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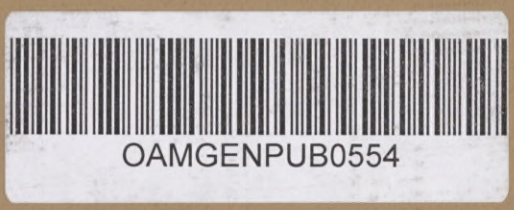

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UNITED STATES REPORTS

VOLUME 435

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1977

OPINIONS OF FEBRUARY 27 THROUGH (IN PART) MAY 1, 1978

ORDERS OF FEBRUARY 27 THROUGH MAY 1, 1978

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402.

Stock Number 028-001-00403-2

ERRATUM

432 U. S. 275, lines 10–11: "Brief for Petitioner in No. 74–454, p. 9" should be "Brief for Petitioner in No. 76–454, p. 9."

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.

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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. WYATT

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, MARCH 1, 1978

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:

We take note for the journal and records of the Court of the death of Walter Wyatt, the 12th Reporter of Decisions of this Court and immediate predecessor of the present incumbent, Henry Putzel, jr. Mr. Wyatt served the Court with distinction from 1946 to 1964.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices.

TABLE OF CASES CITED

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1977

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* TORRES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

No. 77–88. Decided February 27, 1978*

The provisions of the Social Security Act making benefits for aged, blind, and disabled persons under the Supplemental Security Income (SSI) program payable only to residents of the United States, defined as the 50 States and the District of Columbia, are not unconstitutional as applied to persons who upon moving to Puerto Rico lost the benefits to which they were entitled while residing in the United States. The constitutional right to travel does not embrace any such doctrine as would require payment of SSI benefits under such circumstances.

No. 77–88, 426 F. Supp. 1106, and No. 77–126, reversed.

PER CURIAM.

Certain benefits under the Social Security Act, as amended in 1972, are payable only to residents of the United States, defined as the 50 States and the District of Columbia. The District Court for the District of Puerto Rico held in these

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*Together with No. 77–126, *Califano, Secretary of Health, Education, and Welfare* v. *Colon et al.*, also on appeal from the same court.

cases that this geographic limitation is unconstitutional as applied to persons who upon moving to Puerto Rico lost the benefits to which they were entitled while residing in the United States. The Secretary of Health, Education, and Welfare, responsible for the administration of the Social Security Act, has appealed.[1]

I

One of the 1972 amendments to the Social Security Act created a uniform program, known as the Supplemental Security Income (SSI) program, for aid to qualified aged, blind, and disabled persons. 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* (1970 ed., Supp. V). This federally administered program replaced the federal-state programs of Old Age Assistance, 49 Stat. 620, 42 U. S. C. § 301 *et seq.;* Aid to the Blind, 49 Stat. 645, 42 U. S. C. § 1201 *et seq.;* Aid to the Disabled, 64 Stat. 555, 42 U. S. C. § 1351 *et seq.;* and Aid to the Aged, Blind, and Disabled, 42 U. S. C. § 1381 *et seq.*

The exclusion of Puerto Rico in the amended program is apparent in the definitional section. Section 1611 (f) of the Act, as set forth in 42 U. S. C. § 1382 (f) (1970 ed., Supp. V), states that no individual is eligible for benefits during any month in which he or she is outside the United States. The Act defines "the United States" as "the 50 States and the District of Columbia." § 1614 (e), as set forth in 42 U. S. C. § 1382c (e) (1970 ed., Supp. V). The repeal of the pre-existing programs did not apply to Puerto Rico. Thus persons in Puerto Rico are not eligible to receive SSI benefits, but are eligible to receive benefits under the pre-existing programs.[2]

Appellee Torres received SSI benefits while residing in Connecticut; the benefits were discontinued when he moved

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[1] This Court's jurisdiction is based on 28 U. S. C. § 1252.

[2] The SSI benefits are significantly larger.

to Puerto Rico. Similarly, appellees Colon and Vega received benefits as residents of Massachusetts and New Jersey, respectively, but lost them on moving to Puerto Rico.[3]

Torres filed a complaint in the District Court of Puerto Rico claiming that the exclusion of Puerto Rico from the SSI program was unconstitutional, and a three-judge court was convened to adjudicate the suit. Viewing the geographic limitations in the law as an interference with the constitutional right of residents of the 50 States and the District of Columbia to travel, the court searched for a compelling governmental interest to justify such interference. Finding none, the court held §§ 1611 (f) and 1614 (e) unconstitutional as applied to Torres. *Torres* v. *Mathews,* 426 F. Supp. 1106.[4] Soon after that decision appellees Colon and Vega also sued in the Puerto Rico District Court. Relying on the *Torres* decision, a single judge enjoined the Social Security Administration from discontinuing their SSI benefits on the basis of their change of residency to Puerto Rico.[5]

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[3] The record does not show whether the appellees applied for benefits under the pre-existing programs while in Puerto Rico.

[4] The complaint had also relied on the equal protection component of the Due Process Clause of the Fifth Amendment in attacking the exclusion of Puerto Rico from the SSI program. Acceptance of that claim would have meant that all otherwise qualified persons in Puerto Rico are entitled to SSI benefits, not just those who received such benefits before moving to Puerto Rico. But the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States "that has no parallel in our history." *Examining Board* v. *Flores de Otero,* 426 U. S. 572, 596 (1976). Cf. *Balzac* v. *Porto Rico,* 258 U. S. 298 (1922); *Dorr* v. *United States,* 195 U. S. 138 (1904); *Downes* v. *Bidwell,* 182 U. S. 244 (1901). See Leibowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219 (1967); Hector, Puerto Rico: Colony or Commonwealth?, 6 N. Y. U. J. Int'l L. & Pol. 115 (1973).

[5] The opinion of the District Court is unreported.

II

In *Shapiro* v. *Thompson,* 394 U. S. 618 (1969), and *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974), this Court held that laws prohibiting newly arrived residents in a State or county from receiving the same vital benefits as other residents unconstitutionally burdened the right of interstate travel. As the Court said in *Memorial Hospital,* "the right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.,* at 261.

In the present cases the District Court altogether transposed that proposition. It held that the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now.[6] Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each

[6] The constitutional right of interstate travel is virtually unqualified. *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966); *Griffin* v. *Breckenridge,* 403 U. S. 88, 105–106 (1971). By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles,* 357 U. S. 116, 125 (1958); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505–506 (1964). As such this "right," the Court has held, can be regulated within the bounds of due process. *Zemel* v. *Rusk,* 381 U. S. 1 (1965). For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.

State under our Constitution to enact laws uniformly applicable to all of its residents.

If there ever could be a case where a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel, this is surely not it. For we deal here with a constitutional attack upon a law providing for governmental payments of monetary benefits. Such a statute "is entitled to a strong presumption of constitutionality." *Mathews* v. *De Castro,* 429 U. S. 181, 185 (1976). "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney,* 406 U. S. 535, 546 (1972). See also *Califano* v. *Jobst,* 434 U. S. 47, 53–54; *Califano* v. *Goldfarb,* 430 U. S. 199, 210 (1977); *Helvering* v. *Davis,* 301 U. S. 619, 640 (1937).[7]

The judgments are reversed.

So ordered.

MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE MARSHALL would note probable jurisdiction and set these cases for oral argument.

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[7] At least three reasons have been advanced to explain the exclusion of persons in Puerto Rico from the SSI program. First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great—an estimated $300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy. Department of Health, Education, and Welfare, Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands 6 (Oct. 1976).

SIMPSON ET AL. *v.* UNITED STATES

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

No. 76–5761. Argued November 1, 1977—Decided February 28, 1978*

The punishment for bank robbery under 18 U. S. C. § 2113 (a) may be enhanced under § 2113 (d) when the robbery is committed "by the use of a dangerous weapon or device." Title 18 U. S. C. § 924 (c) provides that whoever "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States," shall be subject to a penalty in addition to the punishment provided for the commission of such felony. Petitioners were convicted of two separate aggravated bank robberies and of using firearms to commit the robberies, in violation of §§ 2113 (a) and (d) and 924 (c), and were sentenced to consecutive terms of imprisonment on the robbery and firearms counts, the District Court rejecting their contention that the imposition of the cumulative penalties for the two crimes was impermissible because the § 2113 (d) charges merged with the firearms offenses for purposes of sentencing. The Court of Appeals affirmed. *Held:* In a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113 (d) and § 924 (c). This construction of those provisions is supported not only by § 924 (c)'s legislative history but also by the established rules of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States* v. *Bass,* 404 U. S. 336, 347; *Rewis* v. *United States,* 401 U. S. 808, 812, and that precedence should be given to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later. Pp. 10–16.

542 F. 2d 1177, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post,* p. 16.

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*Together with No. 76–5796, *Simpson* v. *United States,* also on certiorari to the same court.

Robert W. Willmott, Jr., by appointment of the Court, 432 U. S. 904, argued the cause and filed a brief for petitioners in both cases.

H. Bartow Farr III argued the cause for the United States in both cases. With him on the brief were *Acting Solicitor General Friedman, Assistant Attorney General Civiletti,* and *John J. Klein.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The punishment for bank robbery of a fine of not more than $5,000 and imprisonment for not more than 20 years, or both, 18 U. S. C. § 2113 (a), may be enhanced to a fine of not more than $10,000 and imprisonment for not more than 25 years, or both, when the robbery is committed "by the use of a dangerous weapon or device," 18 U. S. C. § 2113 (d).[1] Another statute, 18 U. S. C. § 924 (c), provides that whoever "uses a

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[1] Title 18 U. S. C. §§ 2113 (a) and (d) provide:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

. . . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years," and "[i]n the case of his second or subsequent conviction under this subsection," to imprisonment for not less than 2 nor more than 25 years; "nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony." [2] Petitioners were convicted of two separate bank robberies committed with firearms. The question for decision is whether §§ 2113 (d) and 924 (c) should be construed as intended by Congress to authorize, in the case of a bank robbery committed with firearms, not only the imposition of the increased penalty under § 2113 (d), but also the imposition of an additional consecutive penalty under § 924 (c).

I

On September 8, 1975, petitioners, using handguns to intimidate the bank's employees, robbed some $40,000 from the East End Branch of the Commercial Bank of Middlesboro,

[2] The complete text of 18 U. S. C. § 924 (c) provides:

"(c) Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

"shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

Ky. App. 20. Less than two months later, on November 4, 1975, petitioners returned to Middlesboro and this time, again using handguns, robbed the West End Branch of the Commercial Bank of about the same amount.

Petitioners received a separate jury trial for each robbery. After the trial for the first robbery, they were convicted of both aggravated bank robbery, in violation of 18 U. S. C. §§ 2113 (a) and (d), and of using firearms to commit the robbery, in violation of 18 U. S. C. § 924 (c). They were sentenced to consecutive terms of 25 years' imprisonment on the robbery count and 10 years' imprisonment on the firearms count. After the trial for the second robbery, petitioners were again convicted of one count of aggravated bank robbery in violation of §§ 2113 (a) and (d) and of one count of using firearms to commit the crime in violation of § 924 (c); again each received a 25-year sentence for the robbery and a 10-year sentence for the firearms count, the sentences to run consecutively to each other and to the sentences previously imposed.

During the sentencing proceedings following each conviction, counsel for petitioners argued that the imposition of cumulative penalties for the two crimes was impermissible because the § 2113 (d) charge merged with the firearms offense for purposes of sentencing. The District Court disagreed, holding that "the statutes and the legislative history indicat[e] an intention [by § 924 (c)] to impose an additional punishment." App. 17. The Court of Appeals for the Sixth Circuit affirmed without a published opinion, 542 F. 2d 1177 (1976). We granted certiorari, 430 U. S. 964 (1977), to resolve an apparent conflict between the decision below and the decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Eagle,* 539 F. 2d 1166 (1976).[3] We reverse.

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[3] In agreement with the Court of Appeals for the Sixth Circuit in these cases are the Court of Appeals for the Fourth Circuit, *United States* v. *Crew,* 538 F. 2d 575 (1976), and the Court of Appeals for the Fifth Circuit, *Perkins* v. *United States,* 526 F. 2d 688 (1976).

II

Quite clearly, §§ 924 (c) and 2113 (d) are addressed to the same concern and designed to combat the same problem: the use of dangerous weapons—most particularly firearms—to commit federal felonies.[4] Although we agree with the Court of Appeals that § 924 (c) creates an offense distinct from the underlying federal felony, *United States* v. *Ramirez,* 482 F. 2d 807 (CA2 1973); *United States* v. *Sudduth,* 457 F. 2d 1198 (CA1 1972), we believe that this is the beginning and not the end of the analysis necessary to answer the question presented for decision.

[4] Both the Senate and House Reports on the 1934 Bank Robbery Act, which first made bank robbery a federal offense and which included the provisions of § 2113 (d), state that the legislation was directed at the rash of "gangsterism" by which roving bandits in the Southwest and Northwest would rob banks and then elude capture by state authorities by crossing state lines. S. Rep. No. 537, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1461, 73d Cong., 2d Sess., 2 (1934). The vast majority of such bank robberies were undoubtedly accomplished by the use of guns of various sorts. Indeed, as originally proposed, the provision that became § 2113 (d) covered only the use of "dangerous weapons." The "or device" language was added in response to concern expressed on the House floor that the provision would not reach the conduct of a bank robber who walked into a bank with a bottle of nitroglycerin and threatened to blow it up unless his demands were met. 78 Cong. Rec. 8132–8133 (1934). Thus, although § 2113 (d) undoubtedly covers bank robberies with weapons and devices other than firearms, the use of guns to commit bank robbery was the primary evil § 2113 (d) was designed to deter.

On the other hand, although the overriding purpose of § 924 (c) was to combat the increasing use of *guns* to commit federal felonies, the ambit of that provision is broader. The section imposes increased penalties when a "firearm" is used to commit, or is unlawfully carried during the commission of any federal felony. Title 18 U. S. C. § 921 (a)(3)(D) defines "firearm" to include "any destructive device." A "destructive device," in turn, is defined by § 921 (a)(4)(A) to include "any explosive, incendiary, or poison gas—(i) bomb, (ii) grenade, (iii) rocket . . . , (iv) missile . . . , (v) mine, or (vi) device similar to any of the devices described in the preceding clauses." See *United States* v. *Melville,* 309 F. Supp. 774 (SDNY 1970).

In *Blockburger* v. *United States,* 284 U. S. 299 (1932), this Court set out the test for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." *Brown* v. *Ohio,* 432 U. S. 161, 166 (1977). We held that "[t]he 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." *Blockburger* v. *United States, supra,* at 304. See also *Brown* v. *Ohio, supra,* at 166; *Ianelli* v. *United States,* 420 U. S. 770 (1975); *Gore* v. *United States,* 357 U. S. 386 (1958). The *Blockburger* test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constitute the "same offense" for double jeopardy purposes. *Brown* v. *Ohio, supra.*[5]

Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test. That test, the Government argues, is satisfied in this litigation.[6] We need not reach the issue. Before an

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[5] The Double Jeopardy Clause "protects against multiple punishments for the same offense," *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969), and prohibits multiple prosecutions for the "same offense," *Jeffers* v. *United States,* 432 U. S. 137, 150–151 (1977).

[6] In its attempt to demonstrate that §§ 924 (c) and 2113 (d) are distinct and separately punishable offenses under the *Blockburger* test, the Government apparently reads the phrase "by the use of a dangerous weapon or device" in § 2113 (d) to modify the word "assaults" as well as the phrase "puts in jeopardy the life of any person." Brief for United States 9–10. The lower courts are divided on this issue. Those of the opinion that § 2113 (d) is to be read as the Government reads it include *United States* v. *Crew, supra,* at 577. See *Perkins* v. *United States, supra; United States* v. *Waters,* 461 F. 2d 248 (CA10 1972). Other courts read the provision disjunctively, and hold that the phrase "by the use of a dangerous weapon or device" modifies only the phrase "puts in jeopardy

examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. *Jeffers* v. *United States*, 432 U. S. 137, 155 (1977). Indeed, the Government concedes that "there remains at least a possibility that Congress, although constitutionally free to impose additional penalties for violation of 18 U. S. C. § 924 (c) in a case like the present one, has otherwise disclosed its intention not to do so." Brief for United States 11. We believe that several tools of statutory construction applied to the statutes "in a case like the present one"—where the Government relied on the same proofs to support the convictions under both statutes—require the conclusion that Congress cannot be said to

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the life of any person" and not the word "assaults." *United States* v. *Beasley*, 438 F. 2d 1279 (CA6 1971); *United States* v. *Rizzo*, 409 F. 2d 400 (CA7 1969). See *United States* v. *Coulter*, 474 F. 2d 1004 (CA9 1973). Although we have never authoritatively construed § 2113 (d), we have implicitly given it the same gloss as the Government. *Prince* v. *United States*, 352 U. S. 322, 329 n. 11 (1957). We now expressly adopt this reading of the statute. As Judge McCree observed in *Beasley:*

"[The language of § 2113 (d)] clearly requires the commission of something more than the elements of the offense described in § 2113 (a). Subsection (a) punishes an attempt to take 'from the person or presence of another any . . . thing of value . . . in the . . . custody . . . of any bank . . .' when that taking is done 'by force and violence, or by intimidation.' Force and violence is the traditional language of assault, and something more than an assault must be present to authorize the additional five year penalty under § 2113 (d).

. . . . . .

". . . In order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U. S. C. § 2113 (d), the phrase 'by the use of a dangerous weapon or device' must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision." 438 F. 2d, at 1283–1284 (concurring in part and dissenting in part).

have authorized the imposition of the additional penalty of § 924 (c) for commission of bank robbery with firearms already subject to enhanced punishment under § 2113 (d). Cf. *Gore* v. *United States, supra.*

III

First is the legislative history of § 924 (c). That provision, which was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff. 114 Cong. Rec. 22231 (1968).[7] In his statement immediately following his introduction of the amendment, Representative Poff observed:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." *Id.*, at 22232.

This statement is clearly probative of a legislative judgment that the purpose of § 924 (c) is already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon.[8] Although these remarks are of course not dispositive of the issue of § 924 (c)'s reach, they are certainly entitled to weight, coming as they do from the provision's sponsor. This is especially so because Represent-

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[7] Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports.

[8] Title 18 U. S. C. §§ 111, 112, and 2231 provide for an increased maximum penalty where a "deadly or dangerous weapon" is used to commit the substantive offense. Title 18 U. S. C. §§ 113 (c) and 2114 enhance the punishment available for commission of the substantive offense when the defendant employs a "dangerous weapon."

ative Poff's explanation of the scope of his amendment is in complete accord with, and gives full play to, the deterrence rationale of § 924 (c). *United States* v. *Eagle,* 539 F. 2d, at 1172. Subsequent events in the Senate and the Conference Committee pertaining to the statute buttress our conclusion that Congress' view of the proper scope of § 924 (c) was that expressed by Representative Poff. Shortly after the House adopted the Poff amendment, the Senate passed an amendment to the Gun Control Act, introduced by Senator Dominick, that also provided for increased punishment whenever a firearm was used to commit a federal offense. 114 Cong. Rec. 27142 (1968). According to the analysis of its sponsor, the Senate amendment, contrary to Mr. Poff's view of § 924 (c), would have permitted the imposition of an enhanced sentence for the use of a firearm in the commission of any federal crime, even where allowance was already made in the provisions of the substantive offense for augmented punishment where a dangerous weapon is used. *Id.,* at 27143. A Conference Committee, with minor changes,[9] subsequently adopted the Poff version of § 924 (c) in preference to the Dominick amendment. H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31–32 (1968).

Second, to construe the statute to allow the additional sentence authorized by § 924 (c) to be pyramided upon a sentence already enhanced under § 2113 (d) would violate the established rule of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass,* 404 U. S. 336, 347 (1971);

[9] The prohibitions on suspended sentences and probation were made applicable only to second and subsequent convictions, and restrictions on concurrent sentences were eliminated. Title II of the Omnibus Crime Control Act of 1970, 84 Stat. 1889, amended § 924 (c) by reimposing the restriction that no sentence under that section could be served concurrently with any term imposed for the underlying felony. The amendment also reduced the minimum mandatory sentence of imprisonment for repeat offenders from five to two years.

Rewis v. *United States,* 401 U. S. 808, 812 (1971). See *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 284–285 (1978). The legislative history of § 924 (c) is of course sparse, yet what there is—particularly Representative Poff's statement and the Committee rejection of the Dominick amendment—points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of § 2113 (d). Even where the relevant legislative history was not nearly so favorable to the defendant as this, this Court has steadfastly insisted that "doubt will be resolved against turning a single transaction into multiple offenses." *Bell* v. *United States,* 349 U. S. 81, 84 (1955); *Ladner* v. *United States,* 358 U. S. 169 (1958). See *Prince* v. *United States,* 352 U. S. 322 (1957). As we said in *Ladner:* "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U. S., at 178. If we have something "more than a guess" in this case, that something—Representative Poff's commentary and the Conference Committee's rejection of the Dominick amendment—is incremental knowledge that redounds to petitioners' benefit, not the Government's.

Finally, our result is supported by the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later. See *Preiser* v. *Rodriguez,* 411 U. S. 475, 489–490 (1973). Cf. 2A C. Sands, Sutherland, Statutory Construction § 51.05 (4th ed. 1973). This guide to statutory construction has special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject for his transgressions. In this context, the principle is a corollary of the rule of lenity, an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative

directive. Indeed, at one time, the Government was not insensitive to these concerns respecting the availability of the additional penalty under § 924 (c). In 1971, the Department of Justice found the interpretive preference for specific criminal statutes over general criminal statutes of itself sufficient reason to advise all United States Attorneys not to prosecute a defendant under § 924 (c)(1) where the substantive statute the defendant was charged with violating already "provid[ed] for increased penalties where a firearm is used in the commission of the offense." 19 U. S. Attys. Bull. 63 (U. S. Dept. of Justice, 1971).

Obviously, the Government has since changed its view of the relationship between §§ 924 (c) and 2113 (d). We think its original view was the better view of the congressional understanding as to the proper interaction between the two statutes. Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113 (d) and § 924 (c). The cases are therefore reversed and remanded to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting.

I am unable to agree with the Court's conclusion in this litigation that petitioners, upon being convicted and sentenced under 18 U. S. C. § 2113 (d) for armed robbery, could not have their sentence enhanced pursuant to the provisions of 18 U. S. C. § 924 (c), which provides that when a defendant uses a firearm in the commission of a felony, he "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years." The plain language of the statutes involved certainly confers this sentencing authority upon the District Court. The Court chooses to avoid this

plain meaning by resort to a canon of construction with which no one disagrees, "our practice of avoiding constitutional decisions where possible," *ante,* at 12. The Court then relies on a statement made on the floor of the House of Representatives by Congressman Poff, who sponsored the amendment which became this part of the Gun Control Act of 1968, to the effect that the amendment would not apply to offenses governed by 18 U. S. C. § 2113. But neither of these proffered rationales justifies the Court's decision today.

The canon of construction which the Court purports to follow is like all other canons, only a guide to enable this Court to perform its function. As the Court said in *Shapiro* v. *United States,* 335 U. S. 1, 31 (1948):

> "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule, give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole.' "

While legislative history as well as the language of the statute itself may be used to interpret the meaning of statutory language, *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543 (1940), the decisions of this Court have established that some types of legislative history are substantially more reliable than others. The report of a joint conference committee of both Houses of Congress, for example, or the report of a Senate or House committee, is accorded a good deal more weight than the remarks even of the sponsor of a particular portion of a bill on the floor of the chamber. See, *e. g., Chandler* v. *Roudebush,* 425 U. S. 840, 858 n. 36 (1976); *United States* v. *Automobile Workers,* 352 U. S. 567, 585–586 (1957). It is a matter of common knowledge that at any given time during the debate, particularly a prolonged debate, of a bill the members of either House in attendance on the floor may not be great, and it is only these members, or those who later read the remarks in the Congressional

Record, who will have the benefit of the floor remarks. In the last analysis, it is the statutory language embodied in the enrolled bill which Congress enacts, and that must be our first reference point in interpreting its meaning.

The Court's disregard of this plain meaning is inappropriate in this litigation both because of the circumstances under which the Gun Control Act was passed in June 1968, and because of the gauzy nature of the constitutional concerns which apparently underlie its reluctance to read the statutes as they are written. Several different bills dealing with firearms control, which had been bottled up in various stages of the legislative process prior to June 1968, were brought to the floor and enacted with dramatic swiftness following the assassination of Senator Robert F. Kennedy in the early part of that month. Senator Kennedy's assassination, following by less than three months the similar killing of Reverend Martin Luther King, obviously focused the attention of Congress on the problem of firearms control. It seems to me not only permissible but irresistible, in reading the language of the two statutes, to conclude that Congress intended when it enacted § 924 (c) to authorize the enhancement of the sentence already imposed by virtue of 18 U. S. C. § 2113 (d).

The Court expresses concern, however, that if this construction were adopted problems of double jeopardy would be raised by virtue of our decision in *Blockburger* v. *United States,* 284 U. S. 299 (1932). *Blockburger,* of course, was not based on the Double Jeopardy Clause of the Constitution, but simply upon an analysis of relevant principles of statutory construction for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." *Brown* v. *Ohio,* 432 U. S. 161, 166 (1977); *ante,* at 11. To speak of a congressional provision for enhanced punishment for an offense, as § 924 (c) clearly is, as raising constitutional doubts under the *"Blockburger* test" is to use the language of metaphysics, rather than of constitutional law.

Brown v. *Ohio, supra,* decided last Term, provides no more support for the majority's position. That case involved two entirely separate and distinct prosecutions for the same act, one for the crime of stealing an automobile and the other for the admittedly lesser included offense of operating the same vehicle without the owner's consent. And even there the Court recognized that:

> "[T]he 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." 432 U. S., at 165 (footnote omitted).

Petitioners in this litigation were separately tried for two separate armed bank robberies, and were found guilty of both aggravated bank robbery in violation of 18 U. S. C. §§ 2113 (a) and (d), and of using firearms to commit the robbery in violation of 18 U. S. C. § 924 (c). In addition to imposing sentences on them authorized under the provisions of § 2113 (d), the court imposed additional sentences which it believed and I believe were clearly authorized by the language of § 924 (c). Certainly the language of the double jeopardy provision of the Fifth Amendment, which prohibits a person from being twice put in jeopardy of life or limb, has not the slightest application to this sort of criminal prosecution. It is only by an overly refined analysis, which first suggests that the double jeopardy prohibition encompasses enhancement of penalty for an offense for which there has been but one trial, and then concludes that the plain language of Congress providing for such enhancement shall not be read in that way in order to avoid this highly theoretical problem, that the Court is able to reach the result it does.

The language of § 924 (c), together with the circumstances surrounding its enactment, makes it abundantly clear to me that it was intended to authorize enhancement of punishment in these circumstances. I do not believe that Congressman Poff's statement on the floor of the House of Representatives is sufficient to overcome the meaning of this language, and I think that § 924 (c), so read, is clearly constitutional. I therefore dissent.

CENTRAL ILLINOIS PUBLIC SERVICE CO. *v.* UNITED STATES

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

No. 76–1058. Argued October 12, 1977—Decided February 28, 1978

Reimbursement for 1963 lunch expenses of employees on nonovernight company travel did not constitute "wages" subject to withholding by their employer within the meaning of § 3401 (a) of the Internal Revenue Code of 1954, which defines "wages" for purposes of the withholding tax provisions to include "all remuneration . . . for services performed by an employee for his employer . . . ." Pp. 24–33.

540 F. 2d 300, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 33. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 38. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 39.

Sharon L. King argued the cause and filed briefs for petitioner.

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General McCree* and *Assistant Attorney General Ferguson.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an employer, who in 1963 reimbursed lunch expenses of employees who were on company travel but not away overnight, must withhold federal income tax on those reimbursements. Stated another way, the issue is whether the lunch reimbursements qualify as

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**David W. Richmond* filed a brief for the American Gas Assn. as *amicus curiae*.

"wages" under § 3401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 3401 (a).

I

The facts are not in any real dispute. Petitioner Central Illinois Public Service Company (Company) is a regulated public utility engaged, in downstate Illinois, in the generation, transmission, distribution, and sale of electric energy, and in the distribution and sale of natural gas. Its principal office is in Springfield. It serves a geographic area of some size. In order adequately to serve the area, the Company, in accord with long-established policy, reimburses its employees for reasonable, legitimate expenses of transportation, meals, and lodging they incur in travel on the Company's business. Some of these trips are overnight; on others, the employees return before the end of the business day.

