certiorari denied.

No. 76–6681. CROWLEY *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 76–6688. CUTHBERTSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 88 Wash. 2d 1003, — P. 2d —.

No. 76–6693. CRISAFI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6733. FOSTER *v.* BECHTEL CORP. C. A. 9th Cir. Certiorari denied.

No. 76–6747. OWENS *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 796.

No. 76–6764. SALLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 1345.

No. 76–6766. SHELTON *v.* TAYLOR, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 98.

No. 76–6777. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6821. CUTTING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 552 F. 2d 761.

No. 76–6824. COZZETTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1174.

No. 76–832. JAGNANDAN ET AL. *v.* GILES ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BRENNAN would grant certiorari. Reported below: 538 F. 2d 1166.

No. 76–1322. CHRISTIAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 549 F. 2d 1369.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Western District of Oklahoma of transporting an obscene film in interstate commerce in violation of 18 U. S. C. § 1462. The Court of Appeals for the Tenth Circuit affirmed the conviction. I would reverse. I adhere to my view that this statute is "clearly overbroad and unconstitutional on its face." *United States* v. *Orito,* 413 U. S. 139, 147, 148 (1973) (dissenting opinion). In that circumstance, I have no occasion to consider whether the other question presented merits plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (dissenting opinion).

No. 76–1478. PEROT ET AL. *v.* ALLEGAERT, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Motion of American Stock Exchange, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 548 F. 2d 432.

No. 76–1518. BLACK, WARDEN *v.* HOLT. C. A. 6th Cir. Application for release of respondent on personal recognizance, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 550 F. 2d 1061.

No. 76–1524. TIMES MIRROR CO. *v.* ANSELMI ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL would grant certiorari. Reported below: 552 F. 2d 316.

No. 76–1533. FOGG, CORRECTIONAL SUPERINTENDENT *v.* WELCOME. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 549 F. 2d 853.

No. 76–6333. GHOLSON ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 542 S. W. 2d 395.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would vacate the death sentences in this case.

Rehearing Denied

No. 76–1353. KUYKENDALL *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE CO., 431 U. S. 917;

No. 76–6265. GOODWIN *v.* GEORGIA, 431 U. S. 909; and

No. 76–6397. BOYD *v.* RODRIGUEZ, WARDEN, 431 U. S. 921. Petitions for rehearing denied.

No. 665, O. T. 1966. KLEIN *v.* KLEIN, 385 U. S. 973. Motion for leave to file third petition for rehearing denied.

No. 76–330. PARKER *v.* BOORSTIN, LIBRARIAN OF CONGRESS, ET AL., 429 U. S. 978. Motion for leave to file petition for rehearing denied.

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ABORTIONS. See also **Constitutional Law**, III, 3, 5; VI; **Social Security Act**, 3.

State funding—Medical necessity.—Since it is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes, District Court erred in invalidating Connecticut requirements of prior written request by pregnant woman and prior authorization by Connecticut Department of Social Services for abortions. Although similar requirements are not imposed for other medical procedures, such procedures do not involve termination of a potential human life. Maher v. Roe, p. 464.

ACCESS TO BALLOT. See **Constitutional Law**, III, 4.

ACCOMMODATION TO EMPLOYEES' RELIGIOUS NEEDS. See **Civil Rights Act of 1964**, 1.

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ADMISSIBILITY OF IDENTIFICATION EVIDENCE. See **Constitutional Law**, II, 1.

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AMOUNT IN CONTROVERSY. See **Jurisdiction**, 1.

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Preliminary injunction against mortgage foreclosure.—Title 12 U. S. C. § 91, which prohibits an "attachment, injunction, or execution" from being issued against a national bank or its property before final judgment in any state or local court, when read in context, merely prevents prejudgment seizure of bank property by creditors and does not apply to a mortgagor-debtor's action seeking a preliminary injunction to protect its real property from wrongful foreclosure. Third National Bank v. Impac Limited, Inc., p. 312.

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CERTIORARI.

Improvident grant—Failure to present question.—Where petitioner's counsel informed this Court at oral argument that petitioner's sole claim of constitutional deprivation resulting from her minor son's being shot and killed by respondent police officer was one based on *her* personal liberty and not one of pecuniary loss such as would be covered by Colorado's wrongful-death statute, but that contention was neither alleged in her complaint (which included claims based on wrongful-death statute and a claim under 42 U. S. C. § 1983), presented in her petition for certiorari, nor fairly subsumed in question that was presented as to whether wrongful-death statute's limitation on damages controlled in a § 1983 action, writ of certiorari is dismissed as improvidently granted. Jones v. Hildebrant, p. 183.

CHANGES IN DEATH PENALTY STATUTE. See **Constitutional Law**, III, 2; IV.

CIVIL RIGHTS ACT OF 1964. See also **Intervention.**

1. *Accommodation to employee's religious needs—Employer's reasonable efforts.*—Petitioner airline, which made reasonable efforts within framework of its seniority system to accommodate religious needs of respondent employee, whose religious beliefs prohibit him from working on Satur-

CIVIL RIGHTS ACT OF 1964—Continued.

days, did not violate Title VII of Act, and each of Court of Appeals' suggested alternatives would have been an undue hardship within meaning of statute as construed by Equal Employment Opportunity Commission guidelines. Trans World Airlines, Inc. v. Hardison, p. 63.

2. *Courts' discretionary remedial power—Equal Employment Opportunity Commission's delay in bringing suit.*—Courts do not lack discretionary remedial power if, despite procedural protections accorded a Title VII defendant under Act, EEOC's delay in bringing suit, after conciliation efforts have failed, significantly handicaps defense. Occidental Life Insurance Co. v. EEOC, p. 355.

3. *Equal Employment Opportunity Commission enforcement actions—Subjection to state statutes of limitations.*—EEOC enforcement actions are not subject to state statutes of limitations. Though a congressional intent to apply a local limitations period has been inferred in instances where a federal statute creating a cause of action fails to specify such a period, state limitations periods will not be borrowed if their application would not comport with federal statute's underlying policies. Occidental Life Insurance Co. v. EEOC, p. 355.

4. *Equal Employment Opportunity Commission's power to file suit—Effect of § 706 (f)(1).*—Section 706 (f)(1) of Act imposes no limitation upon EEOC's power to file suit in federal court. Provision's language and legislative history show that it was intended to enable an aggrieved person unwilling to await conclusion of extended EEOC proceedings to institute a private lawsuit 180 days after a charge has been filed. Occidental Life Insurance Co. v. EEOC, p. 355.

5. *Seniority system—Unlawful employment practice.*—Under § 703 (h) of Title VII of Act, absent a discriminatory purpose, operation of a seniority system cannot be an unlawful employment practice even if system is discriminatory in its effect. Trans World Airlines, Inc. v. Hardison, p. 63.

CLASS ACTIONS. See **Intervention.**

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I. Commerce Clause.

State statute prohibiting display of state grade of apples—Burden on interstate commerce.—North Carolina statute requiring that all apples sold or shipped into State in closed containers be identified by no grade other than applicable federal grade or a designation that apples are not graded, violates Commerce Clause by burdening and discriminating against interstate sale of Washington apples. Hunt v. Washington Apple Advertising Comm'n, p. 333.

II. Due Process.

1. *Admissibility of identification evidence—State criminal trial.*—Due Process Clause of Fourteenth Amendment does not compel exclusion, at respondent's state criminal trial on charge of possession and sale of heroin, of identification evidence consisting of police photograph of respondent, testimony of undercover police officer that person shown in photograph was suspect from whom officer had purchased heroin, and officer's positive in-court identification. Reliability is linchpin in determining admissibility of identification testimony for confrontations occurring both prior to and after *Stovall* v. *Denno,* 388 U. S. 293, wherein it was held that determination depends on "totality of circumstances." Manson v. Braithwaite, p. 98.

2. *Murder prosecution—Burden of proving affirmative defense—Retroactivity of Mullaney v. Wilbur, 421 U. S. 684.*—North Carolina Supreme Court, on appeal from petitioner's conviction for second-degree murder, erred in declining, with respect to erroneous jury instruction as to burden on petitioner to prove self-defense, to hold retroactive *Mullaney* rule, which required State to establish all elements of a criminal offense beyond a reasonable doubt and which invalidated presumptions that shifted burden of proving such elements to defendant. While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider State's reliance on old rule and impact of new rule on administration of justice if degree to which new rule enhances integrity of fact-finding process is sufficiently small, "where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect." Hankerson v. North Carolina, p. 233.

3. *Murder prosecution—Fair trial—Jury selection—Pretrial news coverage.*—Absent anything in record, in particular with respect to *voir dire* examination of jurors, that would require a finding of constitutional unfairness as to method of jury selection or as to character of jurors actually

CONSTITUTIONAL LAW—Continued.

selected, petitioner has failed to show that under "totality of circumstances" extensive pretrial news media coverage of his case denied him a fair trial on a charge, *inter alia,* of first-degree murder of one of his children. Dobbert v. Florida, p. 282.