In 1963, the tax year in issue, the Company had approximately 1,900 employees. It reimbursed its union employees and the operating employees of its western division (its only nonunionized division) for noon lunches consumed, while on authorized travel, in an amount not to exceed $1.40 per lunch.[1] The amount was specified in the Company's collective-bargaining agreement with the union. Other salaried employees were reimbursed for actual reasonable luncheon expenses up to a specified maximum amount.[2]

An employee on an authorized trip prepared his expense account on a company form. This was turned in to his supervisor for approval. The $1.40 rate sometimes was in excess of the actual lunch cost, but at other times it was insufficient to

[1] In 1960 the noon meal reimbursement was $1.30. In 1961 the union negotiated an increase to $1.40. Tr. 93.

[2] The Company's controller testified that the expense accounts of employees entitled to reimbursement for actual amounts expended were carefully reviewed, were often regarded as questionable ($2.50, at the trial date, was considered questionable), and were disallowed if deemed not to be reasonable. *Id.*, at 64–66.

cover that cost. An employee who took lunch from home with him on a company trip was entitled to reimbursement. If, because of the locality of his work assignment on a particular day, the employee went home for lunch, he was not entitled to reimbursement. Many employees were engaged in open-air labor. Even in 1963 the $1.40 rate was "modest." [3]

The employee on travel status rendered no service to the Company during his lunch. He was off duty and on his own time. He was subject to call, however, as were all employees at any time as emergencies required. The lunch payment was unrelated to the employee's specific job title, the nature of his work, or his rate of pay. "[T]his lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses." [4]

During 1963 the Company paid its employees a total of $139,936.12 in reimbursement for noon lunches consumed while away from normal duty stations on nonovernight trips. It did not withhold federal income tax for its employees with respect to the components of this sum. The Company in 1963, however, did withhold and pay federal income withholding taxes totaling $1,966,489.87 with respect to other employee payments.

Upon audit in 1971, the Internal Revenue Service took the position that the lunch reimbursements in 1963 qualified as wages subject to withholding. A deficiency of $25,188.50 in withholding taxes was assessed. The Company promptly paid this deficiency together with $11,427.22 interest thereon, a total of $36,615.72. It then immediately filed its claim for

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[3] The District Court in its findings, in addition to describing the rate as "modest," observed: "As a practical matter, it could hardly be considered a money making proposition for an employee." 405 F. Supp. 748, 749 (SD Ill. 1975).

[4] *Ibid.*

refund of the total amount so paid and, with no action forthcoming on the claim for six months, see 26 U. S. C. § 6532 (a) (1), instituted this suit in the United States District Court for the Southern District of Illinois to recover the amount so paid.

The District Court ruled in the Company's favor, holding that the reimbursements in question were not wages subject to withholding. 405 F. Supp. 748 (1975). The United States Court of Appeals for the Seventh Circuit reversed. 540 F. 2d 300 (1976). Because that decision appeared to be in conflict with the views and decision of the Fourth Circuit in *Royster Co.* v. *United States,* 479 F. 2d 387 (1973), we granted certiorari. 431 U. S. 903 (1977).

II

In *Commissioner* v. *Kowalski,* 434 U. S. 77 (1977), decided earlier this Term, the Court held that New Jersey's cash reimbursements to its highway patrol officers for meals consumed while on patrol duty constituted income to the officers, within the broad definition of gross income under § 61 (a) of the 1954 Code, 26 U. S. C. § 61 (a), and, further, that those cash payments were not excludable under § 119 of the Code, 26 U. S. C. § 119, relating to meals or lodging furnished for the convenience of the employer.

Kowalski, however, concerned the federal income tax and the issue of what was income. Its pertinency for the present withholding tax litigation is necessarily confined to the income tax aspects of the lunch reimbursements to the Company's employees.

The income tax issue is not before us in this case. We are confronted here, instead, with the question whether the lunch reimbursements, even though now they may be held to constitute taxable income to the employees who are reimbursed, are or are not "wages" subject to withholding, within the meaning and requirements of §§ 3401–3403 of the Code, 26 U. S. C. §§ 3401–3403 (1970 ed. and Supp. V). These withholding

statutes are in Subtitle C of the Code. The income tax provisions constitute Subtitle A.

The income tax is imposed on taxable income. 26 U. S. C. § 1. Generally, this is gross income minus allowable deductions. 26 U. S. C. § 63 (a). Section 61 (a) defines as gross income "all income from whatever source derived" including, under § 61 (a)(1), "[c]ompensation for services." The withholding tax, in some contrast, is confined to wages, § 3402 (a), and § 3401 (a) defines as "wages," "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." The two concepts—income and wages—obviously are not necessarily the same. Wages usually are income,[5] but many items qualify as income and yet clearly are not wages. Interest, rent, and dividends are ready examples. And the very definition of "wages" in § 3401 (a) itself goes on specifically to exclude certain types of remuneration for an employee's services to his employer (*e. g.*, combat pay, agricultural labor, certain domestic service). Our task, therefore, is to determine the character of the lunch reimbursements in the light of the definition of "wages" in § 3401 (a), and the Company's consequent obligation to withhold under § 3402 (a).

Before we proceed to the resolution of that issue, however, one further observation about the income tax aspect of lunch reimbursements is in order. Although *United States* v. *Correll*, 389 U. S. 299 (1967), restricting to overnight trips the travel expense deduction for meal costs under § 162 (a)(2), dispelled some of the confusion, it is fair to say that until this Court's very recent decision in *Kowalski*, the Courts of Appeals have been in disarray on the issue whether, under §§ 61 and 119 of the 1954 Code or under the respective predecessor sections of the 1939 Code, such reimbursements were income

[5] There are exceptions. *E. g.*, 26 U. S. C. § 911 (a).

at all to the recipients.[6] Thus, even the income tax character of lunch reimbursements was not yet partially clarified before the end of 1967, four full years after the tax year for which withholding taxes on lunch reimbursements are now being claimed from the Company in the present case, and were not entirely clarified until the *Kowalski* decision a few weeks ago.

III

The Sixteenth, or income tax, Amendment to the Constitution of the United States became effective in February 1913. The ensuing Tariff Act of October 3, 1913, § IIE, 38 Stat. 170, contained, perhaps somewhat surprisingly, a fairly expansive withholding provision.[7] This, however, was repealed [8] and in due course came to be replaced with the predecessor of the current "information at the source" provisions constituting § 6041 *et seq.* of the 1954 Code, 26 U. S. C. § 6041 *et seq.*

The present withholding system has a later origin in the Victory Tax imposed by the Revenue Act of 1942, § 172, 56 Stat. 884. This, with its then new § 465 (b) of the 1939 Code, embraced the basic definition of "wages" now contained in

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[6] *E. g., Wilson* v. *United States,* 412 F. 2d 694 (CA1 1969); *Commissioner* v. *Bagley,* 374 F. 2d 204 (CA1 1967), cert. denied, 389 U. S. 1046 (1968); *Saunders* v. *Commissioner,* 215 F. 2d 768 (CA3 1954); *Koerner* v. *United States,* 550 F. 2d 1362 (CA4), cert. denied, 434 U. S. 984 (1977); *Smith* v. *United States,* 543 F. 2d 1155 (CA5 1976), vacated and remanded, 434 U. S. 978 (1977); *United States* v. *Barrett,* 321 F. 2d 911 (CA5 1963); *Magness* v. *Commissioner,* 247 F. 2d 740 (CA5 1957), cert. denied, 355 U. S. 931 (1958); *Correll* v. *United States,* 369 F. 2d 87 (CA6 1966), rev'd, 389 U. S. 299 (1967); *United States* v. *Morelan,* 356 F. 2d 199 (CA8 1966); *Hanson* v. *Commissioner,* 298 F. 2d 391 (CA8 1962); *United States* v. *Keeton,* 383 F. 2d 429 (CA10 1967).

[7] "All persons . . . [or] corporations . . . having the control . . . or payment of . . . salaries [or] wages . . . of another person, exceeding $3,000 for any taxable year . . . are hereby authorized and required to deduct and withhold from such . . . income such sum as will be sufficient to pay the normal tax imposed thereon by this section . . . ."

[8] Act of Oct. 3, 1917, § 1204 (2), 40 Stat. 300.

§ 3401 (a) of the 1954 Code. The Victory Tax was replaced by the Current Tax Payment Act of 1943, 57 Stat. 126, and was repealed by the Individual Income Tax Act of 1944, § 6 (a), 58 Stat. 234. The structure of the 1943 Act survives to the present day.

In this legislation of 35 years ago Congress chose not to return to the inclusive language of the Tariff Act of 1913, but, specifically, "in the interest of simplicity and ease of administration," confined the obligation to withhold to "salaries, wages, and other forms of compensation for personal services." S. Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942).[9] The committee reports of the time stated consistently that "wages" meant remuneration "*if* paid for services performed by an employee for his employer" (emphasis supplied). H. R. Rep. No. 2333, 77th Cong., 2d Sess., 126 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., 166 (1942); H. R. Rep. No. 401, 78th Cong., 1st Sess., 22 (1943); S. Rep. No. 221, 78th Cong., 1st Sess., 17 (1943); H. R. Rep. No. 510, 78th Cong., 1st Sess., 29 (1943).

The current regulations also contain the "if" clause, Treas. Reg. on Employment Taxes, § 31.3401 (a)–1(a)(2), 26 CFR § 31.3401 (a)–1(a)(2) (1977), and then, in § 31.3401 (a)–1 (b)(2) recite: "Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding." But § 31.3401 (a)–1(b)(9) provides: "The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119–1 of this chapter (Income Tax Regulations)."

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[9] The House would have included withholding on dividends and bond interest as well as wages. H. R. Rep. No. 2333, 77th Cong., 2d Sess., 125 (1942).

The Internal Revenue Service by its Regulations thus now would tie the withholding obligation of the employer to the income tax result for the employee.

IV

The Government, straightforwardly and simplistically, argues that the definition of "wages" in § 3401 (a) corresponds to the first category of gross income set forth in § 61 (a)(1), and that the two statutes "although not entirely congruent [in their] relationship," Brief for United States 11, have "equivalent scope," *id.*, at 15. It is claimed that the meal allowance was compensatory, for it was paid for the performance of assigned service at the place the employer determined. Thus, it is said, there was a direct causal connection between the receipt of the allowance and the performance of services. The allowance, then, was part of a total package of remuneration designed to attract and hold the employee to the Company. The Government further argues that this is in accord with the Court's pronouncements as to what is compensation for purposes of the tax statutes. It states that § 3401 (a) broadly defines "wages," and it cites *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716 (1929), where the Court held employees taxable for the amount of their income taxes paid by their employers; *Commissioner* v. *LoBue,* 351 U. S. 243 (1956), where the transfer of assets to an employee at less than fair market value in order to secure better service was held to result in taxable income to the employee; *Social Security Board* v. *Nierotko,* 327 U. S. 358 (1946), where the definition of wages under the Social Security Act was at issue; and *Otte* v. *United States,* 419 U. S. 43, 49–50 (1974), which concerned the payment of wage claims by a trustee in bankruptcy. For purposes of the tax law, the Government argues, there is no difference between benefits of this kind and traditional wage or salary payments. Both are "[c]ompensation for services" under § 61 (a)(1) and "remuneration . . . for

services" under § 3401 (a). It would explain away the seemingly pertinent Treas. Reg. § 31.3401 (a)–1(b)(2) on the ground that it relates only to business expenses that are deductible under § 162 (a) of the Code, and that *Correll* excluded from the benefit of § 162 (a) the cost of meals consumed during nonovernight travel. And it urges that what is important is that the payments at issue were a result of the employment relationship and were a part of the total of the personal benefits that arose out of that relationship.

V

We do not agree with this rather facile conclusion advanced by the Government. The case, of course, would flow in the Government's favor if the mere fact that the reimbursements were made in the context of the employer-employee relationship were to govern the withholding tax result. That they were so paid is obvious. But it is one thing to say that the reimbursements constitute income to the employees for income tax purposes, and it is quite another thing to say that it follows therefrom that the reimbursements in 1963 were subject to withholding. There is a gap between the premise and the conclusion and it is a wide one. Considerations that support subjectability to the income tax are not necessarily the same as the considerations that support withholding. To require the employee to carry the risk of his own tax liability is not the same as to require the employer to carry the risk of the tax liability of its employee. Required withholding, therefore, is rightly much narrower than subjectability to income taxation.

As we have noted above, withholding, under § 3402, is required only upon wages, and § 3401 (a) defines wages as "all remuneration . . . for services performed by an employee for his employer." When the withholding system was effectuated in 1942, the obligation was confined to wages, and the like, "in the interest of simplicity and ease of administration."

S. Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942). And what is now Treas. Reg. § 31.3401 (a)–1(b)(2), applicable to employers and excluding from the concepts of wages and of withholding amounts "paid specifically . . . for traveling or other bona fide ordinary and necessary expenses incurred . . . in the business of the employer," was issued originally—long prior to the *Correll* decision in 1967—as § 404.14 of T. D. 5277, 1943 Cum. Bull. 927, 941.[10] There is nothing in *Correll* that relates to the withholding provisions, and there is nothing in Treas. Reg. § 31.3401 (a)–1(b)(2) that incorporates any overnight concept. This is so despite the Government's assertion that "consistently" since 1940, that is, since I. T. 3395, 1940–2 Cum. Bull. 64 (relating to railroad employees and their deducting the cost of room rentals and meals for necessary rest while away from home), it has adhered to the overnight rule in determining income tax liability. Brief for United States 32. Such consistent adherence to the overnight rule in determining income tax liability—together with the consistent absence of any reference to the overnight rule in the withholding regulations—strongly indicates that it was intended that the overnight rule not apply in determining withholding tax obligations.

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[10] Similarly, Treas. Reg. § 31.3401 (a)–1 (b)(10), promulgated originally as § 404.15 of T. D. 5277, excluded from "wages" facilities and privileges (such as entertainment, medical services, and courtesy discounts) offered by the employer. Yet those, obviously, are also offered in the employer-employee relationship. See S. Rep. No. 830, 88th Cong., 2d Sess., 208 (1964); H. R. Rep. No. 1149, 88th Cong., 2d Sess., 22 (1964); S. Rep. No. 91–552, p. 110 (1969); H. R. Rep. No. 91–413, p. 77 (1969). See also Rev. Rul. 55–520, 1955–2 Cum. Bull. 393; Rev. Rul. 56–249, 1956–1 Cum. Bull. 488; Rev. Rul. 58–301, 1958–1 Cum. Bull. 23; Rev. Rul. 58–145, 1958–1 Cum. Bull. 360; and Rev. Rul. 59–227, 1959–2 Cum. Bull. 13, modified and superseded prospectively by Rev. Rul. 75–44, 1975–1 Cum. Bull. 15, for other instances of payments made in the employer-employee relationship where withholding was not required despite includability for income tax purposes.

Decided cases have made the distinction between wages and income and have refused to equate the two in withholding or similar controversies. *Peoples Life Ins. Co.* v. *United States,* 179 Ct. Cl. 318, 332, 373 F. 2d 924, 932 (1967); *Humble Pipe Line Co.* v. *United States,* 194 Ct. Cl. 944, 950, 442 F. 2d 1353, 1356 (1971); *Humble Oil & Refining Co.* v. *United States,* 194 Ct. Cl. 920, 442 F. 2d 1362 (1971); *Stubbs, Overbeck & Associates* v. *United States,* 445 F. 2d 1142 (CA5 1971); *Royster Co.* v. *United States,* 479 F. 2d, at 390;[11] *Acacia Mutual Life Ins. Co.* v. *United States,* 272 F. Supp. 188 (Md. 1967). The Government would distinguish these cases on the ground that some of them involved overnight travel, the expenses of which would be deductible, and that others were concerned with particularized allowances. We perceive the distinctions but are not persuaded that they blunt the basic difference between the wage and the income concepts the respective courts have emphasized.

An expansive and sweeping definition of wages, such as was indulged in by the Court of Appeals, 540 F. 2d, at 302, and is urged by the Government here, is not consistent with the existing withholding system. As noted above, Congress chose simplicity, ease of administration, and confinement to wages as the standard in 1942. This was a standard that was intentionally narrow and precise. It has not been changed by Congress since 1942, although, of course, as is often the case, administrative and other pressures seek to soften and stretch the definition. Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative. See *Humble Oil & Refining Co.* v. *United*

[11] In the District Court in the *Royster* case, the Government abandoned its position that the income tax provisions of the Code were *in pari materia* with the withholding provisions. See 479 F. 2d, at 388.

States, 194 Ct. Cl., at 933, 442 F. 2d, at 1369–1370. See also H. R. Rep. No. 94–1515, p. 489 (1976).[12]

In 1963 not one regulation or ruling required withholding on any travel expense reimbursement. The intimation was quite the other way. See Treas. Reg. § 31–3401 (a)–1(b)(2). No employer, in viewing the regulations in 1963, could reasonably suspect that a withholding obligation existed. The 1940 ruling upon which the Government would erect its case, I. T. 3395, 1940–2 Cum. Bull. 64, predated the withholding regulations of 1943. Apart from the fact that this was a deduction ruling, it is also significant that the Government did not reflect it in its withholding regulations adopted shortly thereafter. With this omission on the part of the Government, it is hardly reasonable to require an employer to fill the gap on its own account. Further, in 1963 and for some time thereafter all judicial decisions were the other way, even on the deductibility issue. Only with *Correll,* decided by this Court in 1967, was there a ruling of nondeductibility. And until the Court of Appeals' decision in the present case, no court had ever held lunch reimbursements to be wages for withholding purposes. The first published pronouncement by the Internal Revenue Service with respect to withholding came only in 1969 with Rev. Rul. 69–592, 1969–2 Cum. Bull. 193, shortly after *Correll* came down. That Ruling's suggestion that withholding was a possible requirement (when reimbursed travel expenses exceeded travel deductions) contained no reference whatsoever to wages, and thus avoided any mention of the statutory requirement that the payment must be a wage to be subject to withholding.

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[12] An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in the light of the facts of this case.

Needless to say, we do not decide today whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid.

This is not to say, of course, that the Congress may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so as yet. And we cannot justify the Government's attempt to do so by judicial determination.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, concurring.

I join the Court's opinion, emphasizing that it does not decide "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid." *Ante,* at 32 n. 12. I share the Court's conclusion that petitioner met its obligations under Treas. Reg. § 31.3401 (a)–1 (b)(2) as that regulation was most reasonably interpreted in 1963. I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the Government. See *ante,* at 28–29.

I

Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. See 26 U. S. C. § 7805 (b),[1] construed in *Dixon* v. *United States,* 381 U. S. 68 (1965); *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180

[1] "(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

(1957).[2] That authority is not unfettered, however, and conditions are present here that would make retroactive application of the withholding tax to petitioner's lunch payments an abuse of discretion.

The legislative history of the Internal Revenue Code does not reveal any evidence of congressional intent to make employers guarantors of the tax liabilities of their employees, which would in all likelihood be the result if withholding taxes can be assessed retroactively.[3] Far from it. When Congress has changed the withholding provisions to enlarge the scope of

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[2] This case is very unlike either *Dixon* or *Automobile Club of Michigan* in each of which the Commissioner was held authorized to correct what we characterized as "mistakes of law." See 381 U. S., at 72; 353 U. S., at 183, 184. There is no simple sense in which the Commissioner is here merely undoing a mistake of law. Instead, as the Commissioner's recent withdrawal of his fringe-benefit regulations witnesses, 41 Fed. Reg. 56334 (1976), the bifurcation of payments made to employees by employers into those that are fringe benefits—and hence income and hence taxable—and those that are merely reimbursements of moneys expended by the employee for the benefit of the employer's business—and hence are a cost of doing business as an employee and hence excludable or deductible from income—is by no means easy. In the field of fringe-benefit taxation, therefore, the fact that something is taxed today that was not taxed yesterday is not so much evidence of mistake corrected as of an evolving understanding of what changed circumstances, equity, and legislative purpose require. And, although I feel no compulsion to insist that fringe-benefit law must always have been as it is newly announced on the theory that administrative interpretation must reflect a constant congressional intent, cf. *Dixon* v. *United States, supra,* at 73–75, I of course do not suggest that the Commissioner's power to define income or wages is unfettered. It will be time enough to consider whether any particular fringe-benefit regulation is valid when and if such a regulation comes before this Court.

[3] It is possible that the employer could sue each of his employees to recover the amount of withholding taxes retroactively assessed by the Government. The chance that such a method of recovery would be either practical or cost effective is remote, however.

the withholding base or to increase the tax rate, its uniform practice has been to give employers a grace period in which to bring their withholding practices in line with the new law.[4]

[4] One of the first instances of this policy can be found in the Revenue Act of 1942 itself. There, Congress raised the witholding tax rate on payments made to nonresident aliens and foreign corporations, see Internal Revenue Code of 1939, §§ 143–144, 53 Stat. 60–62, but nonetheless delayed the effective date of the increase

"until the tenth day after the enactment of the act in order to afford a reasonable period within which withholding agents will be informed of the higher rate applicable to payments made to nonresident aliens or nonresident foreign corporations." S. Rep. No. 1631, 77th Cong., 2d Sess., 69 (1942); see Revenue Act of 1942, § 108 (c), 56 Stat. 808.

Similarly withholding for the Victory Tax did not commence until tax years beginning after December 31, 1942, see *id.*, § 172 (a), 56 Stat. 884, although the Tax was passed in October 1942. Section 2 (c) of the Current Tax Payment Act of 1943, 57 Stat. 139, also delayed imposition of modified withholding obligations for about three weeks.

A review of amendments to the withholding provisions of the 1954 Code reveals a uniform practice of prospective application of modifications to the withholding tax that would require an employer to withhold increased amounts from employees' pay.

The first such amendment to § 3401 is found in § 213 of Title II of the Revenue Act of 1964, which clarified and in some cases expanded the tax liability of employees for moving expenses and modified withholding correspondingly. See Tit. II, §§ 213 (a), 213 (c), 78 Stat. 50–52, adding respectively, 26 U. S. C. §§ 217 and 3401 (a)(15). Congress, apparently recognizing that additional withholding might be required, stated in § 213 (d): "The amendment made by subsection (c) shall apply with respect to remuneration paid after the seventh day following the date of enactment of this Act." 78 Stat. 52. By contrast, § 204 of the Act, 78 Stat. 36—which added § 79 of the Internal Revenue Code, 26 U. S. C. § 79, giving deductions to employees for group term life insurance contributions made by employers, and which created a corresponding deduction in the withholding tax (§ 3401 (a)(14))—actually *contracted* the wage base and this change in withholding obligation was made *retroactive*. See § 204 (d) of the Act, 78 Stat. 37.

In 1965, Congress modified the treatment of tip income under both the Social Security Act and the withholding provisions of the Code. Although the amending legislation was passed in July 1965, the modifications to

In the one instance where this has not been the case,[5] Congress has made clear that its retroactive application of withholding tax changes was inadvertent and it has moved promptly to correct its error:

> "The Tax Reform Act of 1976, enacted on October 4, 1976, made several changes which increased tax liabilities from the beginning of 1976.
>
> "In prior legislation (such as the Tax Reform Act of 1969) which the Congress passed late in the year but

withholding did not take effect until January 1, 1966. See Social Security Amendments of 1965, Tit. III, § 313 (f), 79 Stat. 385.

In 1966, Congress amended §§ 3401 (a)(6) and 3401 (a)(7), specifying that withholding on wages paid to aliens would thereafter be governed by Treasury Regulations. See Foreign Investors Tax Act of 1966, Tit. I, § 103 (k), 80 Stat. 1554. This change could have required increased withholding and Congress, apparently recognizing this, delayed the effective date of the change to 1967. See § 103 (n)(4), 80 Stat. 1555. Similarly, in 1972, Congress modified § 3401 (a)(1) of the Code. Again, Congress provided: "The amendments made [to § 3401 (a)(1)] shall apply to wages paid on or after the first day of the first calendar month which begins more than 30 days after the date of enactment of this Act." Pub. L. No. 92–279, § 3 (b), 86 Stat. 125. See also Employee Retirement Income Security Act of 1974, Tit. II, §§ 2002 (g)(7), 2002 (i)(2), 88 Stat. 970–971.

In the Tax Adjustment Act of 1966, Congress made a wholesale modification of the withholding tax tables found in § 3402 of the Code, 26 U. S. C. § 3402. Again, Congress created a grace period—this time of over a month—before the new withholding provisions took effect. See Tax Adjustment Act of 1966, § 101 (g), 80 Stat. 62. Further complex changes in withholding tables that increased withholding for many taxpayers were made in 1969, 1971, and 1976. In each instance but the last, changes were expressly made prospective. See Tax Reform Act of 1969, Tit. VIII, § 805 (h), 83 Stat. 709; Revenue Act of 1971, Tit. II, § 208 (i), 85 Stat. 517. As explained in the text, *infra*, Congress' failure to make the 1976 withholding changes prospective was an oversight and has been corrected.

Thus, although the withholding provisions of the Code have been frequently amended, there is only one instance of intentionally retroactive application of an amendment and in that case the amendment scaled down an employer's withholding obligations.

[5] See n. 4, *supra*.

> which imposed tax increases from the beginning of the year, the Congress, *as a matter of equity and custom,* has relieved taxpayers of any liability for additions to tax, interest, and penalties with respect to increases in estimated tax resulting from increases in tax liability . . . . Relying on Congressional assurances that the failure to provide such relief in the 1976 Act was an oversight which would be remedied, the Commissioner [has delayed tax assessments for 1976]. . . .
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> . . . . . .
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> "The committee believes it is appropriate to grant to taxpayers affected by the 1976 legislation relief from additions to tax, interest, and penalties, similar to that which has traditionally been granted in connection with earlier legislation where provisions were enacted with retroactive application.
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> . . . . . .
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> "[Therefore, t]he committee amendment . . . *relieves employers of any liability for failure to withhold income tax during 1976, on any type of remuneration which was made taxable by the 1976 Act.*" S. Rep. No. 95–66, pp. 85–86 (1977) (emphasis added).

See Tax Reduction and Simplification Act of 1977, § 404, 91 Stat. 155–156.

The only conclusion that can be drawn from Congress' consistent practice of avoiding retroactive imposition of withholding tax liability and its recent judgment that "equity and custom" require relief from inadvertent retroactive liability, I submit, is that additional withholding taxes should not, at least without good reason, be assessed against employers who did not know of and who had no reason to know of increased withholding obligations at the time wages had to be withheld.

Such notice, as the Court holds, *ante,* at 25–26, 29–30, was not given petitioner until at least 1967 and, for all that ap-

pears, possibly not until our decision in *Commissioner* v. *Kowalski*, 434 U. S. 77 (1977). Thus, the only question remaining is whether there is here some good reason to depart from customary practice. The United States does not suggest one, arguing instead that petitioner had ample notice of its obligations—a conclusion I join the Court in rejecting. Moreover, unlike the situation in *Dixon* and *Automobile Club of Michigan*, imposition of taxes retroactively here would not serve the important function of ensuring that all similarly situated taxpayers are assessed equally. Instead, the likely effect would be that the individual taxpayers who should have reported these meal reimbursements in income will be relieved of all taxes they should have paid, and petitioner will bear the tax directly rather than simply acting as a collection conduit for the United States, a result certainly not intended by Congress.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

In addition to joining the Court's opinion, I also join MR. JUSTICE BRENNAN's concurring opinion addressing the question of retroactive application of the withholding tax. It seems particularly inappropriate for the Commissioner, absent express statutory authority, to impose retroactively a tax with respect to years prior to the date on which taxpayers are clearly put on notice of the liability. In other areas of the law, "notice," to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation. In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization.

As the Court observes, *ante*, at 32, in 1963—the year in question—no regulation or ruling required withholding on any travel expense reimbursement, and the intimations were to the

contrary. It can safely be said that until recently (perhaps until our decision this Term in *Commissioner* v. *Kowalski,* 434 U. S. 77 (1977)), neither employers nor employees generally had notice of the asserted tax consequences of lunch reimbursement. In short, as MR. JUSTICE BRENNAN's opinion makes clear, the Commissioner abused his discretion in attempting the retroactive imposition of withholding tax liability.

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much that is said in the Court's opinion, I join only in its judgment.