4. *Murder trial—Burden of proving affirmative defense.*—New York law requiring that defendant in a prosecution for second-degree murder prove by a preponderance of evidence affirmative defense of extreme emotional disturbance in order to reduce crime to manslaughter does not violate Due Process Clause of Fourteenth Amendment. Patterson v. New York, p. 197.

III. Equal Protection of the Laws.

1. *Barring resident aliens from state financial assistance for higher education—Strict scrutiny.*—New York statute that bars certain resident aliens from state financial assistance for higher education violates Equal Protection Clause of Fourteenth Amendment. Statute discriminates against a class and is subject to strict scrutiny since it is directed at aliens and only aliens are harmed by it even though its bar against them is not absolute in that those who have applied for citizenship or those not qualified to apply who have filed statements of intent may participate in assistance programs. Nyquist v. Mauclet, p. 1.

2. *Changes in death penalty statute.*—Imposition of death sentence upon petitioner for first-degree murder pursuant to new Florida death penalty statute did not deny him equal protection of laws. Having been neither tried nor sentenced prior to *Furman* v. *Georgia,* 408 U. S. 238, he was not similarly situated to those prisoners whose death sentences under old statute were commuted to life imprisonment after Florida Supreme Court had invalidated old statute under *Furman,* and it was not irrational for Florida to relegate petitioner to class of those prisoners whose acts could properly be punished under new statute that was in effect at time of his trial and sentence. Dobbert v. Florida, p. 282.

3. *City funding of childbirth but not nontherapeutic abortions.*—City of St. Louis, in electing, as a policy choice, to provide publicly financed hospital services for childbirth but not for nontherapeutic abortions, does not violate any constitutional rights. Poelker v. Doe, p. 519.

4. *Independent candidate—Access to ballot.*—In appellees' action challenging constitutionality of Maryland statute requiring an independent candidate for statewide or federal office, in order to qualify for a position on general election ballot, to file 70 days before date of party primaries, nominating petitions signed by at least 3% of State's registered voters, three-judge District Court was not warranted in holding, on basis of this Court's summary affirmance in *Tucker* v. *Salera,* 424 U. S. 959, that

CONSTITUTIONAL LAW—Continued.

Maryland statute's early filing deadline was an unconstitutional burden on an independent candidate's access to ballot. Rather than relying on *Salera* as controlling precedent, District Court should have conducted an independent examination of merits under constitutional standards set forth in *Storer* v. *Brown*, 415 U. S. 724, 742, for determining extent of burden imposed on independent candidates. Mandel v. Bradley, p. 173.

5. *Medicaid program—State funding of childbirth but not nontherapeutic abortions.*—Equal Protection Clause does not require a State participating in Medicaid program to pay expenses incident to nontherapeutic abortions for indigent women simply because it has made a policy choice to pay expenses incident to childbirth. Maher v. Roe, p. 464.

IV. Ex Post Facto Laws.

1. *Changes in death penalty statute.*—Changes in Florida's death penalty statute between time of first-degree murder for which petitioner was convicted and sentenced to death and time of trial are procedural and on whole ameliorative, and hence there is no *ex post facto* violation. New statute simply altered methods employed in determining whether death penalty was to be imposed, and there was no change in quantum of punishment attached to crime. New statute provides capital defendants with more, rather than less, judicial protection than old statute. Dobbert v. Florida, p. 282.

2. *Changes in death penalty statute—Increased burdens on life sentence under new statute.*—Petitioner, having been sentenced to death for first-degree murder under new Florida death penalty statute, may not complain of burdens attached to a life sentence under that statute which may not have attached to old statute which was in effect at time murder was committed. Dobbert v. Florida, p. 282.

3. *Changes in death penalty statute—Warning of death penalty.*—Existence of earlier Florida death penalty statute at time of first-degree murder for which petitioner was convicted and sentenced under changed statute served as an "operative fact" to warn petitioner of penalty which Florida would seek to impose on him if he were convicted of first-degree murder, and this was sufficient compliance with *ex post facto* provision of Constitution, notwithstanding subsequent invalidation of earlier statute. Dobbert v. Florida, p. 282.

V. Fifth Amendment.

1. *Double jeopardy—Conviction of lesser included offense—Bar to subsequent prosecution.*—Double Jeopardy Clause of Fifth Amendment, applied to States through Fourteenth, bars prosecution and punishment for crime of stealing an automobile following prosecution and punishment

CONSTITUTIONAL LAW—Continued.

for lesser included offense of operating same vehicle without owner's consent. Brown v. Ohio, p. 161.