The so-called overnight rule of *United States* v. *Correll,* 389 U. S. 299, has nothing whatever to do with the definition of either "income" or "wages." It is exclusively concerned with what deductions employees may take when they prepare their own tax returns.

The obligation of an employer to withhold upon wages depends not at all on what deductions his various employees may eventually report on their individual income tax returns. That is a question about which, as a matter of fact and of law, the employer can neither know nor care. The importation of the *Correll* rule into this case can do nothing, therefore, but confuse the issues actually before us.

I concur in the judgment of the Court because I think the reimbursements here involved were not, at the time they were made, "wages" within the meaning of § 3401 (a) of the Internal Revenue Code of 1954 as interpreted by Treas. Reg. § 31.3401 (a)–1 (b)(2).

FEDERAL MARITIME COMMISSION ET AL. *v.* PACIFIC MARITIME ASSN. ET AL.

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

No. 76–938. Argued December 7, 1977—Decided March 1, 1978

Respondent Pacific Maritime Association (PMA), a collective-bargaining agent for a multiemployer bargaining unit composed of various employers of Pacific coast dockworkers, entered into a collective-bargaining agreement with respondent Union regarding nonmember use of dockworkers jointly registered and dispatched through PMA-Union hiring halls whereby the nonmembers would participate in all fringe-benefit programs, pay the same dues and assessments as PMA members, use "steady" men in the same way as members, and be treated as members during work stoppages. Various nonmember public ports, which had previously competitively made separate (and assertedly in several respects more advantageous) agreements with the Union and the PMA, filed a petition with petitioner Federal Maritime Commission (FMC) asserting that the collective-bargaining agreement was subject to filing and approval under § 15 of the Shipping Act, 1916 (Act), which requires the filing of agreements between a common carrier by water (or "other person" furnishing facilities in connection with such a carrier) and another such carrier or person, including those agreements "controlling, regulating, preventing, or destroying competition." The FMC is empowered to "disapprove, cancel, or modify" any such agreement that it finds to be unjustly discriminatory or to be detrimental to commerce or the public interest. Before FMC approval or after disapproval agreements subject to filing are unlawful and may not be implemented. Lawful agreements are excepted from the antitrust laws. The FMC severed for initial determination the issues of its jurisdiction over the challenged agreement and whether there were considerations in the national labor policy that would nevertheless exempt the agreement from the filing and approval requirements of § 15. The FMC found that the purpose of the agreement was to place nonmembers on the same basis as members of the PMA and that its effect was to control or affect competition between members and nonmembers. Applying the standards articulated in *United Stevedoring Corp.* v. *Boston Shipping Assn.*, 16 F. M. C. 7, the FMC found the agreement to be outside the protection of an FMC-recognized labor exemption and therefore subject to filing

under § 15. The Court of Appeals reversed, ruling that *any* collective-bargaining agreement, regardless of its impact on competition, was exempt from the § 15 filing requirements. Though recognizing that its holding precluded for collective-bargaining agreements the antitrust immunity that § 15 approval provides, even in cases where shipping considerations would support an exemption, the court felt its holding necessary to implement the collective-bargaining system established by the federal statutes dealing with labor-management relations, including those in the shipping industry. Alternatively, the court held that if its *per se* rule was infirm the FMC had erred in refusing to exempt the challenged agreement. *Held:*

1. Collective-bargaining agreements as a class are not categorically exempt from § 15's filing requirements. Pp. 53–60.

(a) Because § 15 provides that an approved agreement will not be subject to the antitrust laws, it is clear that Congress (1) assigned to the FMC, not the courts, the task of initially determining which anticompetitive restraints are to be approved and which are to be disapproved under the general statutory guidelines, and (2) anticipated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry. Pp. 53–56.

(b) The Court of Appeals' conclusion that prompt implementation of lawful collective-bargaining agreements could not be realized under the § 15 procedure overlooked the fact that under the Act's terms the vast majority of collective-bargaining arrangements would not be candidates for disapproval under § 15 and would be routinely approved even if filed. The FMC has determined that it will recognize a "labor exemption" from § 15 filing requirements for collective-bargaining contracts falling within the boundaries of the exemption defined by announced criteria like those applicable to the labor exemption from the antitrust laws. Pp. 56–58.

(c) The FMC's procedure for conditional approval of filed agreements pending a final decision as to their legality is adequate to overcome the Court of Appeals' concern that the § 15 procedures would prevent "the maintenance or prompt restoration of industrial peace." Pp. 59–60.

2. The Court of Appeals also erred in its alternative ground of decision that even under a balancing test weighing Shipping Act and labor relations considerations the challenged agreement should be exempt from filing, in support of which view the court suggested that the FMC had failed to realize that the agreement was an effort to force the public ports into a multiemployer bargaining unit against their will, an issue exclusively within the domain of the National Labor Relations Board. Here

there was no effort to change bargaining units but to impose bargaining-unit terms on employers outside the units. Pp. 60–61.

3. The FMC made the requisite findings to sustain its decision. Pp. 61–63.

177 U. S. App. D. C. 248, 543 F. 2d 395, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 64. BLACKMUN, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Shenefield, Marion L. Jetton, Robert B. Nicholson, Robert J. Wiggers, Richard E. Hull, Edward G. Gruis,* and *Gordon M. Shaw.*

R. Frederic Fisher argued the cause for respondent Pacific Maritime Assn. With him on the brief were *Edward D. Ransom* and *Gary J. Torre. Norman Leonard* argued the cause and filed a brief for respondent International Longshoremen's and Warehousemen's Union.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814,[1] requires the filing with the

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**Herbert Rubin, Cecelia H. Goetz,* and *Alan A. D'Ambrosio* filed a brief for Wolfsburger Transport-Gesellschaft m. b. H. as *amicus curiae* urging reversal.

[1] Section 15, as set forth in 46 U. S. C. § 814, provides as follows:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying com-

Federal Maritime Commission (Commission) of seven categories of agreements between a common carrier by water, or "other person subject to this chapter" and another such carrier

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petition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly

or person.[2] Among those agreements that must be filed are those "controlling, regulating, preventing, or destroying competition." The Commission is empowered to "disapprove, cancel, or modify" any such agreement that it finds to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, . . . or to operate to the detriment

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or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817 (b) of this title and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section."

[2] Section 1 of the Act, as set forth in 46 U. S. C. § 801, defines the term "other person subject to this chapter" as "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

of the commerce of the United States, or to be contrary to the public interest . . ." and is directed to approve all filed agreements that do not transgress these standards. Before approval or after disapproval, agreements subject to filing are unlawful and may not be implemented.[3] Agreements that are "lawful under this section" are excepted from those provisions of the antitrust laws contained in §§ 1–11 and 15 of Title 15 of the United States Code. Violations of the section are punishable by civil fines of not more than $1,000 per day.

The issue in this case is whether § 15 of the Shipping Act requires the filing and the Commission's approval or disapproval of a collective-bargaining agreement between respondent Pacific Maritime Association (PMA), a collective-bargaining agent for a multiemployer bargaining unit made up of various employers of Pacific coast dockworkers,[4] and respondent International Longshoremen's and Warehousemen's Union (Union).

I

This case arose when eight municipal corporations, owners and operators of Pacific coast port facilities and not members of the PMA,[5] filed a petition with the Commission asserting that a 1972 agreement between PMA and the Union was subject to filing and approval under § 15 and was violative of §§ 15, 16, and 17 of the Shipping Act[6] because it was unjust,

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[3] There are exceptions to this rule, see n. 1, *supra,* not relevant to this case.

[4] PMA's membership includes steamship lines, steamship agents, stevedoring companies, and marine terminal companies operating at Pacific coast ports of the United States.

[5] The complaining public ports were Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland, and Tacoma. The Port of Seattle subsequently intervened on their side.

[6] Section 16, 39 Stat. 734, as amended, 46 U. S. C. § 815, forbids discriminatory or preferential rates or other acts; and § 17, 39 Stat. 734, as

discriminatory, and contrary to the public interest. Prior to this time, the nonmember ports had negotiated separate agreements with the Union which contained terms and conditions that in some respects differed from those contained in the collective-bargaining contracts between PMA and the Union. Fringe-benefit provisions varied, depending on the result of individual negotiations.[7] In some respects the ports enjoyed more flexible work rules than did PMA; the ports, for example, were often permitted to use "steady crews," whereas, under the PMA contract, rotation of workers among employers was the general rule.[8] The existence of separate agreements between the Union and the public ports also enabled the Union to exert negotiating pressure on PMA by striking PMA while continuing to work for the individual ports. The ports, nevertheless, were permitted by virtue of separate agreements with PMA to secure their work force through the PMA-Union hiring halls[9] and to make the particular fringe-benefit pay-

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amended, 46 U. S. C. § 816, empowers the Commission to prescribe reasonable nondiscriminatory rates.

[7] For present purposes, the term "fringe benefits" refers to bargained-for plans for vacation pay, pay guarantees, pensions, welfare, and holidays.

[8] The Union favors the centralized, rotational hiring system, because such a system equalizes job opportunities by insuring that available work is spread among the registered work force. Employers, however, prefer to use steady gangs, believing that system to be more efficient since new workers are not constantly having to be familiarized with the employer's operations.

[9] Since 1935, PMA employers have been required to hire exclusively from hiring halls jointly financed by PMA and the Union. This hiring-hall system was created in an effort to reconcile the fluctuating demand for labor in the Pacific coast longshore industry with the need for stable employment. Union members register for jobs at the halls and from there are dispatched to work assignments. Despite the rotational hiring method used within the industry, registered Union workers receive a single paycheck from PMA. This requires PMA to maintain a central payroll and recordkeeping system for these longshoremen.

ments called for by their individual contracts by contributing to the fringe-benefit funds maintained by PMA.[10]

During contract negotiations between PMA and the Union beginning in November 1970, one of the issues raised was whether nonmembers should continue to be allowed to participate in PMA hiring-hall and fringe-benefit plans. These privileges PMA desired to eliminate.[11] Ultimately, the parties arrived at a Supplemental Memorandum of Understanding described as follows by the court below:

> "In the Supplemental Memorandum the parties agreed that PMA would accept contributions from all nonmembers who executed a uniform participation agreement. This standard agreement, included in the Supplemental Memorandum, would require nonmembers, as a condition of using the joint dispatching halls for jointly registered employees, to participate in all fringe benefit programs, pay the same dues and assessments as PMA members, use steady men 'in the same way a member may do so,' and be treated as a member during work stoppages." 177 U. S. App. D. C. 248, 250–251, 543 F. 2d 395, 397–398 (1976) (footnotes omitted).[12]

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[10] The ports paid a participation fee for this privilege. In PMA's view, allowing nonmembers to participate in the fringe-benefit plans was a great benefit to the nonmembers, for it permitted them to participate in programs funded for thousands of employees, rather than having to establish their own plans for very few employees. On the other hand, PMA thought that having nonmembers participate in some, but not necessarily all, of the benefit plans created additional administrative burdens for it.

[11] When contract negotiations began in late 1970, the Union proposed that the contract provide that PMA would accept all fringe-benefit contributions from any employer, whether or not a PMA member. In response PMA proposed that all nonmember participation under the collective-bargaining agreement be eliminated except as applied to those employers who were not permitted by law to become members of PMA.

[12] To support this description, the Court of Appeals quoted the following paragraphs from a revision of the Supplemental Memorandum of

It was this agreement that the public ports asserted was subject to filing and Commission action under § 15.

In October 1972, the Commission severed for initial deter-

Understanding, to be mentioned in the text, which the Commission found was substantially the same as the Supplemental Memorandum of Understanding, 177 U. S. App. D. C., at 250–251, nn. 6–9, 543 F. 2d, at 397–398, nn. 6–9:

"6. 7. The nonmember participant shall participate in the ILWU–PMA Pension Plan, the ILWU–PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU–PMA Guarantee Plans (longshoremen and clerks/ and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Non-member Participants shall be subject to the same audits as members of PMA."

"7. 9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay."

"8. 5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU."

"9. 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example

"a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,

"b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

"c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

"The essence of b) and c) of this section is the acceptance by nonmem-

mination the issues of its jurisdiction over the challenged agreement, and, if the Supplemental Memorandum of Understanding was otherwise covered by § 15, whether there were considerations rooted in the national labor policy that would nevertheless exempt the agreement from the filing and approval requirements of the section. Thereafter, on June 24, 1973, PMA and the Union arrived at a new collective-bargaining agreement, which included a revised nonmember participation agreement replacing the Supplemental Memorandum of Understanding. By additional order, the Commission extended its jurisdictional inquiry to include the new contract with its nonmember participation provisions, which, although revised, were deemed by the Commission to have essentially the same impact for present purposes as the Supplemental Memorandum of Understanding.

In its subsequent report and order, *Pacific Maritime Assn.—Cooperative Working Arrangements,* 18 F. M. C. 196 (1975), the Commission first rejected the suggestion that because the case called for accommodating the Shipping Act and the labor statutes, as well as determining whether the parties had exceeded the scope of legitimate bargaining, the Commission should not itself decide the issue but should defer to the courts or to the National Labor Relations Board.[13] The Com-

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ber participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants."

The Court of Appeals went on to point out:

"The Revised Agreement also required uniform terms regarding selection of men in the joint work force, continuance of obligation to pay PMA assessments, and use of uniform payment and record forms." *Id.,* at 251 n. 9, 543 F. 2d, at 398 n. 9.

[13] The Commission noted that the complaint before it alleged, not that PMA or the Union had refused to bargain, but rather that they had entered into an agreement in violation of the shipping and antitrust laws. The Commission concluded that the NLRB would be without available procedure to investigate the legality of the nonmember participation agreement.

The suggestion that it defer the matter to the courts was also deemed

mission also rejected the argument, as it had rejected similar arguments in *New York Shipping Assn.—NYSA–ILA Man-Hour/Tonnage Method of Assessment,* 16 F. M. C. 381 (1973), aff'd, 495 F. 2d 1215 (CA2), cert. denied, 419 U. S. 964 (1974), that § 15's filing requirement was not triggered because some members of PMA were neither carriers nor "other persons subject to the act" or because PMA's contract was with a labor union, which also was neither a carrier nor "other person." [14] The Commission went on to find that the purpose of the nonmember participation agreement was to place nonmembers on the same competitive basis as members of the PMA and that its effect was to control or affect competition between members and nonmembers. The Commission concluded that the agreement was thus subject to filing and approval or disapproval under § 15, unless, because it was part of a collective-bargaining contract, it fell within that category of contracts that the national labor policy placed beyond the reach of the Shipping Act. The Commission had recognized this so-called "labor exemption" in *United Stevedoring Corp.* v. *Boston Shipping Assn.,* 16 F. M. C. 7 (1972), and it pro-

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unmeritorious, since the Commission had already intervened in a counterpart antitrust case brought by the ports and had requested a stay of those proceedings, which had been granted pending the Commission's resolution of the Shipping Act questions.

[14] The Commission's view is that, although the Union is neither a carrier nor "other person," the agreement nevertheless constitutes an agreement among the contracting carriers—in this case as to how the public ports were to be dealt with—and is therefore a § 15 contract insofar as the identity of the parties is concerned. The Court of Appeals for the Second Circuit agrees with the Commission. *New York Shipping Assn.* v. *FMC,* 495 F. 2d 1215, 1220–1221, cert. denied, 419 U. S. 964 (1974). Nor did the Court of Appeals in this case disagree; it simply noted the approach of the Commission and suggested that this Court might have approved it in *Volkswagenwerk* v. *FMC,* 390 U. S. 261 (1968). 177 U. S. App. D. C., at 261 n. 31, 543 F. 2d, at 408 n. 31.

ceeded to adjudicate the status of the instant agreement under the criteria annnounced in that case.[15]

The Commission's ultimate conclusion was that the nonmember participation agreement was not entitled to exemption from filing under § 15, primarily because its thrust was to

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[15] The Commission said, 16 F. M. C., at 12–13:

"Hence, from these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we. Each of the following criteria deserves consideration, but it is obvious that each element is not in and of itself controlling. They are rather guidelines or 'rules of thumb' for each factual situation. These criteria are as follows:

"1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are 'arms-length' or 'eyeball to eyeball.'

"2. The matter is a mandatory subject of bargaining, e. g. wages, hours or working conditions. The matter must be a proper subject of union concern, i. e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

"3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

"4. The union is not acting at the behest of or in combination with nonlabor groups, i. e., there is no conspiracy with management.

"In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. In balancing the equities, the above criteria will no doubt be of value. We cannot, however, subscribe to the view that collective bargaining agreements be granted a blanket labor exemption from the Shipping Act."

bring nonmembers into parity with members by requiring employers outside the bargaining unit to submit to bargaining-unit terms. The result had "a potentially severe and adverse effect upon competition," 18 F. M. C., at 208, and only a superficial effect on the collective-bargaining process. The agreement was thus subject to filing and approval under § 15.

The Court of Appeals for the District of Columbia Circuit set aside the Commission's order, holding that the disputed agreement was wholly beyond the Commission's jurisdiction under § 15. 177 U. S. App. D. C. 248, 543 F. 2d 395 (1976). The Commission's approach, which extends to labor agreements an exemption from Shipping Act requirements roughly equivalent to the exemption from the antitrust laws that the courts hold the labor statutes require for collective-bargaining contracts, was deemed an inadequate response to the demands of the national labor policy. Without disturbing the Commission's conclusion that the purpose and effect of the nonmember participation agreement at issue here were "to control or affect competition between members and nonmembers," 18 F. M. C., at 201, and hence that it was within the literal terms of § 15, and without holding that the agreement would qualify for an antitrust exemption under the relevant cases, the Court of Appeals ruled that *any* collective-bargaining contract, whatever its impact on competition, was exempt from filing with the Commission. Alternatively, the Court of Appeals held that, even if its *per se* rule excluding collective-bargaining agreements from the reach of § 15 was infirm, the Commission had erred in refusing to exempt from filing the particular nonmember participation agreement in question here.

We granted the petition for certiorari filed by the United States and the Commission, 430 U. S. 905 (1977), which raises two issues: whether the national labor policy requires exempting collective-bargaining contracts as a class from the filing

requirements of § 15 and, if not, whether the agreement at issue here is nevertheless exempt from those requirements.

II

We cannot agree with the holding below that, whatever their effect on competition might be, collective-bargaining contracts are categorically exempt from the filing requirements of § 15 of the Shipping Act. Section 15 on its face reaches any contract between carriers "controlling, regulating, preventing, or destroying competition." If a contract is of that nature, it is within the reach of § 15 and subject to the Commission's jurisdiction, and it is quite untenable to suggest that collective-bargaining contracts *never* control, regulate, prevent, or destroy competition. See *Mine Workers* v. *Pennington,* 381 U. S. 657 (1965); *Allen Bradley Co.* v. *Electrical Workers,* 325 U. S. 797 (1945). If subject to § 15, a filed agreement must be approved by the Commission unless it is discriminatory or unfair, operates to the detriment of the commerce of the United States, or is contrary to the public interest. Because § 15 provides that an approved agreement will not be subject to the antitrust laws, it is apparent that Congress assigned to the Commission, not to the courts, the task of initially determining which anticompetitive restraints are to be approved and which are to be disapproved under the general statutory guidelines. It is equally apparent that as a substantive matter, Congress anticipated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry.

That the Commission is the public arbiter of competition in the shipping industry is reflected in prior holdings that in reaching its decision under § 15 the Commission *must* "consider the antitrust implications of an agreement before approving it," *FMC* v. *Seatrain Lines, Inc.,* 411 U. S. 726, 739 (1973), and should approve an anticompetitive agreement only if it is " 'required by a serious transportation need, neces-

sary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'" *FMC* v. *Svenska Amerika Linien,* 390 U. S. 238, 243 (1968). The Commission, nevertheless, may approve agreements "even though they are violative of the antitrust laws . . . ." *Seatrain, supra,* at 728.

The removal of the task of initially overseeing private restraints on competition from the regime of the antitrust laws and the courts is not a historical anachronism that we are entitled to ignore. Congress responded to *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481 (1958), which held that a particular system of dual rates adopted by a shipping conference violated § 14 of the Shipping Act, by suspending the effect of that decision pending full study and permanent legislation. After extensive investigation, important amendments were forthcoming in 1961, Pub. L. 87–346, 75 Stat. 763; but the Act's basic approach—that the regulation of competition in the shipping industry is to be an administrative function, subject to judicial review—was reaffirmed. Indeed, § 15 was amended "by enlarging and clarifying the [Commission's] powers over agreements filed thereunder" by, among other things, the addition of the public interest standard to § 15. H. R. Rep. No. 498, 87th Cong., 1st Sess., 17–18 (1961). Section 15 was declared by the Antitrust Subcommittee of the House Judiciary Committee, which undertook a three-year study of "the entire gamut of antitrust problems in the ocean freight industry . . . ," to be "the heart of the Shipping Act." H. R. Rep. No. 1419, 87th Cong., 2d Sess., 2, 15 (1962).

It is appropriate, therefore, that the Court has recognized the broad reach of § 15 and resisted improvident attempts to narrow it. In *Volkswagenwerk* v. *FMC,* 390 U. S. 261 (1968), a collective-bargaining agreement between PMA and the Union included a provision requiring PMA to create a sizable fund to be used to mitigate the impact of technological unemployment upon employees. PMA reserved the right to

determine how the fund was to be raised, and thereafter it settled upon a particular method by which its members would contribute to the fund. The issue then arose whether this latter agreement was within the Commission's jurisdiction under § 15. The Commission held that, although the assessment formula arrived at was within the literal language of the section, it was exempt from filing since § 15 should be applied only to those agreements that affect competition among the carriers in their dealings with the shipping and traveling public.[16] The Court of Appeals affirmed; but we reversed, rejecting the Commission's "extremely narrow view of a statute that uses expansive language." 390 U. S., at 273. In response to the Commission's expressed desire to read § 15 narrowly in order to minimize the antitrust exemption, we noted that "antitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved . . . ," 390 U. S., at 273, and that "in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust implications." *Id.*, at 273–274. Hence, "[t]o limit § 15 agreements that 'affect competition,' as the Commission used that phrase . . . simply [did] not square with the structure of the statute," *id.*, at 275, and "would [render] virtually meaningless" major parts of § 15's filing provisions. 390 U. S., at 275 n. 23.

Because *Volkswagenwerk* dealt only with the agreed-upon assessment formula, the Court noted that no question had been raised about the validity of the underlying collective-bargaining contract. The opinion does not, therefore, determine one way or the other whether collective-bargaining contracts are ever within the reach of § 15; but the Court did

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[16] The Commission concluded that the agreement in question did not affect "outsiders" because there was no express agreement among the PMA members to pass on all or a portion of the assessments to the carriers and shippers served by the terminal operators. *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.*, 9 F. M. C. 77, 82–83 (1965).

emphasize the breadth of the statutory language and the determination of Congress, reflected in § 15, to "subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry." 390 U. S., at 276. At the very least, the opinion counsels against implying broad exemptions for agreements, collective-bargaining contracts or otherwise, whose impact on competition is "neither *de minimis* nor routine." *Id.*, at 277.

In the present case, the Court of Appeals' removal from the Commission's jurisdiction of all collective-bargaining contracts, regardless of how anticompetitive they might be, and whether or not exempt under the antitrust laws, would appear to be contrary to the plain terms of § 15. The Court of Appeals was not unaware that it was depriving the Commission of the power to approve or disapprove anticompetitive contracts that § 15 on its face clearly confers, but it thought its holding necessary to implement the collective-bargaining system established by the federal statutes dealing with labor-management relations, including those in the shipping industry. While there is no doubt that the courts must give all due effect to each of two seemingly overlapping statutes, we think the Court of Appeals misconceived its task here.

The principal objection to Commission jurisdiction over *any* bargaining agreement was that under § 15 agreements subject to filing cannot be implemented *prior* to approval or after disapproval. This alone was enough to exempt collective-bargaining contracts from filing under § 15, for, as the Court of Appeals understood the collective-bargaining system mandated by the National Labor Relations Act, one of its essential elements is for the parties to be legally free "to implement promptly the compromise agreements worked out in eleventh-hour bargaining sessions . . . ." 177 U. S. App. D. C., at 259, 543 F. 2d, at 406. Subjecting negotiated labor agreements to filing and approval "would make nearly impossible the maintenance or prompt restoration of industrial peace." *Ibid.*

Prompt implementation of lawful collective-bargaining agreements is indeed an important consideration, but the fears of the Court of Appeals as to the possible impact of the Commission's decision on the collective-bargaining process are exaggerated and do not justify the major surgery performed on § 15 by the decision below. In the first place, the Commission's decision would not require the filing of all or even most of the collective-bargaining contracts entered into in the shipping industry. Because § 15 applies only to agreements between at least two parties subject to the Act, see n. 1, *supra,* collective-bargaining contracts between the Union and a single employer would not have to be filed. Moreover, not all collective-bargaining agreements between the Union and PMA would be subject to the requirements of § 15. Under § 15, filed agreements must be approved unless they operate to the detriment of commerce, are contrary to the public interest, or otherwise fail to satisfy the specified standards. Under these standards, it would be difficult to conclude that ordinary collective-bargaining agreements establishing wages, hours, and working conditions in a bargaining unit could or would be disapproved as contrary to the public interest or detrimental to commerce. Such contracts are the product of bargaining compelled by the labor laws, which themselves were enacted pursuant to the power of Congress to regulate commerce in the public interest. They are also the kind of contracts that the courts, because of the collective-bargaining regime established by the labor laws, in the main have declared to be beyond the reach of the antitrust laws, the statutes specifically designed to protect the commerce of the United States from anticompetitive restraints.

The Commission has recognized that the vast majority of collective-bargaining arrangements cannot be deemed candidates for disapproval under § 15 and that they would be routinely approved even if filed. Consistent with its power under § 35 of the Shipping Act, 39 Stat. 738, as added, 80 Stat.

1358, 46 U. S. C. § 833a, in appropriate circumstances to exempt from § 15 filing requirements "any class of agreements between persons subject to this chapter or any specified activity of such persons . . . ," [17] the Commission, by adjudication, has determined that it will recognize a "labor exemption" from the filing requirements of § 15 for collective-bargaining contracts falling within the boundaries of the exemption defined by its announced criteria.[18] In doing so, the Commission has been guided by its understanding of our cases, and those of other courts, that recognize and define an exemption from the antitrust laws for certain contracts between management and labor. It appears to be the intention of the Commission to exercise jurisdiction over only those collective-bargaining contracts that in its view would not be exempt from examination under antitrust laws and that should be reviewed under Shipping Act standards. We therefore doubt that the Commission's decision will have a broad impact on labor-management relations. At least, it has not been demonstrated at this juncture that the collective-bargaining concerns cited by the Court of Appeals are sufficient to require complete exemption for labor agreements and the consequent partial emasculation of the statutory scheme for administrative review of anticompetitive agreements.

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[17] Section 35, as set forth in 46 U. S. C. § 833a, provides:

"The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of such persons from any requirement of this chapter, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

"The Commission may attach conditions to any such exemptions and may, by order, revoke any such exemption.

"No order or rule of exemption or revocation of exemption shall be issued unless opportunity for hearing has been afforded interested persons."

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

Second, the Commission, in any event, claims the authority, which it has exercised, see *New York Shipping Assn.—NYSA–ILA Man-Hour/Tonnage Method of Assessment,* 16 F. M. C. 381 (1973), aff'd, 495 F. 2d 1215 (CA2), cert. denied, 419 U. S. 964 (1974), to issue conditional approval of filed agreements pending final decision as to their legality; and it is not clear why this mechanism is not amply responsive to the fears of undue delay or why its adequacy should now be debated since the parties could have, but did not, request early, conditional approval. The Court of Appeals did not deny that the Commission could permit implementation of filed agreements prior to a final decision, but it thought the mechanism only a partial alleviation of the problem since the parties still would face the "specter" of a later administrative invalidation of perhaps a crucial part of a collective-bargaining contract. But it is not immediately obvious why provisions of a collective-bargaining contract that appear obviously illegal to the Commission should be immediately implemented pending final decision. Furthermore, if a collective-bargaining contract having serious anticompetitive aspects is not subject to filing under § 15, as the Court of Appeals would have it, the parties would in any event face the uncertainty of possible invalidation and of treble damages after long and difficult litigation in an antitrust court. At least under § 15, it would be possible that an anticompetitive collective-bargaining contract that would not survive scrutiny under the antitrust laws could be approved by the Commission, if it served important regulatory goals, and hence would be insulated from antitrust attack. Indeed, a critical aspect of the regulatory plan devised by Congress is the requirement of administrative judgment with respect to all of the specified contracts required to be filed. It was therefore error for the Court of Appeals to hold that the legality of collective-bargaining contracts, challenged as anticompetitive and nonexempt, must be judicially determined under the antitrust laws without interposition of the admin-

istrative judgment and without regard for Shipping Act considerations.

III

The Court of Appeals also ruled that even absent a blanket exemption from § 15 for collective-bargaining agreements, the Commission should not have exercised § 15 jurisdiction in this case but should have exempted the nonmember participation agreement from filing. In doing so, the court appeared to disagree with the Commission's weighing of the impact on shipping interests of holding the agreement exempt against the impact on collective-bargaining interests of requiring filing and approval under § 15. Perhaps because under the Act this kind of comparison must be the business of the Commission if all collective agreements are not exempt, the Court of Appeals offered little to support this alternative judgment. It suggested that the Commission had failed to realize that the nonmember participation agreement in the last analysis was merely an effort to force the public ports into a multiemployer bargaining unit against their will, an issue clearly within the National Labor Relations Board's authority and one in which the Commission should not intermeddle. The argument is wide of the mark. The Commission has not challenged the power of the Board to determine bargaining units; neither the Commission nor the parties have authority to change a unit certified by the Board. Rather than relying on the Board to resolve any bargaining-unit problem, if there was one, PMA and the Union agreed to impose bargaining-unit terms on employers outside the unit.

Furthermore, the Court of Appeals recognized that the "Supreme Court has ruled against primary jurisdiction in the NLRB for anticompetitive agreements," 177 U. S. App. D. C., at 263, 543 F. 2d, at 410, but went on to conclude that we had removed from all primary administrative cognizance the entire question of accommodating collective-bargaining considerations and the public interest in competition. We doubt that our

opinions should be so broadly read. Congress has not authorized the NLRB to police, modify, or invalidate collective-bargaining contracts aimed at regulating competition or to insulate bargaining agreements from antitrust attack. But here, as we have said, Congress took the different course of committing to the Commission the initial task of approving or disapproving all agreements that control, regulate, prevent, or destroy competition. However much the courts might consider this to be a judicial function, particularly when it is necessary to accommodate the possibly conflicting policies of the labor and shipping laws, we have no warrant to ignore congressional preferences written into § 15 of the Shipping Act.

IV

Although the Court of Appeals did not otherwise challenge the content or application of the Commission's guidelines for resolving issues as to its jurisdiction over collective-bargaining agreements, the respondents urge that the Commission has misread the relevant cases. In particular, they fault the Commission's findings with respect to the competitive impact of the nonmember participation agreement and the failure to find that the terms under challenge constituted serious antitrust violations. These submissions are unsound. It is plain from our cases that an antitrust case need not be tried and a violation found before a determination can be made that a collective-bargaining agreement is not within the labor exemption, just as it is clear that denying the exemption does not mean that there is an antitrust violation.[19] Insofar as the asserted exemption for collective-bargaining contracts is con-

[19] In *Connell Construction Co.* v. *Plumbers & Steamfitters,* 421 U. S. 616 (1975), for example, the Court, after concluding that the agreement in question was not entitled to the nonstatutory labor exemption from the antitrust laws, remanded for consideration whether the agreement violated the Sherman Act. See also *Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676, 688–689 (1965) (opinion of WHITE, J.).

cerned, the Commission found all it needed to find to assume jurisdiction and proceed with the case under § 15 when it concluded that PMA and the Union had undertaken to impose employment terms and conditions on employers outside the bargaining unit. As we have previously observed:

> "[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry."
>
> "[A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Mine Workers* v. *Pennington,* 381 U. S., at 665–666.

Here, both the Commission and the Court of Appeals understood the nonmember participation agreement to require nonmembers to participate in all fringe-benefit plans agreed upon between the PMA and the Union, to observe PMA-determined labor policies in the event of a work stoppage, and to observe the same work rules with respect to the hiring-hall work force. The result, the Commission found, would be higher costs for nonmembers and the elimination of what the PMA considered to be "a competitive disadvantage" to its members.[20] Accordingly, the Commission was warranted in finding that "the purpose of the supplemental agreement

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[20] The PMA thought that the nonmembers enjoyed an advantage in that they were able to "pick and choose fringe benefits on a piecemeal basis . . . [and could] get favored treatment in regard to the utilization of the workforce, the employment of steady men, the privilege of working when members [could not], and [that the nonmembers] even [went] so far as to take advantage of that latter situation and handle cargo which would otherwise be handled by members during strike or stoppage periods." App. 102.

[was] . . . to place nonmembers on the same 'competitive' basis as members of the PMA." 18 F. M. C., at 201.

We are thus unpersuaded that the Commission did not make the requisite findings to sustain its view. Nor are we impressed with other arguments that in one guise or another are contentions that the Commission, for lack of ability and experience, should not purport to deal with any collective-bargaining agreement but should leave the entire matter of anticompetitive labor-management contracts to the courts and the antitrust laws. As we have said, Congress has made the Commission the arbiter of competition in the shipping industry; and if there are labor agreements so anticompetitive that they are vulnerable under the antitrust laws, it is difficult to explain why the Commission should not deal with them in the first instance and either approve or disapprove them under the standards specified in § 15.

In summary, we think the Commission was true to § 15 and that it has also demonstrated its sensitivity to the national labor policy by exempting from the filing requirements all collective-bargaining contracts that in its view would also be exempt from the antitrust laws. Because the Commission also has the power to approve filed agreements, even though anticompetitive, the Commission may also take into account any special needs of labor-management relationships in the shipping industry. We should add that since the Shipping Act contains its own standards for exempting and for approving and disapproving agreements between carriers, and because the ultimate issue in cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the antitrust laws, it will not necessarily be a misapplication of the statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE BLACKMUN 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.

The Court today holds that collective-bargaining agreements in the maritime industry are subject to the filing and prior approval requirements of § 15 of the Shipping Act, 1916 (Act), 46 U. S. C. § 814. Neither statutory language nor legislative history offers specific support for this result. For well over a half a century, the agency responsible for enforcing the Act did not consider § 15 previews of maritime labor contracts to be within its mission,[1] even though collective

[1] Prior to 1968, the Federal Maritime Commission (Commission) and its predecessors resisted the idea that § 15 reached agreements affecting employer-employee relationships. Three years after this Court's ruling in *Volkswagenwerk* v. *FMC*, 390 U. S. 261 (1968), however, the Commission held that § 15 applied to work-gang allocation and employee-recall provisions developed among members of a multiemployer association. The recall provision had been embodied in a collective-bargaining agreement. *United Stevedoring Corp.* v. *Boston Shipping Assn.*, 15 F. M. C. 33 (1971). On appeal, the United States, as statutory respondent, incorporating the positions of the Department of Labor and the National Labor Relations Board, objected to the Commission's decision. The opposition of the United States prompted the Commission to move for a remand for further consideration. The Court of Appeals granted the motion, expressing "astonishment" at the Commission's failure to recognize the difference "between attaching a separate, Section 15, agreement, in which the union had little interest, to a collective bargaining agreement, and making a multi-employer agreement with a union, eyeball to eyeball, but which, by the very fact that it is multi-employer, has some effect on employer competition." *Boston Shipping Assn.* v. *United States*, 8 SRR 20,828, 20,830 (CA1 1972). On remand, the Commission found that both provisions were entitled to a "labor exemption" derived, by analogy, from this Court's labor-

bargaining is hardly a recent development in the major ports of the Nation.[2] No intervening legislation explains the Court's willingness to recognize this belated assertion of jurisdiction.[3]

This decision would be debatable but unexceptional were it not for the presence of a competing statute. The task confronting the Court is one of reconciling the broad language of § 15 with the distinct policy of federal labor law embodied in the Labor Management Relations Act, 1947, 29 U. S. C. § 141 *et seq.* It seems to me that today's ruling undercuts federal labor policy, imposing undue burdens on collective bargaining, without advancing significantly any Shipping Act objective. I therefore dissent.

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antitrust decisions. *United Stevedoring Corp.* v. *Boston Shipping Assn.*, 16 F. M. C. 7, 14–15 (1972).

Aside from the present controversy, the Commission's only other foray into the labor arena involved an assessment formula for funding a fringe-benefit program that was incorporated in a collective-bargaining agreement. *New York Shipping Assn.—NYSA–ILA Man-Hour/Tonnage Method of Assessment*, 16 F. M. C. 381 (1973). On appeal, the United States supported the Commission, while the Department of Labor and the National Labor Relations Board urged reversal. The Court of Appeals upheld the decision. *New York Shipping Assn.* v. *FMC*, 495 F. 2d 1215 (CA2), cert. denied, 419 U. S. 964 (1974).

[2] New York longshoremen were sufficiently organized by 1874 to conduct a five-week strike for higher wages. By 1914, New York locals formed the International Longshoremen's Association (ILA) and, by 1916, the union secured a portwide agreement. On the west coast, District Council 38 of the ILA, in 1915, entered into an agreement providing for wage increases with all employers in the Puget Sound-British Columbia area. C. Larrowe, Shape-Up and Hiring Hall 7–9, 87–89 (1955).

[3] The Court notes that the Shipping Act, including § 15, was extensively revised in 1961, Pub. L. 87–346, 75 Stat. 763, see *ante*, at 54, but offers no evidence that this re-examination of "the entire gamut of antitrust problems in the ocean freight industry," H. R. Rep. No. 1419, 87th Cong., 2d Sess., 2 (1962), touched upon the possibility of § 15's application to collective-bargaining agreements.

I

The sweeping generality of § 15 arguably would enable the statute to be applied to almost any agreement involving a party subject to the Act. But this merely accents the importance of construing its general language in light of the Act's purposes and the policies of other pertinent statutes. Section 15 has not been interpreted as reaching all agreements related to maritime transportation. See *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 731–734 (1973). Although *Volkswagenwerk* v. *FMC*, 390 U. S. 261 (1968), referred to today, *ante*, at 55–56, emphasized the breadth of the statutory language, the Court was careful to limit its holding to avoid any suggestion that collective-bargaining agreements must comply with the requirements of § 15.

In subjecting collective-bargaining agreements to prior clearance by the Commission under § 15, the Court goes well beyond the limits established in *Volkswagenwerk*. There, an earlier agreement between respondent Pacific Maritime Association (PMA) and respondent International Longshoremen's and Warehousemen's Union (Union) provided for the introduction of laborsaving devices and the elimination of certain work practices. The agreement required the creation of a "Mechanization and Modernization Fund" (Mech Fund) of $29 million to be used to mitigate the impact of technological unemployment upon employees. It reserved to the PMA alone the right to determine how to raise the fund from its members. The question before the Court was whether § 15 applied to a *subsequent* agreement among members of the PMA setting forth various formulas for collecting the Mech Fund. The Court held that the employers' "side agreement" would have a substantial impact on stevedoring and terminal charges, and required the prior approval of the Commission. Following the suggestion of the United States,[4] the Court

[4] "For purposes of deciding this case, we may assume that agreements which relate solely to collective bargaining or labor relations are excepted from the scope of Section 15 of the Shipping Act. Cf. *Kennedy* v. *Long*

restricted its holding to the "side agreement," explicitly disclaiming any intention to reach the underlying collective-bargaining agreement.

> "It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. *Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity.* But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case." 390 U. S., at 278 (emphasis supplied).

Island R. Co., 211 F. Supp. 478 (S. D. N. Y.), affirmed, 319 F. 2d 366 (C. A. 2), certiorari denied, 375 U. S. 830. *The basic agreement to provide a mechanization fund in a certain amount for the benefit of the longshoremen would appear to be of this character.* And after the Association agreed to create the fund it had an ancillary obligation to collect it somehow. But at issue here is only the side agreement among the Association's members prescribing a special assessment on the cargo handled by them. Such an agreement among employers apportioning the cost of the labor contract is not a part of that contract, involves no question of labor relations, and is not subject to the jurisdiction of the Labor Board." Brief for United States in *Volkswagenwerk* v. *FMC*, O. T. 1967, No. 69, pp. 31–32 (emphasis supplied); see Memorandum for United States in *Volkswagenwerk*, pp. 7–8.

The italicized language makes clear that the *Volkswagenwerk* Court perceived a distinction, material to Commission authority under § 15, between a collective-bargaining agreement, and implementing agreements among carriers, stevedoring contractors, and marine terminal operators.

In this case, I would follow what seems to have been the lead of the Court in *Volkswagenwerk*. A proper accommodation of the conflicting signals of the Shipping Act and federal labor policy requires that bona fide collective-bargaining agreements, arrived through arm's-length negotiations,[5] do not fall within § 15. As in other collective-bargaining contexts, labor and management in the maritime industry would be free to reach agreement without prior Government approval or control over the substantive terms of the bargain, while the agreement itself or its implementation would be subject to scrutiny under the antitrust laws and the specific prohibitions of §§ 16[6] and 17[7] of the Act.

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[5] Petitioners do not challenge the bona fides of the agreement in question. Indeed, they concede that the Union has a legitimate interest in the integrity and work opportunities of the registered work force and in the fringe benefits covered by the agreement. Reply Brief for Petitioners 6.

[6] Section 16 of the Act, as set forth in 46 U. S. C. § 815, provides in relevant part:

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

See n. 16, *infra*.

[7] Section 17 of the Act, as set forth in 46 U. S. C. § 816, provides in relevant part:

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or

II

The prospects for peaceful resolution of labor disputes in an industry marked by a history of industrial strife, see C. Larrowe, Shape Up and Hiring Hall 1–48, 83–138 (1955); *Volkswagenwerk* v. *FMC,* 390 U. S., at 296–299 (Douglas, J., dissenting in part), are not enhanced by the Court's imposition of a system of administrative prior restraints. Collective bargaining works best when the parties are free to arrive at negotiated solutions to problems without first having to secure the approval of Government regulators. The legal consequences of a bargain may be assessed after the fact, but the parties should be free to negotiate an agreement within the framework of procedures prescribed by the National Labor Relations Board (Board). Often negotiations are conducted under substantial constraints of time, and agreement is reached at the eleventh hour. If there is no agreement by the expiration date of the previous contract, or if an accord may not be executed because of a requirement of prior governmental approval, labor's "no contract, no work" tradition suggests the likelihood of a disruptive work stoppage. Moreover, the bargaining process itself may suffer where the parties know that any agreement is simply a tentative accord, subject to pre-implementation review by an administrative agency. As the Board noted in *New York Shipping Assn.* v. *FMC,* 495 F. 2d 1215 (CA2), cert. denied, 419 U. S. 964 (1974):

> "It is extremely difficult for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Com-

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delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." This provision may not reach the collective-bargaining agreement, but it would appear to be applicable to the implementation of the agreement by persons subject to the Act.

mission. This kind of administrative supervision will impede the process of collective bargaining and could inhibit negotiators' attempts to arrive at novel solutions to troublesome labor problems. The superimposition of the approval of the FMC over [matters that are] crucial to the agreement is likely to disrupt the process of collective bargaining and deter the speedy resolution of industrial disputes in the maritime industry." Brief for National Labor Relations Board as *Amicus Curiae* in Nos. 73–1919 and 73–1991 (CA2), p. 14.

Section 15 jurisdiction also entails recognition of a revisory power in the Commission over the substantive terms of collective-bargaining agreements. The Commission is empowered, after notice and hearing, to "disapprove, cancel or modify any agreement" that it finds to be "unjustly discriminatory or unfair," detrimental to commerce, contrary to the public interest, or otherwise violative of the Act. If—as the Court holds—this power is applicable to collective-bargaining agreements, it would exceed even the broad remedial authority of the Board itself, which falls short of any substantial interference with the "freedom of contract" of the parties. In *Porter Co.* v. *NLRB*, 397 U. S. 99 (1970), the Court held that the Board could not order an employer to grant the union a contract checkoff clause as a remedy for an acknowledged violation of the statutory duty to bargain in good faith.

"It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties. . . . The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement

> when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.*, at 107–108.

The parties cannot agree to terms that violate the law, but the remedy that is generally applied is post-execution invalidation and assessment of damages, rather than "official compulsion over the actual terms of the contract." [8] Hence, the Court's recognition of such a power reposing in the Commission is fundamentally at odds with national labor policy.

The Court insists that concern over "the possible impact of the Commission's decision on the collective-bargaining process [is] exaggerated and [does] not justify the major surgery performed on § 15 by the decision below." *Ante,* at 57. It is suggested that few labor agreements will have to be filed, because § 15 does not apply to contracts between a union and a single employer, and the Commission has forsworn jurisdiction over agreements falling within the uncertain contours of a "labor exemption" to be developed in the course of agency adjudications. *Ante,* at 57–58.

It is by no means clear to me that the Court's optimism is justified. Labor unions and management groups, following the course of caution, are likely to respond to today's decision by filing all labor agreements with the Commission. Respondents can take little comfort in the assertion that "routine," Brief for Petitioners 28, or "ordinary collective-bargaining

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[8] For example, although § 8 (e) of the National Labor Relations Act, 29 U. S. C. § 158 (e) (1970 ed., Supp. V), prohibits entering into a "hot cargo" agreement, there is no requirement that the parties submit a proposed agreement to the Board for prior clearance. The Board's remedial authority is limited to the obtaining of a preliminary injunction under § 10 (*l*), 29 U. S. C. § 160 (*l*), and the ultimate issuance of a cease-and-desist order, requiring enforcement by a court of appeals.

agreements" will not "be subject to the requirements of § 15," *ante,* at 57.[9] Few agreements negotiated between a union and a multiemployer bargaining association for the purpose of governing working relations at a major port are likely to be so "routine" that the parties safely may assume that they enjoy an exemption from § 15. A degree of uncertainty and delay, then, would seem an inevitable byproduct of § 15 jurisdiction over maritime labor relations.

Similarly, the possibility that the Commission may find that a particular agreement qualifies for a "labor exemption" does not offer a realistic palliative for the probable impact of the Court's decision on free collective bargaining. The Court suggests that the Commission may apply its special understanding of the requirements of anticompetitive policy,[10] but there is no well-developed corpus of maritime labor-antitrust decisions to guide the formulation of labor agreements in the industry. The Commission has identified four nonexclusive, nondeterminative criteria to inform its "labor exemption"

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[9] The Court's discussion on this point is somewhat unclear. The argument appears to be, as observed in the text, that "ordinary collective-bargaining agreements" would not "be subject to the requirements of § 15," *ante,* at 57, apparently because their conformity with antitrust and Shipping Act policies may be presumed. If the Court is simply saying, however, that such agreements are likely to be "routinely approved even if filed," *ibid.,* this is no answer to respondents' contention that compliance with § 15 prevents the prompt implementation of compromise agreements worked out in eleventh-hour bargaining sessions that often is necessary to the preservation of labor peace.

[10] "We should add that since the Shipping Act contains its own standards for exempting and for approving and disapproving agreements between carriers, and because the ultimate issue in cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the antitrust laws, it will not necessarily be a misapplication of the statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts." *Ante,* at 63.

rulings.[11] The brief history of the Commission's entry into the maritime labor field, however, see n. 1, *supra,* offers little basis for hope that its assertion of § 15 jurisdiction will not impair the collective-bargaining process. In the final analysis, the substantial penalties provided by the Act [12] for "guessing wrong" make it unlikely that the disruption and uncertainty inherent in this prior-restraint scheme will be allayed significantly by the rulings of a federal agency inexpert in labor and labor-antitrust matters.[13]

III

I cannot agree that either the statutory language or the

[11] "These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we. Each of the following criteria deserves consideration, but it is obvious that each element is not in and of itself controlling. They are rather guidelines or 'rules of thumb' for each factual situation." *United Stevedoring Corp.* v. *Boston Shipping Assn.,* 16 F. M. C., at 12.

Although the Commission has promised to undertake a rulemaking proceeding to promulgate more precise standards for its "labor exemption," *id.,* at 15, no regulations have been forthcoming.

[12] Noncompliance with § 15 exposes the offending party to a civil penalty of not more than $1,000 for each day of violation. If the agreement, or its implementation, is ultimately held to violate § 16 as well, the party also may be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

[13] The power of the Commission to grant temporary approvals under § 15, *e. g., New York Shipping Assn.* v. *FMC,* 495 F. 2d, at 1218, has not been passed on by a federal court, see *Marine Cooks & Stewards* v. *FMC,* No. 75–2013 (CADC Feb. 4, 1977) (dismissing appeal). In any event, this dispensation is a matter of administrative grace. The problems of uncertainty and delays are not likely to disappear because there is a chance that the Commission may be persuaded to issue a temporary approval. And, as the Court of Appeals recognized, even if such a power and its frequent exercise are assumed, interim approval "does not remove the possibility of later unilateral modification by the Commission . . . ." 177 U. S. App. D. C. 248, 260, 543 F. 2d 395, 407 (1976).

legislative history [14] of § 15 requires that it be made applicable to collective-bargaining agreements. Neither contains any reference to labor agreements. Although § 15 reaches a broad spectrum of arrangements, its terms apply only to agreements among "common carriers by water" or "other persons subject to this chapter." [15] Unions are not persons subject to the Act. One would have thought that if Congress had wished to include collective-bargaining agreements within the scope of § 15, it would have done so specifically or, at least,

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[14] Petitioners concede that "[t]he legislative history of the Shipping Act is unilluminating concerning Congress' specific intent where a labor union is a signatory to an agreement otherwise subject to the Act. . . ." Brief for Petitioners 24 n. 25.

Legislative developments after the passage of the Shipping Act highlight the improbability of § 15 jurisdiction over labor agreements. In 1938, Congress created a Maritime Labor Board (MLB) for the purpose of encouraging collective bargaining and assisting in the peaceful settlement of disputes through mediation. A provision of the 1938 measure, § 1005, 52 Stat. 967, required every maritime employer to file with the MLB a copy of every contract with any group of its employees covering wages, hours, and working conditions. A 1941 House Committee Report on a bill providing for a two-year extension of the 1938 machinery noted:

"This is the only Government agency with which copies of all labor agreements are required to be filed and these have been studied by the Board with a view to promoting stable labor relations in the maritime industry.

"One of the most unique provisions . . . requires the filing with the Board of all maritime labor agreements. The 4,303 collective agreements filed with the Maritime Labor Board represent the most complete file of collective agreements in the maritime industry, *as employers are not required to file agreements, covering their maritime employees, with any other Federal agency.*" H. R. Rep. No. 354, 77th Cong., 1st Sess., 5 (1941) (emphasis supplied).

The MLB ultimately was discontinued.

[15] The term "other person subject to this chapter" "means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U. S. C. § 801.

it would have provided for jurisdiction over the indispensable party to such an agreement—the labor union.[16]

The terms of § 15 must be construed in light of the considerations that led to federal regulation of the maritime industry [17] and encouraged Congress to empower the Commission to immunize restrictive agreements among shippers and others subject to the Act from all antitrust scrutiny.[18] The Court's ruling abstracts this power of approval from the particular context that prompted Congress to accord certain agreements an immunity premised on Shipping Act policies which did not necessarily reflect antitrust principles.[19] In

[16] By contrast, § 16 bars certain discriminatory acts engaged in by "any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person . . . ." The term "person" "includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or possession thereof, or of any foreign country." 46 U. S. C. § 801.

[17] The guiding force in the development of the Shipping Act was the House Committee that issued the "Alexander Report." House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations, H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914). See *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 490 (1958). The Alexander Committee principally addressed the methods for control of competition employed by steamship lines and water carriers that had cartelized much of the industry. Alexander Report 409–412, 415, 421–422. To ensure Government surveillance of these practices, the Committee recommended that all carriers engaged in the foreign and domestic trade of the United States file with the Government all agreements entered into with any other carrier, shipper, railroad, or other transportation agencies. *Id.*, at 419–420, 422–423.

[18] Concluding that outright prohibition of steamship agreements and conference arrangements would result only in rate wars and anticompetitive mergers, the Alexander Committee "chose to permit continuation of the conference system, but to curb its abuses by requiring government approval of conference agreements." *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 738 (1973).

[19] At least until 1961, it was an open question whether the Commission could take antitrust policies into account when ruling on proposed agreements. *Id.*, at 739. Apparently, the approval of an agreement, premised

Volkswagenwerk, the Court recognized § 15 jurisdiction over an agreement among members of respondent Association, to which a grant of immunity, after Commission study and approval, would have been understandable. That agreement presented only Shipping Act considerations. As the Government pointed out in that case, the assessment formula was "not a part of [the labor] contract, involve[d] no question of labor relations, and [was] not subject to the jurisdiction of the Labor Board." See n. 4, *supra.* I find it difficult to believe, however, that Congress in 1916 intended to empower the Commission to approve, and thereby immunize from the reach of the antitrust laws, the varied terms of collective-bargaining agreements.

The Commission in this case found that the agreement fell within the third category of § 15—which concerns agreements "controlling, regulating, preventing, or destroying competition." *Pacific Maritime Assn.—Cooperative Working Arrangements,* 18 F. M. C. 196 (1975). Undoubtedly, some maritime labor agreements will pose antitrust problems. But we must recognize, as we did in *FMC* v. *Seatrain Lines, Inc.,* that a broad "reading of the Commission's jurisdiction would increase the number of cases subject to potential antitrust immunity," and "conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, see, *e. g., United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305, 316 (1956) . . . ." 411 U. S., at 733, and n. 8.

Plenary review by the Commission of all maritime labor agreements that now will have to be filed in their entirety may be avoided only by retroactive, piecemeal grants of a "labor exemption." [20] The better course would be to recognize that

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on a consideration of Shipping Act policies alone, was sufficient to confer an immunity from the antitrust laws.

[20] The Commission's assertion of power to accord a "labor exemption" after filing to particular collective-bargaining agreements, or portions thereof, does not fit neatly within the authorization of § 35 of the Act,

bona fide collective-bargaining agreements, as a class, do not come within § 15.

IV

An exemption from the filing and prior-clearance regime of § 15 would not shield collective-bargaining agreements from all scrutiny under the Shipping Act. It would remain open to the Commission to determine that a particular agreement was not the product of arm's-length negotiations, but rather was an effort to circumvent § 15 by clothing a restrictive arrangement otherwise subject to the filing requirement with the trappings of a labor accord. Moreover, even a bona fide collective-bargaining agreement, or at least action taken in its implementation, may be reviewed under §§ 16 and 17. Petitioners have not demonstrated that vindication of Shipping Act policies requires the application of § 15, in the first instance, to genuine collective-bargaining agreements. Indeed, the Commission's recognition of a "labor exemption" and its unreviewed assertion of power to accord "interim approval" to labor agreements, see n. 13, *supra,* suggest that the proposed remedy for an occasional evasion of the Shipping Act through the device of the collective-bargaining agreement may be likened to using "a sledge hammer to fix a watch." *Volkswagenwerk* v. *FMC,* 390 U. S., at 296 (Douglas, J., dissenting in part).[21]

I respectfully dissent.

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46 U. S. C. § 833a. That provision contemplates action "for the future," after opportunity for a hearing, exempting "any class of agreements between persons subject to this chapter or any specified activity of such persons . . . ."

[21] Because of my conclusion that § 15, properly read, does not apply to bona fide collective-bargaining agreements, I do not reach the question of whether the Commission interpreted correctly *Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), to deny a "labor exemption" from the Shipping Act to the agreement in question.