2. *Double jeopardy—Multiple prosecutions—Accused's opposition to consolidated trial.*—Court of Appeals' judgment that although offense under 21 U. S. C. § 846 (conspiracy to distribute drugs) was a lesser included offense of 21 U. S. C. § 848 (conducting a criminal enterprise to violate drug laws), §§ 846 and 848 were not "same offense" for double jeopardy purposes and therefore petitioner's conviction under § 846 did not bar prosecution under § 848, petitioner having opposed a consolidated trial, is affirmed. Jeffers v. United States, p. 137.

3. *Double jeopardy—Retrial after dismissal of information.*—Petitioner's retrial for theft in violation of Assimilative Crimes Act and applicable Indiana statute after dismissal of defective information at his request did not violate Double Jeopardy Clause. Proceedings against petitioner did not terminate in his favor, dismissal clearly not being predicated on any judgment that he could never be prosecuted for or convicted of theft. Lee v. United States, p. 23.

VI. Right of Privacy.

Medicaid abortion benefits—Limitation to "medically necessary" abortions.—Connecticut regulation limiting state Medicaid benefits for first trimester abortions to those that are "medically necessary," does not impinge upon fundamental right of privacy recognized in *Roe* v. *Wade*, 410 U. S. 113, that protects a woman from unduly burdensome interference with her freedom to decide whether or not to terminate her pregnancy. That right implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by allocation of public funds. An indigent woman desiring an abortion is not disadvantaged by Connecticut's decision to fund childbirth; she continues as before to be dependent on private abortion services. Maher v. Roe, p. 464.

COURTS OF APPEALS. See **Investment Company Act of 1940.**

CRIMINAL ENTERPRISE IN VIOLATION OF DRUG LAWS. See **Constitutional Law**, V, 2; **Criminal Law.**

CRIMINAL LAW. See also **Constitutional Law**, II; III, 2; IV; V.

Cumulative fines.—Court of Appeals' judgment imposing cumulative fines for petitioner's separate convictions for violation of 21 U. S. C. § 846 (conspiracy to distribute drugs) and 21 U. S. C. § 848 (conducting a criminal enterprise to violate drug laws), is vacated, and case is remanded. Jeffers v. United States, p. 137.

CUMULATIVE PENALTIES OR FINES. See **Criminal Law.**

DEATH PENALTY. See **Constitutional Law**, II, 3; III, 2; IV.

DEFENSES TO MURDER. See **Constitutional Law**, II, 2, 4.

DELAY OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN BRINGING ENFORCEMENT ACTION. See **Civil Rights Act of 1964**, 2–4.

DENIAL OF STAY. See **Jurisdiction**, 2; **Stays.**

DEPENDENT CHILDREN. See **Social Security Act**, 2.

DETERMINATION OF COVERAGE UNDER VOTING RIGHTS ACT OF 1965. See **Voting Rights Act of 1965**, 1.

DISCLOSURE OF ILLEGITIMATE CHILD'S FATHER. See **Social Security Act**, 1.

DISCRIMINATION. See **Civil Rights Act of 1964**; **Intervention**; **Voting Rights Act of 1965.**

DISMISSAL OF INFORMATION. See **Constitutional Law**, V, 3.

DISMISSAL OF WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED. See **Certiorari.**

DISPLAY OF SWASTIKA. See **Jurisdiction**, 2.

DOUBLE JEOPARDY. See **Constitutional Law**, V.

DRUG OFFENSES. See **Constitutional Law**, V, 2; **Criminal Law.**

DUE PROCESS. See **Constitutional Law**, II.

EDUCATIONAL ASSISTANCE PROGRAMS. See **Constitutional Law**, III, 1.

ELECTIONS. See **Constitutional Law**, III, 4.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964**, 1, 5; **Longshoremen's and Harbor Workers' Compensation Act.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964**; **Intervention.**

ENFORCEMENT ACTIONS BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964**, 2–4.

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972. See **Civil Rights Act of 1964**, 2–4.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964**, 2–4.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III.

EVIDENCE. See **Constitutional Law**, II, 1, 2, 4.

EX POST FACTO LAWS. See **Constitutional Law**, IV.

EXTREME EMOTIONAL DISTURBANCE AS DEFENSE TO MURDER. See **Constitutional Law**, II, 4.

EYEWITNESS IDENTIFICATION. See **Constitutional Law**, II, 1.