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. *v.* HOROWITZ

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

No. 76–695. Argued November 7, 1977—Decided March 1, 1978

The academic performance of students at the University of Missouri-Kansas City Medical School is periodically assessed by the Council of Evaluation, a faculty-student body that can recommend various actions, including probation and dismissal; its recommendations are reviewed by the faculty Coordinating Committee, with ultimate approval by the Dean. After several faculty members had expressed dissatisfaction with the clinical performance of respondent medical student during a pediatrics rotation, the Council recommended that she be advanced to her final year on a probationary basis. Following further faculty dissatisfaction with respondent's clinical performance that year, the Council in the middle of the year again evaluated her academic progress and concluded that she should not be considered for graduation in June of that year and that, absent "radical improvement," she be dropped as a student. As an "appeal" of that decision, respondent was allowed to take examinations under the supervision of seven practicing physicians, only two of whom thereafter recommended that respondent be allowed to graduate on schedule. Two others recommended that she be dropped from the school immediately; and three recommended that she not be allowed to graduate as scheduled but that she be continued on probation. The Council then reaffirmed its prior position. At a subsequent meeting, having noted that respondent's recent surgery rotation had been rated "low-satisfactory," the Council concluded that, barring reports of radical improvement, respondent should not be allowed to re-enroll; and when a report on another rotation turned out to be negative, the Council recommended that respondent be dropped. When notified of that decision, which the Coordinating Committee and Dean had approved, respondent appealed to the Provost, who after review sustained the decision. Respondent thereafter brought this action against petitioner officials under 42 U. S. C. § 1983, contending, *inter alia,* that she had not been accorded due process prior to her dismissal. The District Court, after a full trial, concluded that respondent had been afforded all rights guaranteed by the Fourteenth Amendment. The Court of Appeals reversed. *Held:*

1. The procedures leading to respondent's dismissal for academic deficiencies, under which respondent was fully informed of faculty dissatisfaction with her clinical progress and the consequent threat to respondent's graduation and continued enrollment, did not violate the Due Process Clause of the Fourteenth Amendment. Dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decisionmaking body. *Goss* v. *Lopez,* 419 U. S. 565, distinguished. Pp. 84–91.

2. Though respondent contends that the case should be remanded to the Court of Appeals for consideration of her claim of deprivation of substantive due process, this case, as the District Court correctly concluded, reveals no showing of arbitrariness or capriciousness that would warrant such a disposition, even if it were deemed appropriate for courts to review under an arbitrariness standard an academic decision of a public educational institution. Pp. 91–92.

538 F. 2d 1317, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and STEVENS, JJ., joined, and in Parts I, II–A, and III of which WHITE, J., joined. POWELL, J., filed a concurring opinion, *post,* p. 92. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 96. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post,* p. 97. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post,* p. 108.

Marvin E. Wright argued the cause for petitioners. With him on the brief were *Jackson A. Wright* and *Fred Wilkins.*

Arthur A. Benson II argued the cause and filed a brief for respondent.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent, a student at the University of Missouri-Kansas City Medical School, was dismissed by petitioner officials of the school during her final year of study for failure to meet academic standards. Respondent sued petitioners under 42

**Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

U. S. C. § 1983 in the United States District Court for the Western District of Missouri alleging, among other constitutional violations, that petitioners had not accorded her procedural due process prior to her dismissal. The District Court, after conducting a full trial, concluded that respondent had been afforded all of the rights guaranteed her by the Fourteenth Amendment to the United States Constitution and dismissed her complaint. The Court of Appeals for the Eighth Circuit reversed, 538 F. 2d 1317 (1976), and a petition for rehearing en banc was denied by a divided court. 542 F. 2d 1335 (1976). We granted certiorari, 430 U. S. 964, to consider what procedures must be accorded to a student at a state educational institution whose dismissal may constitute a deprivation of "liberty" or "property" within the meaning of the Fourteenth Amendment. We reverse the judgment of the Court of Appeals.

I

Respondent was admitted with advanced standing to the Medical School in the fall of 1971. During the final years of a student's education at the school, the student is required to pursue in "rotational units" academic and clinical studies pertaining to various medical disciplines such as obstetrics-gynecology, pediatrics, and surgery. Each student's academic performance at the School is evaluated on a periodic basis by the Council on Evaluation, a body composed of both faculty and students, which can recommend various actions including probation and dismissal. The recommendations of the Council are reviewed by the Coordinating Committee, a body composed solely of faculty members, and must ultimately be approved by the Dean. Students are not typically allowed to appear before either the Council or the Coordinating Committee on the occasion of their review of the student's academic performance.

In the spring of respondent's first year of study, several faculty members expressed dissatisfaction with her clinical

performance during a pediatrics rotation. The faculty members noted that respondent's "performance was below that of her peers in all clinical patient-oriented settings," that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene. Upon the recommendation of the Council on Evaluation, respondent was advanced to her second and final year on a probationary basis.

Faculty dissatisfaction with respondent's clinical performance continued during the following year. For example, respondent's docent, or faculty adviser, rated her clinical skills as "unsatisfactory." In the middle of the year, the Council again reviewed respondent's academic progress and concluded that respondent should not be considered for graduation in June of that year; furthermore, the Council recommended that, absent "radical improvement," respondent be dropped from the school.

Respondent was permitted to take a set of oral and practical examinations as an "appeal" of the decision not to permit her to graduate. Pursuant to this "appeal," respondent spent a substantial portion of time with seven practicing physicians in the area who enjoyed a good reputation among their peers. The physicians were asked to recommend whether respondent should be allowed to graduate on schedule and, if not, whether she should be dropped immediately or allowed to remain on probation. Only two of the doctors recommended that respondent be graduated on schedule. Of the other five, two recommended that she be immediately dropped from the school. The remaining three recommended that she not be allowed to graduate in June and be continued on probation pending further reports on her clinical progress. Upon receipt of these recommendations, the Council on Evaluation reaffirmed its prior position.

The Council met again in mid-May to consider whether respondent should be allowed to remain in school beyond June

of that year. Noting that the report on respondent's recent surgery rotation rated her performance as "low-satisfactory," the Council unanimously recommended that "barring receipt of any reports that Miss Horowitz has improved radically, [she] not be allowed to re-enroll in the . . . School of Medicine." The Council delayed making its recommendation official until receiving reports on other rotations; when a report on respondent's emergency rotation also turned out to be negative, the Council unanimously reaffirmed its recommendation that respondent be dropped from the school. The Coordinating Committee and the Dean approved the recommendation and notified respondent, who appealed the decision in writing to the University's Provost for Health Sciences. The Provost sustained the school's actions after reviewing the record compiled during the earlier proceedings.

II

A

To be entitled to the procedural protections of the Fourteenth Amendment, respondent must in a case such as this demonstrate that her dismissal from the school deprived her of either a "liberty" or a "property" interest. Respondent has never alleged that she was deprived of a property interest. Because property interests are creatures of state law, *Perry* v. *Sindermann,* 408 U. S. 593, 599–603 (1972), respondent would have been required to show at trial that her seat at the Medical School was a "property" interest recognized by Missouri state law. Instead, respondent argued that her dismissal deprived her of "liberty" by substantially impairing her opportunities to continue her medical education or to return to employment in a medically related field.

The Court of Appeals agreed, citing this Court's opinion in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972).[1] In that case,

[1] Respondent concedes that petitioners have not "invoke[d] any regulations to bar" her from seeking out employment in the medical

we held that the State had not deprived a teacher of any liberty or property interest in dismissing the teacher from a nontenured position, but noted:

> "[T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities." *Id.*, at 573.

We have recently had an opportunity to elaborate upon the circumstances under which an employment termination might infringe a protected liberty interest. In *Bishop* v. *Wood,* 426 U. S. 341 (1976), we upheld the dismissal of a policeman without a hearing; we rejected the theory that the mere fact of dismissal, absent some publicizing of the reasons for the action, could amount to a stigma infringing one's liberty:

> "In *Board of Regents* v. *Roth,* 408 U. S. 564, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would

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field or from finishing her medical education at a different institution. Brief for Respondent 21. Cf. *Board of Regents* v. *Roth,* 408 U. S., at 573. Indeed, the Coordinating Committee in accepting the recommendation of the Council that respondent be dismissed, noted that "as with all students, should sufficient improvement take place, she could be considered for readmission to the School of Medicine." The Court of Appeals, however, relied on the testimony of a doctor employed by the Kansas City Veterans' Administration to the effect that respondent's dismissal would be "a significant black mark." On the Medical School side, it was the doctor's view that respondent "would have great difficulty to get into another medical school, if at all." As for employment, if two people were applying for a position with the Veterans' Administration with "otherwise . . . equal qualifications, roughly, I would lean heavily to the other person who was not dismissed from a graduate school." 538 F. 2d 1317, 1320–1321, n. 3 (1976).

stretch the concept too far 'to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.' *Id.*, at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

"In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.*, at 348 (footnote omitted).

The opinion of the Court of Appeals, decided only five weeks after we issued our opinion in *Bishop*, does not discuss whether a state university infringes a liberty interest when it dismisses a student without publicizing allegations harmful to the student's reputation. Three judges of the Court of Appeals for the Eighth Circuit dissented from the denial of rehearing en banc on the ground that "the reasons for Horowitz's dismissal were not released to the public but were communicated to her directly by school officials." Citing *Bishop*, the judges concluded that "[a]bsent such public disclosure, there is no deprivation of a liberty interest." 542 F. 2d, at 1335. Petitioners urge us to adopt the view of these judges and hold that respondent has not been deprived of a liberty interest.

B

We need not decide, however, whether respondent's dismissal deprived her of a liberty interest in pursuing a medical career. Nor need we decide whether respondent's dismissal infringed any other interest constitutionally protected against deprivation without procedural due process. Assuming the

existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment. We agree with the District Court that respondent

> "was afforded full procedural due process by the [school]. In fact, the Court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct." App. 47.

In *Goss* v. *Lopez,* 419 U. S. 565 (1975), we held that due process requires, in connection with the suspension of a student from public school for disciplinary reasons, "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.,* at 581. The Court of Appeals apparently read *Goss* as requiring some type of formal hearing at which respondent could defend her academic ability and performance.[2] All

[2] The Court of Appeals held without elaboration that the dismissal had been "effected without the hearing required by the fourteenth amendment." 538 F. 2d, at 1321. No express indication was given as to what the minimum requirements of such a hearing would be. One can assume, however, that the contours of the hearing would be much the same as those set forth in *Greenhill* v. *Bailey,* 519 F. 2d 5 (CA8 1975), which also involved an academic dismissal and upon which the Court of Appeals principally relied. *Greenhill* held that the student must be "accorded an opportunity to appear personally to contest [the allegations of academic deficiency]. We stop short, however, of requiring full trial-type procedures in such situations. A graduate or professional school is, after all,

that *Goss* required was an "informal give-and-take" between the student and the administrative body dismissing him that would, at least, give the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Id.*, at 584. But we have frequently emphasized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.[3]

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the best judge of its students' academic performance and their ability to master the required curriculum. The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration. But an 'informal give-and-take' between the student and the administrative body dismissing him . . . would not unduly burden the educational process and would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" *Id.*, at 9 (footnote omitted), quoting *Goss* v. *Lopez*, 419 U. S., at 584. Respondent urges us to go even further than the Court of Appeals and require "the fundamental safeguards of representation by counsel, confrontation, and cross-examination of witnesses." Brief for Respondent 36.

[3] We fully recognize that the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss*. And a relevant factor in determining the nature of the requisite due process is "the private interest that [was] affected by the official action." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). But the severity of the deprivation is only one of several factors that must be weighed in deciding the exact due process owed. *Ibid.* We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment.

Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter. Thus, in *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 102 N. E. 1095 (1913), the Supreme Judicial Court of Massachusetts rejected an argument, based on several earlier decisions requiring a hearing in disciplinary contexts, that school officials must also grant a hearing before excluding a student on academic grounds. According to the court, disciplinary cases have

> "no application. . . . Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship." *Id.,* at 22–23, 102 N. E., at 1097.

A similar conclusion has been reached by the other state courts to consider the issue. See, *e. g., Mustell* v. *Rose,* 282 Ala. 358, 367, 211 So. 2d 489, 498, cert. denied, 393 U. S. 936 (1968); cf. *Foley* v. *Benedict,* 122 Tex. 193, 55 S. W. 2d 805 (1932). Indeed, until the instant decision by the Court of Appeals for the Eighth Circuit, the Courts of Appeals were also unanimous in concluding that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decisionmaking body. See *Mahavongsanan* v. *Hall,* 529 F. 2d 448 (CA5 1976);[4] *Gaspar* v. *Bruton,* 513

[4] "The district court's grant of relief is based on a confusion of the court's power to review *disciplinary* actions by educational institutions on the one hand, and *academic* decisions on the other hand. This Court has been in the vanguard of the legal development of due process protections for students ever since *Dixon* v. *Alabama State Board of Education,* 5 Cir. 1961, 294 F. 2d 150, *cert. denied* 1961, 368 U. S. 930 . . . . However,

F. 2d 843 (CA10 1975).[5] These prior decisions of state and federal courts, over a period of 60 years, unanimously holding that formal hearings before decisionmaking bodies need not be held in the case of academic dismissals, cannot be rejected lightly. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 118–119, 131–132 (1934); *Powell* v. *Alabama,* 287 U. S. 45, 69–71 (1932); *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922).

Reason, furthermore, clearly supports the perception of these decisions. A school is an academic institution, not a courtroom or administrative hearing room. In *Goss,* this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and ad-

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the due process requirements of notice and hearing developed in the *Dixon* line of cases have been carefully limited to disciplinary decisions. When we explained that 'the student at the tax supported institution cannot be arbitrarily disciplined without the benefit of the ordinary, well recognized principles of fair play', we went on to declare that '[w]e know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards. Indeed, *Dixon* infers to the contrary.' *Wright* v. *Texas Southern University,* 5 Cir. 1968, 392 F. 2d 728, 729. Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals." 529 F. 2d, at 449–450.

[5] In *Greenhill* v. *Bailey, supra,* the Court of Appeals held that a hearing had been necessary where a medical school not only dismissed a student for academic reasons but also sent a letter to the Liaison Committee of the Association of the American Medical Colleges suggesting that the student either lacked "intellectual ability" or had insufficiently prepared his course work. The court specifically noted that "there has long been a distinction between cases concerning disciplinary dismissals, on the one hand, and academic dismissals, on the other" and emphasized that it did not wish to "blur that distinction." 519 F. 2d, at 8. In the court's opinion, the publicizing of an alleged deficiency in the student's intellectual ability removed the case from the typical instance of academic dismissal and called for greater procedural protections. Cf. *Bishop* v. *Wood,* 426 U. S. 341 (1976).

ministrative factfinding to call for a "hearing" before the relevant school authority. While recognizing that school authorities must be afforded the necessary tools to maintain discipline, the Court concluded:

> "[I]t would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.
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> . . . . .
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> "[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect." 419 U. S., at 580, 583–584.

Even in the context of a school disciplinary proceeding, however, the Court stopped short of requiring a *formal* hearing since "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as a part of the teaching process." *Id.*, at 583.

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss,* the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." *Ibid.* The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have

the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute." *Goss* v. *Lopez,* 419 U. S., at 594 (POWELL, J., dissenting). This is especially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized. In *Goss,* this Court concluded that the value of some form of hearing in a disciplinary context outweighs any resulting harm to the academic environment. Influencing this conclusion was clearly the belief that disciplinary proceedings, in which the teacher must decide whether to punish a student for disruptive or insubordinate behavior, may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context. We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or harmful in finding out the truth as to scholarship." *Barnard* v. *Inhabitants of Shelburne,* 216 Mass., at 23, 102 N. E., at 1097.

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968). We see no reason to intrude on that historic control in this case.[6]

III

In reversing the District Court on procedural due process grounds, the Court of Appeals expressly failed to "reach the substantive due process ground advanced by Horowitz." 538 F. 2d, at 1321 n. 5. Respondent urges that we remand the cause to the Court of Appeals for consideration of this additional claim. In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." *Mahavongsanan* v. *Hall,* 529 F. 2d, at 449. See *Gaspar* v. *Bruton,* 513 F. 2d, at 850, and citations therein. Even assuming that the courts can review under such a standard an academic decision of a public educational

[6] Respondent contends in passing that she was not dismissed because of "clinical incompetence," an academic inquiry, but for disciplinary reasons similar to those involved in *Goss.* Thus, as in *Goss,* a hearing must be conducted. In this regard, respondent notes that the school warned her that significant improvement was needed not only in the area of clinical performance but also in her personal hygiene and in keeping to her clinical schedules. The record, however, leaves no doubt that respondent was dismissed for purely academic reasons, a fact assumed without discussion by the lower courts. Personal hygiene and timeliness may be as important factors in a school's determination of whether a student will make a good medical doctor as the student's ability to take a case history or diagnose an illness. Questions of personal hygiene and timeliness, of course, may seem more analogous to traditional factfinding than other inquiries that a school may make in academically evaluating a student. But in so evaluating the student, the school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the factfinding hearing. And the critical faculty-student relationship may still be injured if a hearing is required.

institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case.[7] Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking.[8]

The judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE POWELL, concurring.

I join the Court's opinion because I read it as upholding the District Court's view that respondent was dismissed for academic deficiencies rather than for unsatisfactory personal

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[7] Respondent alleges that the school applied more stringent standards in evaluating her performance than that of other students because of her sex, religion, and physical appearance. The District Court, however, found: "There was no evidence that [respondent] was in any manner evaluated differently from other students because of her sex or because of her religion. With regard to [respondent's] physical appearance, this in and of itself did not cause [her] to be evaluated any differently than any of the other students." App. 45.

[8] Respondent also contends that petitioners failed to follow their own rules respecting evaluation of medical students and that this failure amounted to a constitutional violation under *Service* v. *Dulles*, 354 U. S. 363 (1957). We disagree with both respondent's factual and legal contentions. As for the facts, the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent, as with the practical "appeal" that petitioners allowed respondent to take. The District Court specifically found that "the progress status of [respondent] in the medical school was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students, with the exception that [respondent's] docent . . . went to even greater lengths to assist [respondent] in an effort for her to obtain her M. D. degree, than he did for any of his other students." App. 45. As for the legal conclusion that respondent draws, both *Service* and *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), upon which *Service* relied, enunciate principles of federal administrative law rather than of constitutional law binding upon the States.

conduct, and that in these circumstances she was accorded due process.

In the numerous meetings and discussions respondent had with her teachers and advisers, see opinion of MR. JUSTICE MARSHALL, *post,* at 98–99, culminating in the special clinical examination administered by seven physicians,[1] *ante,* at 81, respondent was warned of her clinical deficiencies and given every opportunity to demonstrate improvement or question the evaluations. The primary focus of these discussions and examinations was on respondent's competence as a physician.

MR. JUSTICE MARSHALL nevertheless states that respondent's dismissal was based "largely" on "her conduct":

> "It may nevertheless be true, as the Court implies, *ante,* at 91 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be 'a good medical doctor.' Whether these inadequacies can be termed 'purely academic reasons,' as the Court calls them, *ibid.,* is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. *The relevant point is that*

[1] As a safeguard against erroneous judgment, and at respondent's request, App. 185, the Medical School submitted the question of respondent's clinical competency to a panel of "seven experienced physicians." Panel members were requested "to provide a careful, detailed, and thorough assessment of [respondent's] abilities at this time." *Ibid.* The Dean's letter to respondent of March 15, 1973, advised her quite specifically of the "general topic[s] in the curriculum about which we are asking [the panel] to evaluate your performance . . . ." *Ibid.* Each member of the examining panel was requested to "evaluate the extent of [respondent's] mastery of relevant concepts, knowledge, skills, and competence to function as a physician." *Id.,* at 209. The examinations by members of the panel were conducted separately. Two of the doctors recommended that respondent be graduated although one added that "she would not qualify to intern at the hospital where he worked." *Id.,* at 40. Each of the other five doctors submitted negative recommendations, although they varied as to whether respondent should be dropped from school immediately. *Ibid.*

respondent was dismissed largely because of her conduct, just as the students in Goss were suspended because of their conduct." Post, at 104 (emphasis added; footnotes omitted).

This conclusion is explicitly contrary to the District Court's undisturbed findings of fact. In one sense, the term "conduct" could be used to embrace a poor academic performance as well as unsatisfactory personal conduct. But I do not understand MR. JUSTICE MARSHALL to use the term in that undifferentiated sense.[2] His opinion likens the dismissal of respondent to the suspension of the students in *Goss* v. *Lopez,* 419 U. S. 565 (1975), for personal misbehavior. There is evidence that respondent's personal conduct may have been viewed as eccentric, but—quite unlike the suspensions in *Goss*—respondent's dismissal was not based on her personal behavior.

The findings of the District Court conclusively show that respondent was dismissed for failure to meet the academic standards of the Medical School. The court, after reviewing the evidence in some detail, concluded:

"The evidence presented in this case totally failed to

[2] Indeed, in view of MR. JUSTICE MARSHALL's apparent conclusion that respondent was dismissed because of some objectively determinable conduct, it is difficult to understand his conclusion that the special examination administered by the seven practicing physicians "may have been better than . . . a formal hearing." *Post,* at 102. That examination did not purport to determine whether, in the past, respondent had engaged in conduct that would warrant dismissal. Respondent apparently was not called upon to argue that she had not done certain things in the past. There were no facts found on that point. Nor did the doctors who administered the examination address themselves to respondent's conduct at the time, *apart from her ability to perform the clinical tasks physicians must master.* MR. JUSTICE MARSHALL says that this evaluation tested the truth of the assertions that respondent could not function as a doctor. *Post,* at 102–103, n. 14. This is a tacit recognition that the issue was an academic one, rather than one limited to whether respondent simply engaged in improper conduct.

> establish that plaintiff [respondent] was expelled for any reason other than the quality of her work." App. 44.[3]

It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum.[4] Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.[5]

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[3] The District Court also found:

"Considering all of the evidence presented, the Court finds that the grading and evaluating system of the medical school was applied fairly and reasonably to plaintiff, but plaintiff did not satisfy the requirements of the medical school to graduate from the medical school in June 1973." App. 45.

[4] Dr. William Sirridge was the faculty member assigned to respondent as her "chief docent" (faculty adviser). A portion of his testimony was summarized by the District Court as follows:

"He [Dr. Sirridge] emphasized that plaintiff's [respondent's] problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M. D. degree. He further testified that plaintiff cannot perform many of the necessary basic skills required of a practicing physician . . . ." *Id.*, at 35.

[5] MR. JUSTICE MARSHALL insists that calling this an academic judgment is an exercise in futility. *Post,* at 104–105, n. 18. As the Court points out, however, the distinction between dismissal for academic deficiency and dismissal for misconduct may be decisive as to the process that is due. *Ante,* at 89–90. A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause. An academic judgment also involves this type of objectively determinable fact—*e. g.,* whether the student gave certain answers on an examination. But the critical decision requires a subjective, expert evaluation as to

Because it is clear from the findings of fact by the District Court that respondent was dismissed solely on academic grounds, and because the standards of procedural due process were abundantly met before dismissal occurred,[6] I join the Court's opinion.

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

I join Parts I, II–A, and III of the Court's opinion and concur in the judgment.

I agree with my Brother BLACKMUN that it is unnecessary to decide whether respondent had a constitutionally protected property or liberty interest or precisely what minimum procedures were required to divest her of that interest if it is assumed she had one. Whatever that minimum is, the procedures accorded her satisfied or exceeded that minimum.

The Court nevertheless assumes the existence of a protected interest, proceeds to classify repondent's expulsion as an "academic dismissal," and concludes that no hearing of any kind or any opportunity to respond is required in connection with such an action. Because I disagree with this conclusion,

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whether that performance satisfies some predetermined standard of academic competence. That standard, in turn, is set by a similarly expert judgment. These evaluations, which go far beyond questions of mere "conduct," are not susceptible of the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct. Thus, the conclusion that a particular dismissal is academic—that it entails these expert evaluations—is likely to have controlling significance in determining how much and what sort of process is due.

[6] University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. Contrary to the suggestion of MR. JUSTICE MARSHALL, *post*, at 104–105, n. 18, the fact that a particular procedure is possible or available does not mean that it is required under the Due Process Clause. *Goss* v. *Lopez*, 419 U. S. 565 (1975), simply does not speak to that point.

I feel constrained to say so and to concur only in the judgment.

As I see it, assuming a protected interest, respondent was at the minimum entitled to be informed of the reasons for her dismissal and to an opportunity personally to state her side of the story. Of course, she had all this, and more. I also suspect that expelled graduate or college students normally have the opportunity to talk with their expellers and that this sort of minimum requirement will impose no burden that is not already being shouldered and discharged by responsible institutions.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court that, "[a]ssuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires." *Ante,* at 84–85. I cannot join the Court's opinion, however, because it contains dictum suggesting that respondent was entitled to even less procedural protection than she received. I also differ from the Court in its assumption that characterization of the reasons for a dismissal as "academic" or "disciplinary" is relevant to resolution of the question of what procedures are required by the Due Process Clause. Finally, I disagree with the Court's decision not to remand to the Court of Appeals for consideration of respondent's substantive due process claim.

I

We held in *Goss* v. *Lopez,* 419 U. S. 565 (1975), that

> "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.,* at 581.

There is no question that respondent received these protections, and more.[1]

According to the stipulation of facts filed in the District Court, respondent had a "discussion" with the Dean of the Medical School in mid-1972, at the close of her first year in school, during which she was notified of her unsatisfactory performance.[2] The Dean testified that he explained the nature of her problems to respondent twice at this meeting, so that she would fully understand them.[3] A letter from the Dean followed shortly thereafter, in which respondent was advised that she was being placed on probation because of, *inter alia,* "a major deficiency" in her "relationships with others," and her failure to "kee[p] to established schedules" and "atten[d] carefully to personal appearance." [4] The Dean again met with respondent in October 1972 "to call attention in a direct and supportive way to the fact that her performance was not then strong." [5]

In January 1973, there was still another meeting between respondent and the Dean, who was accompanied by respondent's docent and the chairman of the Council on Evaluation. Respondent was there notified of the Council's recommendation that she not graduate and that she be dropped from school unless there was "radical improvement" in her "clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism." [6] A letter from the Dean again

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[1] It is necessary to recount the facts underlying this conclusion in some detail, because the Court's opinion does not provide the relevant facts with regard to the notice and opportunity to reply given to respondent.

[2] App. 15. It is likely that respondent was less formally notified of these deficiencies several months earlier, in March 1972. See *id.,* at 100–101 (testimony of respondent's docent).

[3] *Id.,* at 146.

[4] *Id.,* at 15–16.

[5] *Id.,* at 147.

[6] *Id.,* at 18.

followed the meeting; the letter summarized respondent's problem areas and noted that they had been discussed with her "several times." [7]

These meetings and letters plainly gave respondent all that *Goss* requires: several notices and explanations, and at least three opportunities "to present [her] side of the story." 419 U. S., at 581. I do not read the Court's opinion to disagree with this conclusion. Hence I do not understand why the Court indicates that even the "informal give-and-take" mandated by *Goss, id.,* at 584, need not have been provided here. See *ante,* at 85–86, 89–91. This case simply provides no legitimate opportunity to consider whether "far less stringent procedural requirements," *ante,* at 86, than those required in *Goss* are appropriate in other school contexts. While I disagree with the Court's conclusion that "far less" is adequate, as discussed *infra,* it is equally disturbing that the Court decides an issue not presented by the case before us. As Mr. Justice Brandeis warned over 40 years ago, the " 'great gravity and delicacy' " of our task in constitutional cases should cause us to " 'shrink' " from " 'anticipat[ing] a question of constitutional law in advance of the necessity of deciding it,' " and from " 'formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander* v. *TVA,* 297 U. S. 288, 345–347 (1936) (concurring opinion).

II

In view of the Court's dictum to the effect that even the minimum procedures required in *Goss* need not have been provided to respondent, I feel compelled to comment on the extent of procedural protection mandated here. I do so within a framework largely ignored by the Court, a framework derived from our traditional approach to these problems. According to our prior decisions, as summarized in *Mathews* v.

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[7] *Id.,* at 182–183.

Eldridge, 424 U. S. 319 (1976), three factors are of principal relevance in determining what process is due:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.,* at 335.

As the Court recognizes, the "private interest" involved here is a weighty one: "the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss.*" *Ante,* at 86 n. 3. One example of the loss suffered by respondent is contained in the stipulation of facts: Respondent had a job offer from the psychiatry department of another university to begin work in September 1973; the offer was contingent on her receiving the M. D. degree.[8] In summary, as the Court of Appeals noted:

> "The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F. 2d 1317, 1321 (CA8 1976).

As Judge Friendly has written in a related context, when the State seeks "to deprive a person of a way of life to which [s]he has devoted years of preparation and on which [s]he . . . ha[s] come to rely," it should be required first to provide a "high level of procedural protection." [9]

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[8] *Id.,* at 16.

[9] "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296–1297 (1975) (revocation of professional licenses).

Neither of the other two factors mentioned in *Mathews* justifies moving from a high level to the lower level of protection involved in *Goss*. There was at least some risk of error inherent in the evidence on which the Dean relied in his meetings with and letters to respondent; faculty evaluations of such matters as personal hygiene and patient and peer rapport are neither as "sharply focused" nor as "easily documented" as was, *e. g.*, the disability determination involved in *Mathews, supra,* at 343. See *Goss* v. *Lopez,* 419 U. S., at 580 (when decisionmaker "act[s] on the reports and advice of others . . . [t]he risk of error is not at all trivial").[10]

Nor can it be said that the university had any greater interest in summary proceedings here than did the school in *Goss*. Certainly the allegedly disruptive and disobedient students involved there, see *id.,* at 569–571, posed more of an immediate threat to orderly school administration than did respondent. As we noted in *Goss,* moreover, "it disserves . . . the interest of the State if [the student's] suspension is in fact unwarranted." *Id.,* at 579.[11] Under these circumstances—with respondent having much more at stake than did the students in *Goss,* the administration at best having no more at stake, and the meetings between respondent and the Dean leaving some possibility of erroneous dismissal—I believe that respondent was entitled to more procedural protection than is provided by "informal give-and-take" before the school could dismiss her.

The contours of the additional procedural protection to which respondent was entitled need not be defined in terms of the traditional adversary system so familiar to lawyers and

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[10] The inquiry about risk of error cannot be separated from the first inquiry about the private interest at stake. The more serious the consequences for the individual, the smaller the risk of error that will be acceptable.

[11] The statements and letters of the Medical School Dean reflect a genuine concern that respondent not be wrongfully dismissed. See App. 147–150, 180–183, 185–187.

judges. See *Mathews* v. *Eldridge*, 424 U. S., at 348. We have emphasized many times that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961); see, *e. g.*, *ante*, at 86; *Goss* v. *Lopez*, *supra*, at 578. In other words, what process is due will vary "according to specific factual contexts." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960); see, *e. g.*, *Mathews* v. *Eldridge*, *supra*, at 334; *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972); *Bell* v. *Burson*, 402 U. S. 535, 540 (1971). See also *Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 162–163 (1951) (Frankfurter, J., concurring).

In the instant factual context the "appeal" provided to respondent, see *ante*, at 81, served the same purposes as, and in some respects may have been better than, a formal hearing. In establishing the procedure under which respondent was evaluated separately by seven physicians who had had little or no previous contact with her, it appears that the Medical School placed emphasis on obtaining "a fair and neutral and impartial assessment." [12] In order to evaluate respondent, each of the seven physicians spent approximately half a day observing her as she performed various clinical duties and then submitted a report on her performance to the Dean.[13] It is difficult to imagine a better procedure for determining whether the school's allegations against respondent had any substance to them.[14] Cf. *Mathews* v. *Eldridge*, *supra*, at

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[12] *Id.*, at 150 (testimony of Dean); see *id.*, at 185, 187, 208, 210 (letters to respondent and seven physicians).

[13] See *id.*, at 190–207.

[14] Respondent appears to argue that her sex and her religion were underlying reasons for her dismissal and that a hearing would have helped to resolve the "factual dispute" between her and the school on these issues. Brief for Respondent 30; see *id.*, at 51–52. See also *ante*, at 92 n. 7. But the only express grounds for respondent's dismissal related to deficiencies in personal hygiene, patient rapport, and the like, and, as a matter of procedural due process, respondent was entitled to no more than a

337–338, 344 (use of independent physician to examine disability applicant and report to decisionmaker). I therefore believe that the appeal procedure utilized by respondent, together with her earlier notices from and meetings with the Dean, provided respondent with as much procedural protection as the Due Process Clause requires.[15]

III

The analysis in Parts I and II of this opinion illustrates that resolution of this case under our traditional approach does not turn on whether the dismissal of respondent is characterized as one for "academic" or "disciplinary" reasons. In my view, the effort to apply such labels does little to advance the due process inquiry, as is indicated by examination of the facts of this case.

The minutes of the meeting at which it was first decided that respondent should not graduate contain the following:

> "This issue is *not one of academic achievement,* but of performance, relationship to people and ability to communicate." App. 218 (emphasis added).

By the customary measures of academic progress, moreover, no deficiency was apparent at the time that the authorities decided respondent could not graduate; prior to this time, according to the stipulation of facts, respondent had received

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forum to contest the factual underpinnings of these grounds. The appeal procedure here gave respondent such a forum—an opportunity to demonstrate that the school's charges were "unfair or mistaken," *Goss* v. *Lopez,* 419 U. S. 565, 581 (1975).

[15] Like a hearing, the appeal procedure and the meetings

"represent[ed] . . . a valued human interaction in which the affected person experience[d] at least the satisfaction of participating in the decision that vitally concern[ed] her . . . . [T]hese rights to interchange express the elementary idea that to be a *person,* rather than a *thing,* is at least to be *consulted* about what is done with one." L. Tribe, American Constitutional Law § 10–7, p. 503 (1978) (emphasis in original).

"credit" and "satisfactory grades" in all of her courses, including clinical courses.[16]

It may nevertheless be true, as the Court implies, *ante,* at 91 n. 6, that the school decided that respondent's inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness would impair her ability to be "a good medical doctor." Whether these inadequacies can be termed "purely academic reasons," as the Court calls them, *ibid.,* is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct,[17] just as the students in *Goss* were suspended because of their conduct.[18]

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[16] App. 12. Respondent later received "no credit" for her emergency-room rotation, the only course in which her grade was less than satisfactory. *Ibid.* This grade was not recorded, according to the District Court, until after the decision had been made that respondent could not graduate. *Id.,* at 31. When the Coordinating Committee made this decision, moreover, it apparently had not seen any evaluation of respondent's emergency-room performance. See *id.,* at 229 (minutes of Coordinating Committee meeting).

[17] Only one of the reasons voiced by the school for deciding not to graduate respondent had any arguable nonconduct aspects, and that reason, "clinical competence," was plainly related to perceived deficiencies in respondent's personal hygiene and relationships with colleagues and patients. See *id.,* at 219. See also *id.,* at 181, 182–183, 210.

[18] The futility of trying to draw a workable distinction between "academic" and "disciplinary" dismissals is further illustrated by my Brother POWELL's concurring opinion. The opinion states that the conclusion in the text *supra,* "is explicitly contrary to the District Court's undisturbed findings of fact," *ante,* at 94, but it cites no District Court finding indicating that respondent's dismissal was based on other than conduct-related considerations. No such finding exists.

The District Court's statement that respondent was dismissed because of " 'the quality of her work,' " quoted *ante,* at 95, like statements to the effect that the dismissal was "solely on academic grounds," *ante,* at 96, is ultimately irrelevant to the due process inquiry. It provides no information on the critical question whether "the facts disputed are of a type susceptible of determination by third parties." *Infra,* at 106. Nor does

The Court makes much of decisions from state and lower federal courts to support its point that "dismissals for academic . . . cause do not necessitate a hearing." *Ante,* at 87. The decisions on which the Court relies, however, plainly use the term "academic" in a much narrower sense than does the Court, distinguishing "academic" dismissals from ones based on "misconduct" and holding that, when a student is dismissed for failing grades, a hearing would serve no purpose.[19] These cases may be viewed as consistent with

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the District Court's finding that " 'the grading and evaluating system of the medical school was applied fairly,' " quoted *ante,* at 95 n. 3, advance resolution of this case, especially in view of the fact, noted *supra,* that respondent's grades in clinical courses, as in all other courses, were satisfactory when the decision was made that she could not graduate. This fact further indicates, contrary to MR. JUSTICE POWELL's intimation, *ante,* at 95, that the school found the deficiencies in respondent's clinical performance to be different from the deficiencies that lead to unsatisfactory grades in more traditional scholastic subjects.

MR. JUSTICE POWELL is correct, of course, in suggesting that the kind of conduct here involved is different from that involved in *Goss* v. *Lopez, supra. Ante,* at 94, and n. 2. The question facing the Medical School authorities was not solely whether respondent had misbehaved in the past, but rather whether her past, present, and likely future conduct indicated that she would not be "a good medical doctor," *ante,* at 91 n. 6. The appeal procedure of the school was well suited to aid in resolution of this question, since it involved "observation of her skills and techniques in actual conditions of practice," *ante,* at 95. It matters not at all whether the result of such observation is labeled "an 'academic' judgment," *ibid.,* so long as it is recognized that the school authorities, having an efficient procedure available to determine whether their decision to dismiss respondent was "unfair or mistaken," *Goss* v. *Lopez, supra,* at 581, were constitutionally required to give respondent a chance to invoke the procedure, as they did, before depriving her of a substantial liberty or property interest. See *supra,* at 100–102.

[19] See *Mahavongsanan* v. *Hall,* 529 F. 2d 448, 450 (CA5 1976); *Gaspar* v. *Bruton,* 513 F. 2d 843, 849–851 (CA10 1975); *Mustell* v. *Rose,* 282 Ala. 358, 367, 211 So. 2d 489, 497–498, cert. denied, 393 U. S. 936 (1968); *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 19–20, 22–23, 102 N. E. 1095, 1096–1097 (1913).

our statement in *Mathews* v. *Eldridge* that "the probable value . . . of additional . . . procedural safeguards" is a factor relevant to the due process inquiry. 424 U. S., at 335, quoted *supra,* at 100; see 424 U. S., at 343–347. But they provide little assistance in resolving cases like the present one, where the dismissal is based not on failing grades but on conduct-related considerations.[20]

In such cases a talismanic reliance on labels should not be a substitute for sensitive consideration of the procedures required by due process.[21] When the facts disputed are of a type susceptible of determination by third parties, as the allegations about respondent plainly were, see *ante,* at 91 n. 6, there is no more reason to deny all procedural protection to one who will suffer a serious loss than there was in *Goss* v. *Lopez,* and indeed there may be good reason to provide even more protection, as discussed in Part II, *supra.* A court's

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[20] See *Brookins* v. *Bonnell,* 362 F. Supp. 379, 383 (ED Pa. 1973):

"This case is not the traditional disciplinary situation where a student violates the law or a school regulation by actively engaging in prohibited activities. Plaintiff has allegedly failed to act and comply with school regulations for admission and class attendance by passively ignoring these regulations. These alleged failures do not constitute misconduct in the sense that plaintiff is subject to disciplinary procedures. They do constitute misconduct in the sense that plaintiff was required to do something. Plaintiff contends that he did comply with the requirements. Like the traditional disciplinary case, the determination of whether plaintiff did or did not comply with the school regulations is a question of fact. Most importantly, in determining this factual question, reference is not made to a standard of achievement in an esoteric academic field. Scholastic standards are not involved, but rather disputed facts concerning whether plaintiff did or did not comply with certain school regulations. These issues adapt themselves readily to determination by a fair and impartial 'due process' hearing."

[21] The Court's reliance on labels, moreover, may give those school administrators who are reluctant to accord due process to their students an excuse for not doing so. See generally Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting, 28 Stan. L. Rev. 841 (1976).

characterization of the reasons for a student's dismissal adds nothing to the effort to find procedures that are fair to the student and the school, and that promote the elusive goal of determining the truth in a manner consistent with both individual dignity and society's limited resources.

IV

While I agree with the Court that respondent received adequate procedural due process, I cannot join the Court's judgment because it is based on resolution of an issue never reached by the Court of Appeals. That court, taking a properly limited view of its role in constitutional cases, refused to offer dictum on respondent's substantive due process claim when it decided the case on procedural due process grounds. See 538 F. 2d, at 1321 n. 5, quoted *ante,* at 91. Petitioners therefore presented to us only questions relating to the procedural issue. Pet. for Cert. 2. Our normal course in such a case is to reverse on the questions decided below and presented in the petition, and then to remand to the Court of Appeals for consideration of any remaining issues.

Rather than taking this course, the Court here decides on its own that the record will not support a substantive due process claim, thereby "agree[ing]" with the District Court. *Ante,* at 92. I would allow the Court of Appeals to provide the first level of appellate review on this question. Not only would a remand give us the benefit of the lower court's thoughts,[22] it

[22] It would be useful, for example, to have more careful assessments of whether the school followed its own rules in dismissing respondent and of what the legal consequences should be if it did not. The Court states that it "disagree[s] with both respondent's factual and legal contentions." *Ante,* at 92 n. 8. It then asserts that "the record clearly shows" compliance with the rules, *ibid.,* but it provides neither elaboration of this conclusion nor discussion of the specific ways in which respondent contends that the rules were not followed, Brief for Respondent 42–46, contentions accompanied by citations to the same record that the Court finds so "clear." The statement of the District Court quoted by the Court, *ante,*

would also allow us to maintain consistency with our own Rule 23 (1)(c), which states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." By bypassing the courts of appeals on questions of this nature, we do no service to those courts that refuse to speculate in dictum on a wide range of issues and instead follow the more prudential, preferred course of avoiding decision—particularly constitutional decision—until " 'absolutely necessary' " to resolution of a case. *Ashwander* v. *TVA*, 297 U. S., at 347 (Brandeis, J., concurring).

I would reverse the judgment of the Court of Appeals and remand for further proceedings.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

The Court's opinion, and that of MR. JUSTICE MARSHALL, together demonstrate conclusively that, assuming the existence of a liberty or property interest, respondent received all the procedural process that was due her under the Fourteenth

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at 92 n. 8, is not inconsistent on its face with respondent's claim that the rules were not followed, nor is there anything about the context of the statement to indicate that it was addressed to this claim, see App. 45.

Review by the Court of Appeals would clarify these factual issues, which rarely warrant the expenditure of this Court's time. If the Court's view of the record is correct, however, then I do not understand why the Court goes on to comment on the legal consequences of a state of facts that the Court has just said does not exist. Like other aspects of the Court's opinion, discussed *supra*, the legal comments on this issue are nothing more than confusing dictum. It is true, as the Court notes, *ante*, at 92 n. 8, that the decision from this Court cited by respondent was not expressly grounded in the Due Process Clause. *Service* v. *Dulles*, 354 U. S. 363 (1957). But that fact, which amounts to the only legal analysis offered by the Court on this question, hardly answers respondent's point that some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest.

Amendment. That, for me, disposes of this case, and compels the reversal of the judgment of the Court of Appeals.

I find it unnecessary, therefore, to indulge in the arguments and counterarguments contained in the two opinions as to the extent or type of procedural protection that the Fourteenth Amendment requires in the graduate-school-dismissal situation. Similarly, I also find it unnecessary to choose between the arguments as to whether respondent's dismissal was for academic or disciplinary reasons (or, indeed, whether such a distinction is relevant). I do agree with MR. JUSTICE MARSHALL, however, that we should leave to the District Court and to the Court of Appeals in the first instance the resolution of respondent's substantive due process claim and of any other claim presented to, but not decided by, those courts.

Accordingly, I, too, would reverse the judgment of the Court of Appeals and remand the case for further proceedings.

UNITED STATES *v.* BOARD OF COMMISSIONERS OF SHEFFIELD, ALABAMA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 76–1662. Argued October 11, 1977—Decided March 6, 1978

Section 5 of the Voting Rights Act of 1965 provides that whenever "a State or political subdivision with respect to which" § 4 of the Act is in effect shall enact any voting qualification or standard, practice, or procedure with respect to voting different from that in force on November 1, 1964, the change has no effect as law unless such State or subdivision obtains, as specified in the statute, a declaratory judgment that the change does not have a racially discriminatory purpose or effect. Alternatively, the change may be enforced if it is submitted to the Attorney General and he has interposed no objection to it within 60 days after the submission, or has advised that objection will not be made. The city of Sheffield, Ala., on November 1, 1964, had a commission form of government. Some months later it sought to put to a referendum the question whether the city should adopt a mayor-council form of government, and respondent Board of Commissioners for the city gave the Attorney General written notice of the referendum proposal, Alabama being a State covered under § 4 of the Act. The referendum was held and the voters approved the change. Thereafter, the Attorney General replied that he did not object to the holding of the referendum but that since the voters had elected to adopt the mayor-council form of government, "the change is also subject to the preclearance requirement of Section 5" and that detailed information should be submitted if preclearance was sought through the Attorney General. Following his receipt of such information, the Attorney General made objection to a phase of the change that involved the at-large election of city councilmen. After the city nevertheless scheduled an at-large council election, the United States brought this suit to enforce the § 5 objection. The District Court denied relief, holding that Sheffield was not covered by § 5 because it was not a "political subdivision" as that term is defined in § 14 (c) (2) of the Act, which provides that " 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting," and that therefore Sheffield was not a

political subdivision because in Alabama registration is conducted by the counties. The court also held that by approving the referendum, the Attorney General had approved the mayor-council form of government in which councilmen were elected at large, notwithstanding his statement regarding preclearance. *Held:*

1. Section 5 of the Act applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or other units of state government that perform the function of registering voters, and the District Court therefore erred in holding that Sheffield is not subject to § 5. Pp. 117–135.

(a) The District Court's interpretation of the Act does not comport with the Act's structure, makes § 5 coverage depend upon a factor completely irrelevant to the Act's purposes, and thereby permits precisely the kind of circumvention of congressional policy that § 5 was designed to prevent. Section 5 "was structured to assure the effectiveness of the dramatic step Congress [took] in § 4" and "is clearly designed to march in lock-step with § 4." *Allen* v. *State Board of Elections*, 393 U. S. 544, 584 (Harlan, J., concurring and dissenting). Since jurisdictions may be designated under § 4 (b) by reason of the actions of election officials who do not register voters and since § 4 (a) imposes duties on all election officials, whether or not they are involved in voter registration, it follows from the very structure of the Act that § 5 must apply to all entities exercising control over the electoral process within the covered States or subdivisions. The Act's terms and decisions of this Court clearly indicate that § 5 was not intended to apply only to voting changes occurring within the registration process or only to the changes of specific entities. Pp. 118–125.

(b) The Act's language does not require such a crippling construction as that given by the District Court. In view of the explicit relationship between § 4 and § 5 and the critical role that § 5 is to play in securing the promise of § 4 (a), it is wholly logical to interpret "State . . . with respect to which" § 4 (a) is in effect as referring to all political units within it. Pp. 126–129.

(c) The contemporaneous administrative construction of § 5 by the Attorney General and the legislative history of the enactment and re-enactments of the Act compel the conclusion that Congress always understood that § 5 covers all political units within designated jurisdictions like Alabama. Pp. 129–135.

2. The Attorney General's failure to object to the holding of the referendum did not constitute clearance under § 5 of the method of electing city councilmen under the new government. Since Sheffield sought approval only for the holding of the referendum, not for pre-

clearance of the change in the city's form of government, and the Attorney General had warned the city that the change itself required prior federal scrutiny and advised what detailed information would be necessary for that purpose, it is irrelevant that he might have been on notice that if the referendum passed, Sheffield would under state law have had to adopt an at-large system of councilmanic elections. Pp. 135–138.

430 F. Supp. 786, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined, and in Part III of which POWELL, J., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 138. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 139. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 140.

Assistant Attorney General Days argued the cause for the United States. With him on the brief were *Solicitor General McCree, Allan A. Ryan, Jr., Walter W. Barnett,* and *Judith E. Wolf.*

Vincent McAlister argued the cause for appellees. With him on the brief was *Braxton W. Ashe.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965 (Act), 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V),[1]

Brian J. O'Neill, Vilma S. Martinez, and *Joaquin G. Avila* filed a brief for the Mexican American Legal Defense and Educational Fund et al. urging reversal.

James E. Ross filed a brief for Westheimer Independent School District as *amicus curiae.*

[1] 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 [§ 4 (a) of the Act, 79 Stat. 438, as amended], based upon determinations made under the first sentence of section 1973b (b) of this title [§ 4 (b) of the Act, 79 Stat. 438, as amended], are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure

requires that States, like Alabama, which are covered under § 4 of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b (1970 ed., Supp. V),[2] obtain prior federal approval before changing any voting practice or procedure that was in effect on November 1, 1964. The questions for decision in this case are (1) whether § 5 requires an Alabama city that has never conducted voter registration [3] to obtain preclearance of a voting change and (2), if so, whether the failure of the Attorney

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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, . . . 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. . . ."

[2] Pursuant to the first sentence of § 4 (b), Alabama was designated as a covered jurisdiction on August 6, 1965, 30 Fed. Reg. 9897, it having been determined that Alabama maintained a "test or device" on November 1, 1964, and that "less than 50 per centum of [those] persons of voting age residing [in Alabama] were registered on November 1, 1964, or . . . voted in [the 1964 Presidential election]." 79 Stat. 438, as amended, 42 U. S. C. § 1973b (b) (1970 ed., Supp. V). Because Alabama has not established in a judicial proceeding that the voter qualification requirements had not been used for the purpose or with the effect of denying or abridging the right to vote on account of race, it is subject to the prohibitions of § 4 (a), see 42 U. S. C. § 1973b (a) (1970 ed., Supp. V), and hence to § 5.

[3] In Alabama, voter registration is conducted by county boards, the members of which are appointed by specified state officials. See Ala. Code, Tit. 17, § 17–4–40 (1977).

General of the United States to object to the holding of a referendum election at which a change is adopted constitutes federal approval of that change.

I

The city of Sheffield, Ala. (City or Sheffield), was incorporated in 1885 by the Alabama Legislature. As incorporated, the City was governed by a mayor and eight councilmen, two councilmen being elected directly from each of the City's four wards. Sheffield retained this mayor-council government until 1912 when it adopted a system in which three commissioners, elected by the City at large, ran the City. This commission form of government was in effect in Sheffield on November 1, 1964.

Sometime prior to March 20, 1975, Sheffield decided to put to a referendum the question whether the City should return to a mayor-council form of government.[4] On that date the president of the Board of Commissioners of Sheffield wrote the Attorney General of the United States to "give notice of the proposal of submitting to the qualified voters of the City, whether the present commission form of government shall be abandoned in favor of the Mayor and Alderman form of government." [5] On May 13, 1975, before the Attorney General

[4] The record reflects that the citizens of Sheffield had been considering this change for some time. During the late 1960's, the City wrote the Attorney General of Alabama and raised a number of questions concerning the procedures and mechanics for adopting a mayor-council form of government. The Alabama Attorney General's reply, which took the form of an opinion letter, advised what procedures would have to be followed to effect such a change and informed the City that if the electorate voted to abandon the commission form of government Sheffield would return to the aldermanic form of government "as it existed . . . at the time the commission form of government was adopted."

[5] The letter provided that the mechanics of the proposed referendum were governed by Art. 3 of Title 37 of the Code of Alabama—by which the City presumably meant Art. 3 of Chapter 4 of Title 37, now Ala. Code,

replied, the referendum occurred, and the voters of Sheffield approved the change.

On May 23, the Attorney Genearl formally responded to Sheffield that he did "not interpose an objection to the holding of the referendum," but that "[s]ince voters in the City of Sheffield elected to adopt the mayor-council form of government on May 13, 1975, the change is also subject to the preclearance requirements of Section 5." The Attorney General's letter also stated that in the event the City should elect to seek preclearance of the change from the Attorney General it should submit detailed information concerning the change, including a description of "the aldermanic form of government which existed in 1912 and the method by which it was elected, *i. e.*, the number of aldermen, the terms and qualifications for the mayor and aldermen, whether the aldermen were elected at large or by wards, whether there were numbered post, residency, majority vote or staggered term requirements for the aldermanic seats, and whether single shot voting was prohibited."

Thereafter the City informed the Attorney General that the proposed change would divide the City into four wards of substantially equal population, that each ward would have two council seats, that councilmen from each ward would be elected at large, and that candidates would run for numbered places. Subsequently the City furnished a detailed map showing ward boundaries, data concerning the population distribution by race for each ward, and a history of black candidacy for city and county offices since 1965. The City's submission was completed on May 5, 1976.

On July 6, 1976, the Attorney General notified the City

Tit. 11, § 11–44–150 *et seq.* (1977)—that "[p]resent existing voting wards are not changed at the time of voting (but may be equitably adjusted at a later date)"—as they in fact were—and that "if the present commission type is abandoned, the [mayor-aldermanic form that existed in 1912] would automatically be reinstated."

that while he did not "interpose any objection to the change to a mayor-council form of government . . . to the proposed district lines or to the at-large election of the mayor and the president of the council," he did object to the implementation of the proposed at-large method of electing city councilmen because he was "unable to conclude that the at-large election of councilmen required to reside in districts will not have a racially discriminatory effect."

Notwithstanding the Attorney General's objection, the City scheduled an at-large council election for August 10, 1976. On August 9, the United States instituted this suit in the District Court for the Northern District of Alabama to enforce its § 5 objection. A temporary restraining order was denied. After the election was held, a three-judge court was convened and that court dismissed the suit. 430 F. Supp. 786 (1977). The District Court unanimously held [6] that Sheffield was not covered by § 5 because it is not a "political subdivision" as that term is defined in § 14 (c)(2) of the Act, 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(2), which provides that " 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." See 430 F. Supp., at 788–789 and 790–792. The court also held, one judge dissenting, that "by approving the referendum the Attorney General in fact approved the change to the Mayor-Council form of government [in which aldermen were elected at large] notwithstanding [his statement] to the City that the change was also subject to pre-clearance." *Id.*,

[6] The court initially decided the case on the ground that the Attorney General's July 6, 1976, objection was one day out of time and hence ineffective. However, on petition for rehearing the court found that, because July 5, 1976, was a federal holiday, the July 6 objection was timely. See 430 F. Supp., at 787. The court then considered the other grounds, discussed *infra*.

at 789. The court reasoned that the approval of the referendum constituted clearance of those aspects of the proposed change that the Attorney General knew or should have known would be implemented if the referendum passed and that he should have known that Sheffield would be obliged to follow Ala. Code § 11–43–40 (1975)—formerly Ala. Code, Tit. 37, § 426 (Supp. 1973)—which requires the at-large election of aldermen in cities, like Sheffield, with populations of less than 20,000. 430 F. Supp., at 789–790. We noted probable jurisdiction. 433 U. S. 906 (1977). We reverse.

II

We first consider whether Congress intended to exclude from § 5 coverage political units, like Sheffield, which have never conducted voter registration. In concluding that Congress did, the District Court noted that § 5 applies to "a [designated] state or a [designated] *political subdivision*" and construed § 5 to provide that, where a State in its entirety has been designated for coverage, the only political units within it that are subject to § 5 are those that are "political subdivisions" within the meaning of § 14 (c)(2). Because § 14 (c)(2) refers only to counties and to the units of state government that register voters, the District Court held that political units like the City are not subject to the duties imposed by § 5.

There is abundant evidence that the District Court's interpretation of the Act is contrary to the congressional intent. First, and most significantly, the District Court's construction is inconsistent with the Act's structure, makes § 5 coverage depend upon a factor completely irrelevant to the Act's purposes, and thereby permits precisely the kind of circumvention of congressional policy that § 5 was designed to prevent. Second, the language of the Act does not require such a crippling interpretation, but rather is susceptible of a reading that will fully implement the congressional objectives. Finally,

the District Court's construction is flatly inconsistent with the Attorney General's consistent interpretations of § 5 and with the legislative history of its enactment and re-enactments. The language, structure, history, and purposes of the Act persuade us that § 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters.

A

Although this Court has described the workings of the Voting Rights Act in prior cases, see, *e. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969); *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), it is appropriate again to summarize its purposes and structure and the special function of § 5. Congress adopted the Act in 1965 to implement the Fifteenth Amendment and erase the blight of racial discrimination in voting. See 383 U. S., at 308. The core of the Act "is a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant." *Id.,* at 315. Congress resorted to these stern measures because experience had shown them to be necessary to eradicate the "insidious and pervasive evil of [racial discrimination in voting] that had been perpetuated in certain parts of our country." *Id.,* at 309. Earlier efforts to end this discrimination by facilitating case-by-case litigation had proved ineffective in large part because voting suits had been "unusually onerous to prepare" and "exceedingly slow" to produce results. And even when favorable decisions had been obtained, the affected jurisdictions often "merely switched to discriminatory devices not covered by the federal decrees." See *id.,* at 313–314.

The structure and operation of the Act are relatively simple.

Sections 4 (a) [7] and 4 (b) [8] determine the jurisdictions that are subject to the Act's special measures. Congress, having found that there was a high probability of pervasive racial discrimination in voting in areas that employed literacy tests or similar voting qualifications and that, in addition, had low voter turnouts or registration figures, provided that coverage in a State is "triggered" if it maintained any "test or device" [9] on a specified date and if it had voter registration or voter turnout

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[7] Section 4 (a), as set forth in 42 U. S. C. § 1973b (a) (1970 ed., Supp. V), provides in pertinent part:

"To assure that the right of citi[z]ens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . ."