FAILURE TO PRESENT QUESTION IN PETITION FOR CERTIORARI. See **Certiorari.**

FAIR TRIAL. See **Constitutional Law**, II, 3.

FATHERS OF ILLEGITIMATE CHILDREN. See **Social Security Act**, 1.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction**, 1.

FEDERAL RULES OF CIVIL PROCEDURE. See **Intervention.**

FEDERAL-STATE RELATIONS. See **Banks**; **Civil Rights Act of 1964**, 2–4; **Constitutional Law**, I; III, 5; **Social Security Act.**

FIFTH AMENDMENT. See **Constitutional Law**, V.

FINAL JUDGMENTS. See **Jurisdiction**, 2.

FINANCIAL ASSISTANCE FOR HIGHER EDUCATION. See **Constitutional Law**, III, 1.

FINES. See **Criminal Law.**

FIRST AMENDMENT. See **Jurisdiction**, 2.

FIRST-DEGREE MURDER. See **Constitutional Law**, II, 3; III, 2; IV.

FLORIDA. See **Constitutional Law**, II, 3; III, 2; IV.

FORECLOSURES OF MORTGAGES. See **Banks.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 1, 2, 4; III, 1–3, 5; V, 1.

FUNDING OF ABORTIONS. See **Abortions**; **Constitutional Law**, III, 3; **Social Security Act**, 3.

"GOOD CAUSE" FOR NOT DISCLOSING ILLEGITIMATE CHILD'S FATHER. See **Social Security Act**, 1.

HEALTH, EDUCATION, AND WELFARE SECRETARY. See **Social Security Act**, 2.

HIGHER EDUCATION FINANCIAL ASSISTANCE. See **Constitutional Law**, III, 1.

IDENTIFICATION EVIDENCE. See **Constitutional Law**, II, 1.

ILLEGITIMATE CHILDREN. See **Social Security Act**, 1.

IMPROVIDENT GRANT OF CERTIORARI. See **Certiorari.**

INDEPENDENT CANDIDATES FOR POLITICAL OFFICE. See **Constitutional Law**, III, 4.

INJUNCTIONS. See **Banks; Jurisdiction, 2; Stays.**

INTERSTATE COMMERCE. See **Constitutional Law, I.**

INTERVENING LEGISLATION. See **Social Security Act, 1.**

INTERVENTION.

Timeliness—Fed. Rule Civ. Proc. 24.—Motion of respondent former stewardess for petitioner airline, who had been discharged because of petitioner's no-marriage rule, to intervene in action under Title VII of Civil Rights Act of 1964 challenging legality of that rule was "timely" filed under Fed. Rule Civ. Proc. 24 and should have been granted, notwithstanding it was not filed until after District Court had entered final judgment dismissing action following its determination that plaintiffs were entitled to reinstatement and backpay and parties' agreement on amounts to be awarded each plaintiff. Respondent sought to intervene, not to litigate her individual claim based on no-marriage rule's illegality, but to obtain appellate review of District Court's denial of class-action status of action. United Airlines, Inc. v. McDonald, p. 385.

INVESTMENT COMPANY ACT OF 1940.

Approval of merger—Securities and Exchange Commission's discretion—Judicial review.—In approving merger of a closed-end investment company (Christiana), 98% of whose assets consisted of Du Pont Co. common stock, into an affiliate company (Du Pont), SEC reasonably exercised its discretion under § 17 (b) of Act in valuing Christiana essentially on basis of market value of Du Pont stock rather than on lower basis of Christiana's outstanding stock. Since record before SEC clearly reveals substantial evidence to support its findings and since that agency's conclusions of law were based on a construction of statute consistent with legislative intent, Court of Appeals erred in rejecting SEC's conclusion and substituting its own judgment for that of SEC. E. I. du Pont de Nemours & Co. v. Collins, p. 46.

JOYRIDING. See **Constitutional Law, V, 1.**

JUDICIAL REVIEW. See **Investment Company Act of 1940; Voting Rights Act of 1965.**

JURISDICTION.

1. *Action by state agency in representational capacity—Requisite amount in controversy.*—Requirements of 28 U. S. C. § 1331 are satisfied in action by appellee (a statutory agency for promotion and protection of Washington State apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments finance appellee's operations) challenging constitutionality of North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers

JURISDICTION—Continued.

be identified by no grade on containers other than applicable federal grade or a designation that apples are not graded. Since appellee has standing to litigate its constituents' claims, it may rely on them to meet requisite amount of $10,000 in controversy. And it does not appear "to a legal certainty" that claims of at least some of individual growers and dealers will not come to that amount in view of substantial annual sales volume of Washington apples in North Carolina (over $2 million) and continuing nature of statute's interference with Washington apple industry, coupled with evidence in record that growers and dealers have suffered and will continue to suffer losses of various types from operation of challenged statute. Hunt v. Washington Apple Advertising Comm'n, p. 333.