[8] In pertinent part, § 4 (b), as set forth in 42 U. S. C. § 1973b (b) (1970 ed., Supp. V), provides:

"The provisions of subsection (a) of this section [§ 4 (a)] shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964."

[9] Section 4 (c) of the Act defines "test or device" to "mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 79 Stat. 438, 42 U. S. C. § 1973b (c).

of less than 50% of those of voting age during specified Presidential elections. When this formula is not met in an entire State, coverage is triggered in any "political subdivision" within the State that satisfies the formula. Since § 4 (c) of the Act defines "test or device" as a "prerequisite for *voting or registration* for voting," 79 Stat. 438, 42 U. S. C. § 1973b (c) (emphasis supplied), it is clear that the Attorney General, in making a coverage determination, is to consider not only the voter registration process within a jurisdiction, but also the procedures followed by the election officials at the polling places. A State or political subdivision which does not use literacy tests to determine who may register to vote but employs such tests at the polling places to determine who may cast a ballot may plainly be covered under § 4 (b).

If designated under § 4 (b), a jurisdiction will become subject to the Act's special remedies unless it establishes, in a judicial action, that no "test or device" was used to discriminate on the basis of race in voting. Section 4 (a) is one of the Act's core remedial provisions. Because Congress determined that the continued employment of literacy tests and similar devices in covered areas would perpetuate racial discrimination, it suspended their use in § 4 (a). Just as the actions of every political unit that conducts elections are relevant under § 4 (b), so § 4 (a) imposes a duty on every entity in the covered jurisdictions having power over the electoral process, whether or not the entity registers voters. That § 4 (a) has this geographic reach is clear both from the fact that a "test or device" may be employed by any official with control over any aspect of an election and from § 4 (a)'s provision that its suspension operates "*in* any [designated] State . . . or *in* any [designated] political subdivision." (Emphasis supplied.) The congressional objectives plainly required that § 4 (a) apply throughout each designated jurisdiction.[10] If it did not have this scope, the covered States,

[10] The 1975 amendments to the Act eliminate any question but that

which in the past had been so ingenious in their defiance of the spirit of federal law, could have easily circumvented § 4 (a) by, *e. g.*, discontinuing the use of literacy tests to determine who may register but requiring that all citizens pass literacy tests at the polling places before voting.

Although § 4 (a) is a potent weapon, Congress recognized that it alone would not ensure an end to racial discrimination in voting in covered areas. In the past, States and the political units within them had responded to federal decrees outlawing discriminatory practices by "resort[ing] to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . ." *South Carolina* v. *Katzenbach,* 383 U. S., at 335. To prevent any future circumvention of constitutional policy, Congress adopted § 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims.

The foregoing discussion of the key remedial provisions of the Act belies the District Court's conclusion that § 5 should apply only to counties and to the political units that conduct

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§ 4 (a)'s prohibition has to apply to all political units within designated jurisdictions. Since these amendments provide that, as to jurisdictions that are considered for coverage because they had low voter turnout or registration in the November 1972 election, the phrase "test or device" includes "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority[,]" 89 Stat. 401, 42 U. S. C. § 1973b (f)(3) (1970 ed., Supp. V), it is indisputable that Congress contemplated that the suspension of tests and devices would apply to local officials other than those employed by counties or by the functional units of state government that conduct voter registration.

voter registration. As is apparent from the Act, § 5 "was structured to assure the effectiveness of the dramatic step that Congress had taken in § 4" and "is clearly designed to march in lock-step with § 4 . . . ." *Allen* v. *State Board of Elections,* 393 U. S., at 584 (Harlan, J., concurring and dissenting). Since jurisdictions may be designated under § 4 (b) by reason of the actions of election officials who do not register voters, and since § 4 (a) imposes duties on all election officials whether or not they are involved in voter registration, it appears to follow necessarily that § 5 has to apply to all entities exercising control over the electoral processes within the covered States or subdivisions. In any case, in view of the structure of the Act, it would be unthinkable to adopt the District Court's construction unless there were persuasive evidence either that § 5 was intended to apply only to changes affecting the registration process or that Congress clearly manifested an intention to restrict § 5 coverage to counties or to the units of local government that register voters. But the Act supports neither conclusion.

The terms of the Act and decisions of this Court clearly indicate that § 5 was not intended to apply only to voting changes occurring within the registration process. Section 5 applies to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ." Since the statutory definition of "voting" includes "all action necessary to make a vote effective in any . . . election, including, but not limited to, registration, . . . casting a ballot, and having such ballot counted properly . . . ," 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1), § 5's coverage of laws affecting voting is comprehensive.

The Court's decisions over the past 10 years have given § 5 the broad scope suggested by the language of the Act. We first construed it in *Allen* v. *State Board of Elections, supra.* There our examination of the Act's objectives and original legislative history led us to interpret § 5 to give it "the

broadest possible scope," 393 U. S., at 567, and to require prior federal scrutiny of "any state enactment which altered the election law in a covered State in even a minor way." *Id.*, at 566. In so construing § 5, we unanimously rejected [11]—as the plain terms of the Act would themselves have seemingly required—the argument of an appellee that § 5 should apply only to enactments affecting who may register to vote. 393 U. S., at 564. Our decisions have required federal preclearance of laws changing the location of polling places, see *Perkins* v. *Matthews,* 400 U. S. 379 (1971), laws adopting at-large systems of election, *ibid.; Fairley* v. *Patterson* (decided with *Allen, supra*); laws providing for the appointment of previously elected officials, *Bunton* v. *Patterson* (decided with *Allen, supra*); laws regulating candidacy, *Whitley* v. *Williams* (decided with *Allen, supra*); laws changing voting procedures, *Allen, supra;* annexations, *City of Richmond* v. *United States,* 422 U. S. 358 (1975); *City of Petersburg* v. *United States,* 410 U. S. 962 (1973), summarily aff'g 354 F. Supp. 1021 (DC 1972); *Perkins* v. *Matthews, supra;* and reapportionment and redistricting, *Beer* v. *United States,* 425 U. S. 130 (1976); *Georgia* v. *United States,* 411 U. S. 526 (1973); see *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977). In each case, federal scrutiny of the proposed change was required because the change had the potential to deny or dilute the rights conferred by § 4 (a).

Significantly, in several of these cases, this Court decided that § 5's preclearance requirement applied to cities within designated States without ever inquiring whether the cities conducted voter registration. See *Beer* v. *United States, supra; City of Richmond* v. *United States, supra; Perkins* v.

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[11] Although both Mr. Justice Harlan and Mr. Justice Black dissented from aspects of the Court's holding in *Allen,* neither disagreed with the proposition that the statute had to be construed to cover changes occurring outside the registration process. See 393 U. S., at 591–593 (Harlan, J., concurring and dissenting); *id.*, at 595 (Black, J., dissenting).

Matthews, supra. It is doubtful, moreover, that § 5 would have been held to be applicable in at least one of these cases if the District Court's interpretation of § 5 were the law.[12] Although the assumption of these decisions—that cities are covered whether or not they conduct voter registration—perhaps has little *stare decisis* significance—the issue not having been raised, but see *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 307 (1962)—these decisions underscore the obvious fact that, whether or not they register voters, cities can enact measures with the potential to dilute or defeat the voting rights of minority group members, and they further illustrate that Congress could not have intended § 5's duties to apply only to those cities that register voters.

Because § 5 embodies a judgment that voting changes occurring outside the registration process have the potential to discriminate in voting on the basis of race, it would be irrational for § 5 coverage to turn on whether the political unit enacting or administering the change itself registers voters. But quite apart from the fact that this cramped construction cannot be squared with any reasonable set of objectives, the District Court's interpretation of § 5 would permit the precise evil that § 5 was designed to eliminate. Under it, local political entities like Sheffield would be free to respond to local pressure to limit the political power of minorities and take steps that would, temporarily at least, dilute or entirely defeat the voting rights of minorities, *e. g.,* providing for the appointment of officials who previously had been elected, mov-

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[12] *City of Richmond* v. *United States,* of course, involved a city in Virginia. There voter registration, while conducted on a citywide basis, is—and was at the time of that case—performed, not by employees of the city, but by an electoral board appointed by state judges. See Va. Code 24.1, §§ 24.1–29, 24.1–43—24.1–46 (Supp. 1977). While Richmond's Electoral Board would be covered under the District Court's reading of § 5, it would seem that the city itself would not—a fact that illustrates the severe limitations that the District Court's construction would impose on the reach of § 5.

ing the polling places to areas of the city where minority group members could not safely travel, or even providing that election officials could not count the ballots of minority voters. The only recourse for the minority group members affected by such changes would be the one Congress implicitly found to be unsatisfactory: repeated litigation. See *United Jewish Organizations* v. *Carey, supra,* at 156. The District Court's reading of § 5 would thus place the advantages of time and inertia back on the perpetrators of the discrimination as to all elections conducted by political units that do not register voters, and, equally seriously, it would invite States to circumvent the Act in all other elections by allowing local entities that do not conduct voter registration to control critical aspects of the electoral process. The clear consequence of this interpretation would be to nullify both § 5 and the Act in a large number of its potential applications.[13]

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[13] Our Brother STEVENS' dissenting opinion neither disputes that § 4 (a)'s duties apply to all political units within designated jurisdictions nor disagrees that § 5 was enacted to assure the effectiveness of § 4 (a) by preventing the contrivance of new rules to defeat newly won voting rights. But, in addition to advancing the arguments unanimously rejected by this Court in *Allen,* and by numerous decisions following it, compare *post,* at 145, with *supra,* at 122–123, the dissent argues that several congressional policies will nevertheless be promoted if cities that do not register voters remain free to concoct new measures for the sole purpose of perpetuating voting discrimination. His suggestion that Congress did not intend to cover purely local elections, *post,* at 144, overlooks both the overwhelming evidence that the Act is intended to secure the right to vote in local as well as state and national elections, see, *e. g.,* § 14 (c)(1) of the Act, 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1) ("*any primary, special,* or *general* election" is covered), and the more fundamental point that local political units that do not conduct registration may conduct or control state and national elections. Our Brother STEVENS' further suggestion that an adventitious limitation on the reach of § 5 is necessary because otherwise a deluge of trivial submissions will impair the preclearance function conjures a specter that is unsupported by the legislative record. Ironically, the statistical support for this theory is derived from the hearings conducted by a Congress that repeatedly manifested its understanding that § 5 applied to the voting changes of every

B

The terms of the Act do not require such an absurd result. In arriving at its interpretation of § 5, the District Court focused on its language "a State or political subdivision with respect to which the prohibitions set forth in [§ 4 (a)] based upon determinations made under [§ 4 (b)] are in effect." While § 5's failure to use the phrase "*in* a [designated] State or subdivision" arguably provides a basis for an inference that § 5 was not intended to have the territorial reach of § 4 (a), the actual terms of § 5 suggest that its coverage is to be coterminous with § 4 (a)'s. The coverage provision of § 5 specifically refers to both § 4 (a) and § 4 (b), a fact which itself implies that § 4—not § 14 (c)(2)—is to determine the reach of § 5. And the content of § 5 supports this view. Section 5 provides that it is to apply to the jurisdictions "with respect to which" § 4 (a)'s prohibitions are in effect. Since the States or political subdivisions "with respect to which" § 4 (a)'s duties apply are entire territories and not just county governments or the units of local government that register voters, § 5 must, it would seem, apply territorially as well.

Quite apart from the fact the textual interrelationship between § 4 (a) and § 5 affirmatively suggests that § 5 is to have a territorial reach, the operative language of the statute belies any suggestion that § 14 (c)(2) limits the scope of § 5. Where, as here, a State has been designated for coverage, the meaning of the term "political subdivision" has no operative significance in determining the reach of § 5: the only question is the meaning of "[designated] State." There is no more basis in the statute or its history for treating § 14 (c)(2) as limiting the reach of § 5 than there is for treating it as limiting § 4 (a).

Broader considerations support this construction of § 5's terms. The Act, of course, is designed to implement the Fif-

political unit within each designated jurisdiction. Compare *infra*, at 133–134, with *post*, at 147–148, nn. 8–11.

teenth Amendment and, in some respects, the Fourteenth Amendment, see *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966); *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). One would expect that the substantive duties imposed in the Act, as in the constitutional provisions that it is designed to implement, would apply not only to governmental entities formally acting in the name of the State, but also to those political units that may exercise control over critical aspects of the voting process. Cf. *Hunter* v. *Erickson,* 393 U. S. 385 (1969); *Terry* v. *Adams,* 345 U. S. 461 (1953). It is, of course, the case that the term "State" does not have this meaning throughout the Act. For example, the Attorney General may not designate a city for coverage under § 4 (b) of the Act on the theory the city's actions are often "state action"; for purposes of designation, "State" refers to a specific geographic territory in its entirety. But it is clear that once a State is designated for coverage the Act's remedial provisions apply to actions that are not formally those of the State. Section 4 (a), of course, applies to all state actors, and even the legislative history relied upon by the District Court reveals the congressional understanding that the reference to "State" in § 5 includes political units within it.[14] This alone would appear sufficient reason to make § 5's preclearance requirement apply to all state action. So

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[14] The District Court relied upon the following excerpt from the legislative history:

"Where an entire State falls within . . . subsection [4 (b)] so does each and every political subdivision within that State." H. R. Rep. No. 439, 89th Cong., 1st Sess., 25 (1965); see S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 23 (1965).

Of course, the District Court's assumption to the contrary notwithstanding, this statement does not establish that the only entities in designated States which are subject to § 5 are those that are either counties or the units that register voters. Indeed, since this statement also pertains to the scope of § 4 (a), which clearly applies to all political units within covered jurisdictions, it is difficult to see how it can be relied upon to support a crippling interpretation of § 5.

in view of the explicit textual relationship between § 4 and § 5, the irrelevance of § 14 (c)(2) to the meaning of "[designated] State," and the critical role that § 5 is to play in securing the promise of § 4 (a), it is wholly logical to interpret "State . . . with respect to which" § 4 (a) is in effect as referring to all political units within it.

Because the designated jurisdiction in this case is a State, we need not consider the question of how § 5 applies when a political subdivision is the designated entity. But we observe that a similar argument can be made concerning § 5's reference to "[designated] political subdivision," and this fact plainly supports our interpretation of § 5's parallel reference to "[designated] State." The legislative background of § 14 (c)(2)'s definition of "political subdivision" reflects that Congress intended to define "political subdivision" as areas of a nondesignated State,[15] not only as functional units or levels of government. The conclusion clearly follows that this definition was intended to operate only for purposes of determining which political units in nondesignated States may be

[15] The statutory terms of § 14 (c)(2)—defining subdivision as a "county or parish" or as "any other subdivision of a State which conducts registration for voting"—can obviously refer to a geographic territory, and the usages of "political subdivision" in the Act and the legislative history leave no doubt but that it is in this sense that Congress used the term. The usage "in a political subdivision," which occurs in § 4 (a) and in many other sections of the Act, see, *e. g.*, 42 U. S. C. §§ 1973a (a)–(c) (1970 ed., Supp. V), would be nonsensical if "political subdivision" denoted only specific functional units of state government. And the legislative history eliminates any basis for doubt. Attorney General Katzenbach, whose understanding of the meaning of the term was intended to be embodied in § 14 (c)(2), see Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 121 (1965), repeatedly stated in the course of his testimony before the committees of Congress that "political subdivision" referred to areas of nondesignated States. See, *e. g.*, *id.*, at 21, 51, 53, and 78; Hearings on S. 1564 before the Committee on the Judiciary, 89th Cong., 1st Sess., 44 (1965).

separately designated for coverage under § 4 (b).[16] Congress seemingly wished to ensure that just as, for example, a school board could not be separately designated for coverage in the name of the State, so it could not be separately designated on the theory that it was a "political subdivision" of a State. By the same token, it is equally clear that Congress never intended the § 14 (c)(2) definition to limit the substantive reach of the Act's core remedial provision once an area of a nondesignated State had been determined to be covered; all state actors within designated political subdivisions are subject to § 4 (a). In view of the fact that "political subdivision" was understood as referring to an area of the State, the fact that the Act generally is aimed at all "state action" occurring within specified areas, and the textual interrelationship between § 4 (a) and § 5, it logically follows that where a political subdivision has been separately designated for coverage under § 4, all political units within it are subject to the preclearance requirement.[17]

C

Finally, the legislative history and other related aids to ascertaining congressional intent leave little doubt but that Congress

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[16] The statutory terms support the view that the § 14 (c)(2) definition was not intended to impose any limitations on the reach of the Act outside the designation process. Under § 14 (c)(2)'s terms, counties are "political subdivisions" whether or not they register voters. While the automatic inclusion of counties within the definition of "political subdivision" would be difficult to square with any rational policy were § 14 (c)(2) intended to identify the governmental entities that may be subject to the Act's special duties, the inclusion can be readily explained on the assumption that the only limitation § 14 (c)(2) imposes on the Act pertains to the areas that may be designated for coverage.

[17] Our Brother STEVENS' dissent misconceives the basis for the conclusion that § 5's terms are susceptible of an interpretation under which Sheffield is covered. We believe that the term "State" can bear a meaning that includes all state actors within it and that, given the textual interrelationship between § 5 and § 4 (a) and the related purposes of the two provisions, such a reading is a natural one.

has always—and certainly by 1975—been of the view that § 5, like § 4 (a), applies territorially and includes political units like Sheffield whether or not they conduct voter registration. The specific narrow question was not extensively discussed at the time of original enactment, but there is little, if anything, in the original legislative history that in any way supports the crippling construction of the District Court.[18] At least one statement made in the course of the debate over § 5 strongly suggests that Congress never intended to draw a distinction between cities that do and do not register voters. In support of an amendment that would have stricken § 5 from the Act, Senator Talmadge of Georgia—minutes before the Senate voted to reject his amendment—argued that the section was "far-fetched" because it would require any city which sought to enact or administer a voting change to obtain federal preclearance. 111 Cong. Rec. 10729 (1965). While this statement was made by an opponent of the Act, its proponents, one of whom was on the floor defending § 5 at the time of Senator Talmadge's assertion, see 111 Cong. Rec. 10728 (1965) (remarks of Sen. Tydings), did not disagree with his assessment. Thus, whatever Senator Talmadge's intentions, his statement

[18] Our Brother STEVENS' dissent quotes a number of statements from the legislative history of the original statute which, in his view, establish that Congress believed that § 14 (c) (2) would prevent federal interference with the affairs of "minor, local governmental units." See *post*, at 142–143. While these statements considered in isolation provide colorable support for the dissent's conclusion, the statutory background in its entirety makes it abundantly clear that these fragments from the legislative history cannot support such a broad assertion as to the congressional intent. The dissent's interpretation of these statements necessarily forces one to take a position that not even the dissent is willing to adopt (because it is flatly inconsistent with the statutory terms): *i. e.*, that § 4 (a)'s suspension of literacy tests does not apply to minor, local governmental units. As demonstrated, see *supra*, at 128–129, the statements quoted in the dissent can only be understood as further support for our conclusion that Congress' exclusive objective in § 14 (c) (2) was to limit the jurisdictions which may be separately designated for coverage under § 4 (b).

possesses significant pertinence. See *Arizona* v. *California,* 373 U. S. 546, 583 n. 85 (1963).

What is perhaps a more compelling argument concerning the original, and subsequent, congressional understanding of the scope of § 5 is that the Attorney General has, since the Act was adopted in 1965, interpreted § 5 as requiring all political units in designated jurisdictions to preclear proposed voting changes.[19] This contemporaneous administrative construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress.[20] See *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U. S. 205, 210 (1972); *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965) In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it. See *Perkins* v. *Mat-*

[19] The record reflects that between August 6, 1965, and May 1, 1977, the Attorney General received more than 8,100 proposed voting changes from political units—other than counties or parishes—that did not register voters. While our Brother STEVENS' dissent is correct that few of these occurred during the first few years of the Act's existence, *post,* at 147 n. 8, it does not deny that even during these years the Attorney General received and processed submissions involving proposed changes of political units that were not counties and that did not register voters. In any case, when the Attorney General made § 5 an administrative priority, he unambiguously indicated his view that it applies to all political units in covered jurisdictions. The dissent's suggestion that the Attorney General's reading was somehow precipitated by this Court's "creative" interpretation of § 5 in *Allen* overlooks the fact that the Attorney General filed a brief in *Allen* urging the position that this Court adopted. In short, the Attorney General's administrative interpretation of § 5 is "contemporaneous" as that term is used in our decisions. See, *e. g., Nashville Gas Co.* v. *Satty,* 434 U. S. 136, 142 n. 4 (1977).

[20] See testimony of Attorney General Katzenbach, in Hearings on H. R. 6400, *supra* n. 9, at 9 *et seq.,* and testimony of Attorney General Katzenbach in Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 14 *et seq.* (1965).

thews, 400 U. S., at 390–394.[21] Moreover, the Attorney General's longstanding construction of § 5 was reported to Congress by Justice Department officials in connection with the 1975 extension of the Act. See testimony of Assistant Attorney General J. Stanley Pottinger at the Hearings on H. R. 939 et al. before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., 166 (1975) (1975 House Hearings); exhibits to the testimony of Assistant Attorney General J. Stanley Pottinger at the Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 598–599 (1975) (1975 Senate Hearings).[22]

And the legislative history of the 1970 and 1975 re-enactments compellingly supports the conclusion that Congress shared the Attorney General's view. In 1970, Congress was clearly fully aware of this Court's interpretation of § 5 as reaching voter changes other than those affecting the registration process and plainly contemplated that the Act would continue to be so construed. See, *e. g.,* Hearings on H. R. 4249 et al. before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 1, 4, 18, 83, 130–131, 133, 147–149, 154–155, 182–184, 402–454 (1969); Hearings on S. 818 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 48, 195–196, 369–370, 397–398, 426–427, 469

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[21] The Attorney General's regulations also indicate his view that § 5, like § 4 (a), applies territorially: "Section 5 . . . prohibits the enforcement *in any jurisdiction covered by section 4 (a)* [of any voting change]." 28 CFR § 51.1 (1976) (emphasis supplied).

[22] The Attorney General's statements and exhibits apprised the Congress that the Attorney General had treated cities like Sheffield as covered by § 5. See also 1975 Senate Hearings 563–564 (discussion of § 5 submission from Montgomery, Ala.), and 568 (statement of Justice Department official that there was no need to clarify the Act to make certain that city council redistricting is covered).

(1970). The history further suggests that Congress assumed that, just as § 5 applies to changes that affect aspects of voting other than registration, so it also applies to entities other than those which conduct voter registration. One of the principal factual arguments advanced in favor of the renewal of § 5 was that Anniston, Ala.—which, like Sheffield, has never conducted voter registration—had failed to obtain preclearance of some highly significant voting changes. See Joint View of 10 Members of the Senate Judiciary Committee Relating to the Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5521 (1970).

The congressional history is even clearer with respect to the 1975 extension, which, of course, is the legislation that controls the case at bar. Both the House and Senate Hearings on the bill reflect that the assumption that the coverage of § 5 was unlimited was widely shared and unchallenged. In addition to the aforementioned testimony of the then Assistant Attorney General, which of course has special significance, numerous witnesses expressed this view, either directly or indirectly. See, *e. g.*, 1975 Senate Hearings 75–76 (in covered jurisdictions § 5 requires preclearance of all voting changes, and objections have been entered concerning every stage of the electoral process), 112–114 (describing preclearance of changes in city of Montgomery, Ala.), 463–464 (stating that if Act were applied to Texas, § 5 would require preclearance of voting changes of cities and school districts, neither of which register voters[23]), and 568 (statement by Justice Department official that there is no need to clarify Act to make certain that city council redistricting is covered by § 5); 1975 House Hearings 332 (referring to city of Bessemer, Ala., as "covered jurisdiction") and 631–632 (describing lengthy § 5 preclearance process for Charleston, S. C.—a city which, like Sheffield, does not conduct

[23] See Tex. Elec. Code Ann., Art. 5.09 (Vernon 1967); Art. 5.13a (Vernon Supp. 1978).

voter registration).[24] More significantly, both the House and Senate Committee Reports preclude the conclusion that § 5 was not understood to operate territorially. Not only do the reports state that § 5 applies "[*i*]*n* [designated] jurisdictions," see S. Rep. No. 94–295, p. 12 (1975) (1975 Senate Report); H. R. Rep. No. 94–196, p. 5 (1975) (1975 House Report) (emphasis supplied), they also announce that one benefit of the proposed extension of the Act to portions of Texas would be that Texas cities and school districts—neither of which has ever registered voters—would be subject to the preclearance requirement. 1975 Senate Report 27–28; 1975 House Report 19–20. Finally, none of the opponents of the 1975 legislation took issue with the common assumption that § 5 applied to all voting changes within covered States. Indeed, they apparently shared this view. See 121 Cong. Rec. S13072 (July 21, 1975) (remarks of Sen. Stennis) ("[a]ny [voting changes] . . . made in precincts, county districts, school districts, municipalities, or State legislatures, or any other kind of officers, ha[ve] to be submitted . . . to the Attorney General"). See also *id.*, at S13331 (July 22, 1975) (remarks of Sen. Allen).

Whatever one might think of the other arguments advanced, the legislative background of the 1975 re-enactment is conclusive of the question before us. When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby. See, *e. g., Don E. Williams Co.* v. *Commissioner,* 429 U. S. 569, 576–577 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 414 n. 8 (1975); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1404 (tent. ed. 1958); cf. *Zenith Radio Corp.* v. *Hazeltine Research,* 401 U. S. 321, 336 n. 7 (1971); *Girouard* v. *United*

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[24] See S. C. Code §§ 7–5–10, 7–5–30, 7–5–610 to 7–5–630 (1977).

States, 328 U. S. 61, 69–70 (1946). *Don E. Williams Co.* v. *Commissioner, supra,* is instructive. As here, there had been a longstanding administrative interpretation of a statute when Congress re-enacted it, and there, as here, the legislative history of the re-enactment showed that Congress agreed with that interpretation, leading this Court to conclude that Congress had ratified it. 429 U. S., at 574–577. While we have no quarrel with our Brother STEVENS' view that it is impermissible to draw inferences of approval from the unexplained inaction of Congress, see *post,* at 149, citing *Hodgson* v. *Lodge 851, Int'l Assn. of Mach. & Aerospace Workers,* 454 F. 2d 545, 562 (CA7 1971) (Stevens, J., dissenting), that principle has no applicability to this case. Here, the "slumbering army" of Congress was twice "aroused," and on each occasion it re-enacted the Voting Rights Act and manifested its view that § 5 covers all cities in designated jurisdictions.[25]

In short, the legislative background of the enactment and re-enactments compels the conclusion that, as the purposes of the Act and its terms suggest, § 5 of the Act covers all political units within designated jurisdictions like Alabama. Accordingly, we hold that the District Court erred in concluding that § 5 does not apply to Sheffield.

III

Having decided that Sheffield is subject to § 5, we must consider whether the District Court properly concluded that the Attorney General's failure to object to the holding of the referendum constituted clearance under § 5 of the method of electing city councilmen under the new government. Only a

[25] Our Brother STEVENS' dissent contends that the unambiguous legislative history of the 1970 and 1975 Acts of Congress is not a "reliable guid[e] to what Congress intended in 1965 when it drafted the relevant statutory language." *Post,* at 149. With respect, the dissent asks and answers the wrong question. It cannot be gainsaid that we are construing, not the 1965 enactment of § 5, but a 1975 re-enactment.

few words are needed to demonstrate that the District Court also erred on this point.

It bears re-emphasizing at the outset that the purpose of § 5 is to establish procedures in which voting changes can be scrutinized by a federal instrumentality before they become effective. The basic mechanism for preclearance is a declaratory judgment proceeding in the District Court for the District of Columbia, but the Act, of course, establishes an alternative procedure of submission to the Attorney General to give "covered State[s] a rapid method of rendering a new state election law enforceable." *Allen* v. *State Board of Education,* 393 U. S., at 549. Under the statute's terms, the Attorney General will be treated as having approved a voting change if such change "has been *submitted* . . . to [him] and [he] has not interposed an objection within sixty days after such *submission*" or if the change has been submitted and "the Attorney General has affirmatively indicated that such objection will not be made." 42 U. S. C. § 1973c (1970 ed., Supp. V) (emphasis supplied). See also *Georgia* v. *United States,* 411 U. S., at 540. While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him. But the District Court held precisely that.