2. *Supreme Court—State appellate court's denial of stay of trial court's injunction as final judgment.*—Illinois Supreme Court's order denying stay of trial court's injunction prohibiting petitioners from marching, walking, or parading in uniform of National Socialist Party of America or otherwise displaying swastika, and from distributing pamphlets or displaying materials inciting or promoting hatred against Jews or persons of any faith, ancestry, or race, and also denying leave for an expedited appeal, is a final judgment for purposes of this Court's jurisdiction, since it finally determined merits of petitioners' claim that injunction will deprive them of First Amendment rights during period of appellate review. National Socialist Party of America v. Skokie, p. 43.

JURISDICTIONAL AMOUNT. See **Jurisdiction**, 1.

JURY SELECTION. See **Constitutional Law**, II, 3.

LANGUAGE MINORITIES. See **Voting Rights Act of 1965**, 1.

LEGISLATIVE REAPPORTIONMENT PLANS. See **Voting Rights Act of 1965**, 2.

LESSER INCLUDED OFFENSES. See **Constitutional Law**, V, 1, 2.

LIMITATION OF ACTIONS. See **Civil Rights Act of 1964**, 3, 4.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. *Eligibility for compensation—"Situs" test.*—Injuries of both respondents occurred on a "situs" covered by Act, where in case of one respondent truck that he was helping to load when injured was parked inside terminal area adjoining "navigable waters of the United States" within meaning of 33 U. S. C. § 903 (a) (1970 ed., Supp. V), and in case of other respondent pier on which he was injured when he slipped on some ice while marking cargo unloaded from a container was located in terminal adjoining water so that he was working in an "adjoining terminal . . .

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—Continued.

customarily used . . . for loading [and] unloading" within meaning of § 903 (a). Northeast Marine Terminal Co. v. Caputo, p. 249.

2. *Eligibility for compensation—"Status" test—"Engaged in maritime employment."*—Both respondents (one's job was to check and mark cargo unloaded from a vessel or from a container taken off a vessel, and other's was to load and unload containers, barges, and trucks at a pier) satisfied "status" test of eligibility for compensation under Act, since they were both "engaged in maritime employment" and were therefore "employees" within meaning of 33 U. S. C. § 902 (3) (1970 ed., Supp. V). Northeast Marine Terminal Co. v. Caputo, p. 249.

MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

MARYLAND. See **Constitutional Law**, III, 4.

MEDICAL ASSISTANCE PROGRAM (MEDICAID). See **Abortions; Constitutional Law**, III, 5; VI; **Social Security Act**, 3.

"MEDICALLY NECESSARY" ABORTIONS. See **Abortions; Constitutional Law**, III, 5; VI.

MERGERS. See **Investment Company Act of 1940.**

MEXICAN-AMERICANS. See **Voting Rights Act of 1965**, 1.

MORTGAGE FORECLOSURES. See **Banks.**

MOTHERS OF ILLEGITIMATE CHILDREN. See **Social Security Act**, 1.

MOTIONS TO INTERVENE. See **Intervention.**

MOTOR VEHICLE THEFT. See **Constitutional Law**, V, 1.

MULTIPLE PROSECUTIONS. See **Constitutional Law**, V, 2.

MULTIPLE PUNISHMENTS. See **Criminal Law.**

MURDER. See **Constitutional Law**, II, 2–4; III, 2; IV.

NARCOTIC OFFENSES. See **Constitutional Law**, V, 2; **Criminal Law.**

NATIONAL BANKS. See **Banks.**

NEW YORK. See **Constitutional Law**, II, 4; III, 1.

NO-MARRIAGE RULE FOR AIRLINE STEWARDESSES. See **Intervention.**

NONTHERAPEUTIC ABORTIONS. See **Abortions; Constitutional Law**, III, 3, 5; VI; **Social Security Act**, 3.

NORTH CAROLINA. See **Constitutional Law**, I; II, 2; **Jurisdiction**, 1; **Standing to Sue.**

OPERATING MOTOR VEHICLE WITHOUT OWNER'S CONSENT. See **Constitutional Law**, V, 1.

PHOTOGRAPH IDENTIFICATION. See **Constitutional Law**, II, 1.

PREJUDGMENT WRITS AGAINST BANKS. See **Banks.**

PRELIMINARY INJUNCTIONS AGAINST MORTGAGE FORECLOSURES. See **Banks.**

PRETRIAL IDENTIFICATION EVIDENCE. See **Constitutional Law**, II, 1.

PRETRIAL PUBLICITY. See **Constitutional Law**, II, 3.

PRIVACY RIGHTS. See **Constitutional Law**, VI.

PROCEDURAL SAFEGUARDS. See **Stays.**

PROCEDURE. See **Intervention.**

PUBLIC ASSISTANCE. See **Abortions**; **Constitutional Law**, III, 3, 5; VI; **Social Security Act.**

RACIAL DISCRIMINATION. See **Voting Rights Act of 1965.**

REAPPORTIONMENT PLANS. See **Voting Rights Act of 1965**, 2.

REASONABLE ACCOMMODATION TO EMPLOYEES' RELIGIOUS NEEDS. See **Civil Rights Act of 1964**, 1.

RELIGIOUS BELIEFS PROHIBITING WORK ON SATURDAYS. See **Civil Rights Act of 1964**, 1.

RELIGIOUS DISCRIMINATION. See **Civil Rights Act of 1964**, 1.

RESIDENT ALIENS. See **Constitutional Law**, III, 1.

RETRIALS. See **Constitutional Law**, V, 3.

RETROACTIVITY OF NEW CONSTITUTIONAL RULE. See **Constitutional Law**, II, 2.

RIGHT OF PRIVACY. See **Constitutional Law**, VI.

RIGHT TO FAIR TRIAL. See **Constitutional Law**, II, 3.

RULES OF CIVIL PROCEDURE. See **Intervention.**

SABBATARIANS. See **Civil Rights Act of 1964**, 1.

ST. LOUIS. See **Constitutional Law**, III, 3.

SECOND-DEGREE MURDER. See **Constitutional Law**, II, 2, 4.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Social Security Act**, 2.

SECURITIES AND EXCHANGE COMMISSION. See **Investment Company Act of 1940.**

SELECTION OF JURIES. See **Constitutional Law**, II, 3.

SELF-DEFENSE AS DEFENSE TO MURDER. See **Constitutional Law**, II, 2.

SENIORITY SYSTEMS. See **Civil Rights Act of 1964**, 1, 5.

SEX DISCRIMINATION. See **Civil Rights Act of 1964**, 2–4; **Intervention.**

"SITUS" TEST OF ELIGIBILITY FOR LONGSHOREMEN'S COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act**, 1.

SOCIAL SECURITY ACT. See also **Abortions; Constitutional Law**, III, 5; VI.

1. *Aid to Families with Dependent Children—Required disclosure of illegitimate child's father—Intervening legislation.*—District Court's holding that a Connecticut statute requiring that mothers of illegitimate children, as a condition to receiving AFDC benefits, disclose to appellant Commissioner of Social Services names of children's fathers, was valid provided that state authorities first determine, in accordance with § 402 (a) of Social Security Act, that appellee mothers of illegitimate children did not have "good cause" for refusing to disclose fathers' names, taking into account "best interests of child," is vacated and case is remanded in light of an intervening amendment to Connecticut statute so that District Court can clarify whether appellant is free to make his own "good cause" and "best interests of the child" determinations in absence of effective regulations of Department of Health, Education, and Welfare. Maher v. Doe, p. 526.

2. *Aid to Families with Dependant Children-Unemployed Fathers—Exclusion of fathers unemployed as result of misconduct, strike, or quitting job.*—Regulation promulgated by Secretary of Health, Education, and Welfare pursuant to § 407 (a) of Act, and authorizing States participating in AFDC–UF program, within their discretion, to exclude from definition of an unemployed father entitling family to benefits under program a father "whose unemployment results from participation in labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law," is a proper exercise of Secretary's statutory authority and is reasonable. Batterton v. Francis, p. 416.

3. *Medicaid—State funding of nontherapeutic abortions.*—Title XIX of Act, which establishes a Medical Assistance Program (Medicaid), does

SOCIAL SECURITY ACT—Continued.
not require States to fund nontherapeutic abortions as a condition of participation in program. Beal v. Doe, p. 438.

SOUTH CAROLINA. See **Voting Rights Act of 1965**, 2.

STANDING TO SUE.

State agency performing trade association functions.—Appellee, a statutory agency for promotion and protection of Washington State apple industry and composed of 13 state growers and dealers chosen from electoral districts by their fellow growers and dealers, all of whom by mandatory assessments finance appellee's operations, has standing, in a representational capacity, to bring action challenging constitutionality of North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by no grade on containers other than applicable federal grade or a designation that apples are not graded. Hunt v. Washington Apple Advertising Comm'n, p. 333.

STATE AGENCY'S STANDING TO SUE IN REPRESENTATIONAL CAPACITY. See **Standing to Sue.**

STATE FINANCIAL ASSISTANCE FOR HIGHER EDUCATION. See **Constitutional Law**, III, 1.

STATE FUNDING OF ABORTIONS. See **Abortions**; **Constitutional Law**, III, 5; VI; **Social Security Act**, 3.

STATE REAPPORTIONMENT PLANS. See **Voting Rights Act of 1965**, 2.

"STATUS" TEST OF ELIGIBILITY FOR LONGSHOREMEN'S COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act**, 2.

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964**, 3, 4.

STAYS. See also **Jurisdiction**, 2.

Necessity of stay in absence of procedural safeguards.—State must allow a stay where procedural safeguards, including immediate appellate review, are not provided, and Illinois Supreme Court's order denying a stay of trial court's injunction against petitioners denied this right. National Socialist Party of America v. Skokie, p. 43.

STEWARDESSES. See **Intervention.**

STUDENT LOANS. See **Constitutional Law**, III, 1.

SUGGESTIVE IDENTIFICATION EVIDENCE. See **Constitutional Law**, II, 1.

SUPREME COURT. See also **Jurisdiction**, 2.

Notation of the death of Mr. Justice Clark (retired), p. v.

SWASTIKA DISPLAY. See **Jurisdiction**, 2.

TEXAS. See **Voting Rights Act of 1965**, 1.

THEFT OF AN AUTOMOBILE. See **Constitutional Law**, V, 1.

TIME LIMITATIONS ON EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT ACTIONS. See **Civil Rights Act of 1964**, 3, 4.

TIMELINESS OF MOTIONS TO INTERVENE. See **Intervention.**

TUITION ASSISTANCE. See **Constitutional Law**, III, 1.

UNDUE HARDSHIP IN ACCOMMODATING EMPLOYEES' RELIGIOUS NEEDS. See **Civil Rights Act of 1964**, 1.

UNEMPLOYED FATHERS. See **Social Security Act**, 2.

UNIVERSITIES. See **Constitutional Law**, III, 1.

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964; Intervention.**

VALUATION OF SECURITIES. See **Investment Company Act of 1940.**

VOIR DIRE EXAMINATION. See **Constitutional Law**, II, 3.

VOTING DISCRIMINATION. See **Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

1. *Determination of Act's coverage of State—Preclusion of judicial review.*—Provision of § 4 (b) of Act that a determination of Attorney General or Director of Census that a State is covered by Act "shall not be reviewable in any court," absolutely precludes judicial review of such a determination. Hence District Court and Court of Appeals erred in holding that they had jurisdiction to review petitioners' claims that Attorney General and Director of Census (respondents) had erroneously applied § 4 (b) in determining that Texas is covered by 1975 amendments to Act extending its protections to language minorities, such as Mexican-Americans. A "bailout" suit under § 4 (a) to terminate coverage is Texas' sole remedy. Briscoe v. Bell, p. 404.

2. *Reapportionment plan—Attorney General's objection nunc pro tunc.*—Where Attorney General initially failed to interpose timely objection under § 5 of Act to new plan reapportioning South Carolina Senate found constitutional by District Court for District of South Carolina, his objection to plan, *nunc pro tunc,* after District Court for District of Columbia in subsequent action challenging his failure to object directed him to consider plan without regard to other District Court's decision, is invalid, and therefore South Carolina is free to implement such plan. Morris v. Gressette, p. 491.

WASHINGTON STATE. See **Constitutional Law,** I; **Jurisdiction,** 1; **Standing to Sue.**

WORDS AND PHRASES.

1. *"Adjoining terminal . . . customarily used . . . for loading* [*and*] *unloading."* 33 U. S. C. § 902 (a) (1970 ed., Supp. V) (Longshoremen's and Harbor Workers' Compensation Act). Northeast Marine Terminal Co. v. Caputo, p. 249.

2. *"Engaged in maritime employment."* 33 U. S. C. § 902 (3) (1970 ed., Supp. V) (Longshoremen's and Harbor Workers' Compensation Act). Northeast Marine Terminal Co. v. Caputo, p. 249.

WRONGFUL DEATH. See **Certiorari.**

WRONGFUL MORTGAGE FORECLOSURES. See **Banks.**

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