First, it is clear on this record—and the District Court did not find otherwise—that Sheffield did not, in its March 20, 1975, letter, submit to the Attorney General a request for preclearance of the change in the City's form of government. Sheffield's letter sought approval only for the holding of the referendum.[26] Moreover, under the Attorney General's own

[26] In this connection it bears noting that the Attorney General's regulations provide that such letters should clearly set forth the proposed change affecting voting for which clearance is being sought. See 28 CFR §§ 51.5, 51.10 (a) (1976).

regulation, the validity of which is not questioned, the City could not at that time have sought preclearance of the change in the form of government because, as the March 20, 1975, letter stated, see n. 4, *supra,* the details of the change had not yet been worked out. See 28 CFR § 51.7 (1976).[27]

And there is no question but that the Attorney General did not intend to approve the proposed change to a mayor-council government and could not be understood as having done so. When the Attorney General wrote the City and told it that he had decided not to interpose an objection to the holding of the referendum, he warned that the change itself required prior federal scrutiny, and he apprised it of the information it should supply if it wished to attempt to preclear the change in government with the Attorney General, rather than in federal district court.

Under the circumstances, it is irrelevant that the Attorney General might have been on notice that, if the referendum passed, Sheffield would have been required by state law to adopt an at-large system of councilmanic elections.[28] Although

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[27] In pertinent part, this provides that, "regarding a change as to which approval by referendum . . . is required . . . , the Attorney General may consider and issue a decision concerning the change prior to the referendum . . . if all other action necessary for adoption has been taken." Since it quite frequently will be the case that it will not be possible to determine whether a voting change has the purpose or effect of racial discrimination until all the variables of the change are known, there is no question but that this regulation is a reasonable means of administering the Act and, as such, is valid. See *Georgia* v. *United States,* 411 U. S. 526, 536–538 (1973).

[28] We observe that the District Court's conclusion that the Attorney General should have known that at-large elections were required by law is itself questionable for two reasons. First, at the time of the approval of the referendum, it is doubtful that the Attorney General could have been charged with knowledge of the particular provision of Alabama requiring at-large councilmanic elections in cities like Sheffield. The City's March 20, 1975, letter had not cited Ala. Code, Tit. 37, § 426 (Supp. 1973), which was in Art. 4 of Chapter 8 of Title 37. See n. 3, *supra.* The

the City could have easily placed the request for preclearance of the change in the form of government before the Attorney General—*i. e.*, by taking all action necessary for the completion of the change before submitting it, see 28 CFR § 51.7 (1976), and by stating in its letter that it desired preclearance of the change itself, see §§ 51.5, 51.10 (a)—it did not, so the Attorney General, quite properly, treated Sheffield as having sought prior clearance only of the referendum. Accordingly, the District Court erred in concluding that the Attorney General has to be understood as having approved the adoption of an at-large system of election.

Since we conclude that Sheffield is covered by § 5 of the Act and that the Attorney General did not clear the City's decision to adopt a system of government in which councilmen are elected at large, the judgment of the District Court is

Reversed.

MR. JUSTICE BLACKMUN, concurring.

Although I find this case to be closer than much of the language of the Court's opinion would indicate, I nevertheless join that opinion. I do so because I feel that whatever

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District Court's conclusion that the Attorney General should have known of this provision of Alabama law would be sustainable only if we were to take the extreme position that the Attorney General should be charged with notice of all provisions of local law. Second, even had the Attorney General been aware of § 426 there was reason to believe that, regardless of any statutory requirement, the City would adopt a system of election directly by ward if the referendum passed. Both the Alabama Attorney General's 1968 opinion, see n. 3, *supra*, and the City's March 20, 1975, letter, see n. 4, *supra*, stated that Sheffield would return to the 1912 system, in which councilmen were elected by each of the four wards, if the referendum were to pass. Indeed, the record reflects that the City had some difficulty persuading the Attorney General that state law even permitted it to adopt an at-large system. Thus, it seems that the District Court's conclusion that the Attorney General must have known that at-large elections were required by law is itself questionable.

contrary argument might have been made persuasively on the § 5 issue a decade ago, the Court's decisions since then and the re-enactments by Congress, see *ante,* at 132–135, compel the result the Court reaches today.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

Given the Court's reading of the Voting Rights Act in prior decisions, and particularly in *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), and *Perkins* v. *Matthews,* 400 U. S. 379 (1971), I concur in the judgment of the Court. In addition, I concur in Part III of the Court's opinion.

Although my reservations as to the constitutionality of the Act have not abated,* I believe today's decision to be correct under this Court's precedents and necessary in order to effectuate the purposes of the Act, as construed in *Allen* and *Perkins.* In view of these purposes it does not make sense to limit the preclearance requirement to political units charged with voter registration. As the majority observes, *ante,* at 124, such a construction of the statute could enable covered States or political subdivisions to allow local entities that do not conduct voter registration to assume responsibility for changing the electoral process. A covered State or political subdivision thereby could achieve through its instrumentalities what it could not do itself without preclearance.

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*See *Allen* v. *State Board of Elections,* 393 U. S. 544, 595 (Black, J., dissenting) (1969); *Georgia* v. *United States,* 411 U. S. 526, 545 (1973) (POWELL, J., dissenting). My reservations relate not to the commendable purpose of the Act but to its selective coverage of certain States only and to the intrusive preclearance procedure.

I agree with much of what MR. JUSTICE STEVENS says in dissent, but unless the Court is willing to overrule *Allen* and its progeny—a step it has refrained from taking—I view those decisions as foreshadowing if not compelling the Court's judgment today. I nevertheless record my total agreement with MR. JUSTICE STEVENS' view of the Act's preclearance requirement, *post,* at 141.

I agree with the Court that a more sensible construction of § 5, in view of and in accord with the statute's purpose, is to treat the governmental units responsible for changes in the electoral process within a designated State or political subdivision as the equivalent of the State or political subdivision. This construction also accords with Congress' understanding, cited by the District Court, that the designation of a State would imply the designation of its political subdivisions. In such a situation, the reason for including the political subdivisions is not that they are defined in § 14 (c)(2) and therefore might have been designated separately. Their eligibility for designation apart from the State is without significance once the entire State has been designated. Rather, the political subdivisions are covered because they are within the jurisdiction of the designated unit and might be delegated its authority to enact or administer laws affecting voting. Because the same is true of a governmental unit like the city of Sheffield that is not a "political subdivision" within the meaning of § 14 (c)(2), I agree with the Court that it too is subject to § 5 and must comply with its requirements.

MR. JUSTICE STEVENS, with whom MR. CHIEF JUSTICE BURGER and MR. JUSTICE REHNQUIST join, dissenting.

The principal question presented by this case is whether the city of Sheffield, Ala., is covered by § 5 of the Voting Rights Act of 1965.[1] If that question could be answered solely by reference to the Act's broad remedial purposes, it might be an easy one. But on the basis of the statute as written, the question is not nearly as simple as the Court implies. I believe it requires two separate inquiries: First, whether the city of Sheffield is a "political subdivision" within the meaning of § 5; and second, even if that question is answered in the negative, whether action by the city should

[1] The second question is, I believe, correctly answered in Part III of the Court's opinion.

be regarded as action of the State within the meaning of that section.

I

Briefly stated, § 5 provides that whenever a State or a political subdivision, designated pursuant to § 4, seeks to change a voting practice, it must obtain clearance for that change from either the United States District Court for the District of Columbia or the Attorney General of the United States.[2] This so-called "preclearance" requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a "substantial departure . . . from ordinary concepts of our federal system";[3] its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care. As a starting point, it is clear that it applies only to actions taken by two types of political units—States or political subdivisions.

Since Alabama is a designated State under § 4, "each and every political subdivision within that State" is covered by § 5. See H. R. Rep. No. 439, 89th Cong., 1st Sess., 25 (1965). This does not, however, mean that the city of Sheffield is a "political subdivision" of Alabama covered by § 5. For the Act specifically defines "political subdivision," and that definition does not even arguably include an entity such as Sheffield.

Section 14 (c)(2) of the Act provides:

> "The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not

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[2] See *ante,* at 112–113, n. 1.

[3] Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 536 (1975 Senate Hearings) (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division). See also *South Carolina* v. *Katzenbach,* 383 U. S. 301, 358 (Black, J., concurring and dissenting); *Georgia* v. *United States,* 411 U. S. 526, 545 (POWELL, J., dissenting).

> conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

Sheffield is not a county or a parish, and it does not conduct registration for voting. Consequently, it is not a "political subdivision." [4]

The legislative history of § 14 (c)(2) demonstrates that the term "political subdivision" was defined for the specific purpose of limiting the coverage of the Act. Because the term had not been defined in the bill as originally drafted, Senator Ervin, among others, recognized that it might be read to encompass minor, local governmental units. It was to allay this concern that the definition was included in the Act.

> "Senator ERVIN. This [an early version of the Voting Rights Act] not only applies to a State, but this would apply to any little election district in the State . . . .
>
> "Attorney General KATZENBACH. I do not believe so, Senator. There is a question as to what the term 'political subdivision' means. I have taken the view in the other body and I would state it here that we are talking about the area in which people are registered, the appropriate unit for registering. I believe in every State

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[4] The Court suggests that the term "political subdivision" refers to a geographic area and not to a political unit. *Ante*, at 128 n. 15. But this argument is repudiated by the plain language of the statute. Section 5 reads:

"Whenever a State or political subdivision . . . *shall enact* or seek to administer any voting qualification . . . ." (Emphasis added.)

Since laws are enacted and administered by political units, rather than geographic territories, the term necessarily has the former meaning as it is used in this section.

This conclusion is confirmed by other language in § 5: "[S]uch State or subdivision may institute an action . . . *Provided*, That such qualification . . . may be enforced . . . if . . . submitted by the chief legal officer or other appropriate official of such State or subdivision . . . ." Geographic territories do not institute actions or employ legal officers; but political units do.

> that comes within the provisions of this, we are talking about no area smaller than a county or a parish.
>
> "Senator ERVIN. Do you not think that you had better amend your bill to so provide, because in North Carolina, every municipality is a political subdivision of the State, even every sanitary district is a subdivision of the State. Also every election district is a subdivision of the State, every school district . . . every special bond, school-bond, district is a subdivision of the State.
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> "Attorney General KATZENBACH. I think that might be done to define political subdivision here in the bill in that way, Senator. That is what I intended." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 44 (1965) (1965 Senate Hearings).

See also Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 21 (1965) (1965 House Hearings).

Later, during the Senate debate on the Voting Rights Act, Senator Ervin referred to the above dialogue with Attorney General Katzenbach and stated, without contradiction, that the term "political subdivision" had been defined to avoid a construction of the Act that would "confer jurisdiction upon the Federal Government to intervene in every ward of every city and town covered by the bill." 111 Cong. Rec. 9270 (1965). The Senate Report on the Voting Rights Act made the same point equally bluntly:

> "This definition makes clear that the term 'political subdivision' is not intended to encompass precincts, election districts, or other similar units when they are within a county or parish which supervises registration for voting." S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 31 (1965).[5]

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[5] Ignoring the legislative history which explains why § 14 (c) (2) was inserted in the Act, the Court instead focuses on a statement by Senator

In short, whatever other ambiguities there may be in the Act, the definition of "political subdivision" is not one of them. It was clearly intended to limit the reach of the Act, and the definition clearly excludes cities, such as Sheffield, that do not register voters.

II

The remaining question is whether a political unit that does not register voters may be regarded as the "State," as that term is used in § 5. If there were no contrary legislative history, it might be reasonable to treat the action of entities such as Sheffield, which are within the jurisdiction of a covered State, as "state action," just as such governmental action would be regarded as state action in a constitutional sense. However, such an interpretation of the word "State" would extend the reach of the statute to the same kind of purely local matters that Congress intended to exclude by defining the term "political subdivision."

As is apparent from the comments of Senator Ervin, quoted *supra,* there was congressional concern over whether the Act would extend to governmental units below the county level. That concern was repeatedly expressed and was specifically addressed in § 14 (c)(2). Unquestionably, as the Court recognizes, *ante,* at 128–129, that section protects small political units, such as school boards, from being separately designated for coverage under § 4 (b). The concerns which motivated this exclusion from § 4 (b) apply equally to § 5.[6] Indeed, the

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Talmadge referring to § 5's application to cities. *Ante,* at 130–131. This statement, however, offers little support for the Court's view since Georgia, Senator Talmadge's home State, does have voter registration by cities. Ga. Code 34A–501 (1975).

[6] The Court reasons that since § 4 (a) was intended to apply throughout a designated State, § 5's preclearance requirement must have the same reach. This analysis is unpersuasive for three reasons. First, it does not give sufficient weight to the clear differences in statutory language between § 4 (a) and § 5. See n. 4, *supra.* When Congress wanted the

legislative history provides a perfectly logical explanation of why Congress deliberately limited the reach of § 5, as well as § 4 (b), to "political subdivisions," as defined by the Act.

First, a preclearance requirement limited to governmental units engaged in the registration process would be in accord with the fact that the Act was principally concerned with literacy tests and other devices which were being used to prevent black citizens from registering to vote. As Attorney General Katzenbach repeatedly emphasized, the "bill really is aimed at getting people registered." See 1965 House Hearings 21.[7]

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term "State" to have a geographic reach, it was clearly capable of expressing that intent, as it did in § 4 (a). Its failure to do so in § 5 must be accorded some significance, especially when coupled with § 14 (c) (2)'s general purpose of excluding small political units from the Act's reach. Second, it does not adequately assess the reason for the inclusion of the § 14 (c) (2) definition of "political subdivision." Third, the Court has already recognized that § 5 was not intended to provide a remedy for every wrong committed in a State in connection with voting.

"It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed. At the same time, through §§ 3, 6 (a), and 13 (b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *South Carolina* v. *Katzenbach,* 383 U. S., at 330–331.

[7] The following dialogue is illustrative:

"The CHAIRMAN. The bill also refers to 'political subdivisions.' How far down the political scale does that go?

"Mr. KATZENBACH. I believe that the term 'political subdivision' used in this bill . . . really is aimed at getting people registered.

"The CHAIRMAN. For example, in New York. . . . I take it that an election district would be deemed a political subdivision?

"Mr. KATZENBACH. I think that is possible, Mr. Chairman, but frankly, you are more familiar with how registration is accomplished in

Second, the Act limits judicial review of an election change under § 5 to a three-judge District Court sitting in the District of Columbia. The opponents of the Act frequently expressed their outrage at this limitation, arguing that it was unfair to make people travel "250 or 1,000 or 3,000 miles in order to gain access to a court of justice." See, *e. g.*, 1965 Senate Hearings 43 (remarks of Sen. Ervin); 111 Cong. Rec. 10371 (remarks of Sen. Ellender) (1965). Proponents of § 5 justified the provision on the ground that it would not be difficult or unusual for a State, county, or comparable body to have to make its arguments in Washington, D. C. See, *e. g.*, Senate Hearing 44 (testimony of Attorney General Katzenbach). Senator Javits' comments on the floor of the Senate are typical of this line of argument:

> "Finally, it cannot be claimed that the bill is unfair to litigants other than the Federal Government because we are not dealing with litigants who are unable to pursue a legal remedy. We are not dealing with litigants who might find travel difficult or legal proceedings or appearances expensive. We are dealing with political subdivisions and States, which have county attorneys or State

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New York than I am. I know how it is accomplished or not accomplished in Alabama.

"The CHAIRMAN. What would be the lowest possible political unit in the scale?

"Mr. KATZENBACH. What is the area in which registration is done in New York? I am not familiar with that, Mr. Chairman." 1965 House Hearings 21.

Similar testimony was referred to by the Court in *Allen* v. *State Board of Elections*, 393 U. S. 544, 564.

The fact that *Allen* broadly construed the Act to apply to gerrymandering and other techniques which "dilute" the weight of some votes cannot obscure the fact that voter registration was the central concern of the Act when it was passed in 1965. Indeed, *Allen*'s creative interpretation of the statute was so dramatic that it was given only prospective application. See *id.*, at 572.

> attorneys general who come to Washington, D. C., for many things, and they would not be required to come to Washington merely to participate in litigation that might arise under the bill." 111 Cong. Rec. 10363 (1965).

Obviously, this same argument does not apply to most townships, school boards, and the numerous other small, local units involved in the political process. Whether or not it would be "fair" to make these smaller political units argue their cases only in Washington, D. C., the drafters and supporters of the Act gave assurances that § 5 was not so intended. A broad definition of "State" would nullify those assurances just as surely as a loose interpretation of "political subdivision."

Finally, the logistical and administrative problems inherent in reviewing *all* voting changes of *all* political units strongly suggest that Congress placed limits on the preclearance requirement. Statistics show that the Attorney General's staff is now processing requests for voting changes at the rate of over 1,000 per year,[8] and this rate is by no means indicative of the number of submissions involved if all covered States and political units fully complied with the preclearance requirement, as interpreted by the Attorney General.[9] Furthermore, under the statute each request must be passed upon within 60 days of its submission. This large and rapid volume

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[8] While approximately 6,400 voting change requests have been submitted since the Act was passed, the submissions have not been evenly divided among the 13 years of the Act's existence. Approximately 5,800 of the 6,400 submitted changes were made from 1971 on. See 1975 Senate Hearings 597; Jurisdictional Statement 13–14. The figure of 8,100 cited by the Court, *ante,* at 131 n. 19, *supra,* refers to the number of voting changes included within the submissions.

[9] Assistant Attorney General Pottinger testified in 1975 that "Section 5 has yet to be fully implemented." 1975 Senate Hearings 583. In fact, the Attorney General has had to ask the FBI to conduct investigations to help determine whether local authorities have made any changes in voting procedures that are not reflected in state statutes. *Ibid.*

of work is a product, in part, of this Court's decision in *Allen*.[10] But even apart from *Allen*, it is certainly reasonable to believe that Congress, having placed a strict time limit on the Attorney General's consideration of submissions, also deliberately placed a limit on the number and importance of the submissions themselves.[11] This result was achieved by restricting the reach of § 5 to enactments of either the States themselves or their political subdivisions, as defined by § 14 (c)(2).

Neither the "contemporaneous" construction of the Act by the Attorney General nor the subsequent amendments of § 5 by Congress, in my judgment, undermine the validity of this reading of the section. The Court asserts that the "Attorney General has, since the Act was adopted in 1965, interpreted § 5 as requiring all political units in designated jurisdictions to preclear proposed voting changes." *Ante*, at 131. The unambiguous historical evidence is to the contrary.

The Department of Justice did not adopt regulations implementing § 5's preclearance provisions until September 1971, six years after the passage of the Act and nearly two years after this Court's decision in *Allen*. 36 Fed. Reg. 18186; see *Georgia* v. *United States*, 411 U. S. 526. And it was not until the *Allen* decision that the Department even attempted

[10] Prior to the *Allen* decision in 1969, only three States had submitted any voting changes to the Attorney General for approval, for a total of 323 submissions during a five-year period. *Id.*, at 597. There was a dramatic leap in submissions between 1970 and 1971, from 255 to 1,118. *Ibid.* These figures reveal the obvious impact that *Allen* and *Perkins* v. *Matthews*, 400 U. S. 379, have had on the Attorney General's implementation of § 5.

[11] The sheer number and insignificance of the changes in voting procedures in local political units that must, under today's decision, be submitted to the country's highest legal officer suggest that Congress may have limited the reach of § 5 in order to insure the preclearance requirement's effectiveness and solemnity. Paradoxically, the Court's effort to eliminate any remedial "gaps" in the statute may reduce the preclearance requirement to a trivial, though burdensome, administrative provision. As would be expected, almost all submissions are routinely accepted by the Attorney General. See 1975 Senate Hearings 582.

to develop standards and procedures for enforcing § 5. See 1975 Senate Hearings 537 (testimony of Assistant Attorney General J. Stanley Pottinger). In short, there was no "contemporaneous" construction of the Act by the Attorney General. It may have been reasonable for the Attorney General, in promulgating regulations after the *Allen* decision, to have assumed that, since the section now covered all voting changes and not simply registration changes, all political units and not simply political subdivisions were also covered. But that assumption sheds no light on Congress' intention in passing the Act in 1965.

Nor, in my judgment, are the subsequent amendments of the Act in 1970 and 1975 reliable guides to what Congress intended in 1965 when it drafted the relevant statutory language. The 1970 and 1975 extensions of the Act did not change the operative language in § 5 or alter the definition of the term "political subdivision." As I suggested a few years ago, "[a]n interpretation of a provision in [a] controversial and integrated statute . . . cannot fairly be predicated on unexplained inaction by different Congresses in subsequent years." *Hodgson* v. *Lodge 851, Int'l Assn. of Mach. & Aerospace Workers,* 454 F. 2d 545, 562 (CA7 1971) (dissenting opinion).[12]

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[12] In response to this dissenting opinion, the Court has suggested that in focusing on the language of § 14 (c)(2) and in searching through the 1965 legislative history, I have sought an answer to the wrong question because we are construing the 1975, rather than the 1965, Act. *Ante,* at 135 n. 25. However, the question whether the Act was "re-enacted" in 1975 is of only technical significance. Section 5 would have continued in operation beyond 1975 for States such as Alabama even without the 1975 extension. See comments of Senator Tunney, 121 Cong. Rec. 24706 (1975). More importantly, the 1975 Congress made no change in the definition of "political subdivision" and no one called its attention to any aspect of the issue decided today. The question I have tried to answer is what Congress actually intended to accomplish by its definition of the term "political subdivision." That definition was, perhaps, the product of a

In sum, I am persuaded that the result the Court reaches today is not a faithful reflection of the actual intent of the Congress that enacted the statute. I therefore respectfully dissent.

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legislative compromise, and the resulting statutory language may be "crippling" to the Court's reading of the full remedial purposes of the statute. But we have an obligation to respect the product of legislative compromise as well as policy decisions we wholeheartedly endorse.

Syllabus

RAY, GOVERNOR OF WASHINGTON, ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 76–930. Argued October 31, 1977—Decided March 6, 1978

Appellees challenge the constitutionality of the Washington Tanker Law, which regulates the design, size, and movement of oil tankers in Puget Sound, both enrolled (those engaged in domestic or coastwise trade) and registered (those engaged in foreign trade). Three operative provisions are involved: (1) a requirement (§ 88.16.180) that both enrolled and registered oil tankers of at least 50,000 deadweight tons (DWT) carry a Washington-licensed pilot while navigating the Sound; (2) a requirement (§ 88.16.190 (2)) that enrolled and registered oil tankers of from 40,000 to 125,000 DWT satisfy certain design or safety standards, or else use tug escorts while operating in the Sound; and (3) a ban on the operation in the Sound of any tanker exceeding 125,000 DWT (§ 88.16.190 (1)). A three-judge District Court adjudged the statute void in its entirety, upholding appellees' contentions that all the Tanker Law's operative provisions were pre-empted by federal law particularly the Ports and Waterways Safety Act of 1972 (PWSA), which is designed to insure vessel safety and the protection of navigable waters and adjacent shore areas from tanker oil spillage. Title I of the PWSA empowers the Secretary of Transportation to establish, operate, and require compliance with "vessel traffic services and systems" for ports subject to congested traffic and to control vessel traffic in especially hazardous areas by, among other things, establishing vessel size limitations. Pursuant to this Title, the Secretary, through his delegate, has promulgated the Puget Sound Vessel Traffic System, which contains general and communication rules, vessel movement reporting requirements, a traffic separation scheme, special ship movement rules applying to Rosario Strait (where under a local Coast Guard rule the passage of more than one 70,000 DWT vessel—in bad weather, 40,000 DWT—in either direction at a given time is prohibited), and other requirements. A State, though permitted to impose higher equipment or safety standards, may do so "for structures only." Title II, whose goals are to provide vessel safety and protect the marine environment, provides that the Secretary shall issue such rules and regulations as may be necessary with respect to the design, construction, and operation of oil tankers; provides for inspection of vessels for

compliance with the Secretary's safety and environmental regulations; and prohibits the carrying of specified cargoes absent issuance of a certificate of inspection evidencing compliance with the regulations. Title 46 U. S. C. § 364 provides that every coastwise seagoing steam vessel subject to federal navigation laws not sailing under register shall, when under way, be under the control and direction of pilots licensed by the Coast Guard. Title 46 U. S. C. § 215 adds that no state government shall impose upon steam vessel pilots any obligation to procure a state license in addition to the federal license, though it is specified that the provision does not affect state requirements for carrying pilots on other than coastwise vessels. *Held:*

1. To the extent that § 88.16.180 requires enrolled tankers to carry state-licensed pilots, the State is precluded by 46 U. S. C. §§ 215, 364 from imposing its own pilotage requirements and to that extent the state law is invalid. The District Court's judgment was overly broad, however, in invalidating the pilot provision in its entirety, since under both 46 U. S. C. § 215 and the PWSA States are free to impose pilotage requirements on registered vessels entering and leaving their ports. Pp. 158–160.

2. Congress in Title II intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements, and since the federal scheme aims at precisely the same ends as § 88.16.190 (2) of the Tanker Law, the different and higher design requirements of that provision, standing alone, are invalid under the Supremacy Clause. *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440; *Kelly* v. *Washington,* 302 U. S. 1, distinguished. Pp. 160–168.

3. The District Court erred in holding that the alternative tug requirement of § 88.16.190 (2) was invalid as conflicting with the PWSA, for the Secretary has not as yet promulgated his own tug requirement for Puget Sound tanker navigation or decided that there should be no such requirement. Unless and until he issues such rules, the State's tug-escort requirement is not pre-empted by the federal scheme. Pp. 168–173.

4. The exclusion from Puget Sound of any tanker exceeding 125,000 DWT pursuant to § 88.16.190 (1) is invalid under the Supremacy Clause in light of Title I and the Secretary's actions thereunder, a conclusion confirmed by the legislative history of Title I which shows that Congress intended that there be a single federal decisionmaker to promulgate limitations on tanker size. Pp. 173–178.

5. The tug-escort requirement does not violate the Commerce Clause. This requirement, like a local pilotage requirement, is not the type of regulation demanding a uniform national rule, see *Cooley* v. *Board of*

Wardens, 12 How. 299, nor does it impede the free flow of interstate and foreign commerce, the tug-escort charges not being large enough to interfere with the production of oil. Pp. 179–180.

6. Nor does the tug-escort provision, which does not interfere with the Government's attempt to achieve international agreement on the regulation of tanker design, interfere with the Government's authority to conduct foreign affairs. P. 180.

— F. Supp. —, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined; in all but Parts V and VII of which POWELL and STEVENS, JJ., joined; and in all but Parts IV and VI of which BRENNAN, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and REHNQUIST, JJ., joined, *post,* p. 180. STEVENS, J., filed an opinion concurring and dissenting in part, in which POWELL, J., joined, *post,* p. 187.

Slade Gorton, pro se, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Charles B. Roe, Jr.,* Senior Assistant Attorney General, *Robert E. Mack* and *Richard L. Kirkby,* Assistant Attorneys General, *David E. Engdahl,* Special Assistant Attorney General, *Christopher T. Bayley, pro se, Thomas A. Goeltz, John E. Keegan, Eldon V. C. Greenberg, Richard A. Frank, Thomas H. S. Brucker,* and *James N. Barnes.*

Richard E. Sherwood argued the cause for appellees. With him on the brief were *B. Boyd Hight, Ira M. Feinberg, Raymond W. Haman, James L. Robart,* and *David E. Wagoner.**

**Anthony F. Troy,* Attorney General, *James E. Ryan, Jr.,* Deputy Attorney General, and *John Hardin Young,* Assistant Attorney General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Eugene A. Massey* for the American Institute of Merchant Shipping, by *John M. Cannon* for the Mid-America Legal Foundation, and by *David R. Owen* for the Maritime Law Association of the United States.

Briefs of *amici curiae* were filed by *Solicitor General McCree* and *William F. Sheehan III* for the United States; by *Evelle J. Younger,*

MR. JUSTICE WHITE delivered the opinion of the Court.

Pursuant to the Ports and Waterways Safety Act of 1972 (PWSA), 86 Stat. 424, 33 U. S. C. § 1221 *et seq.* (1970 ed., Supp. V), and 46 U. S. C. § 391a (1970 ed., Supp. V), navigation in Puget Sound, a body of inland water lying along the northwest coast of the State of Washington,[1] is controlled in major respects by federal law. The PWSA also subjects to federal rule the design and operating characteristics of oil tankers.

This case arose when ch. 125, 1975 Wash. Laws, 1st Extr.

Attorney General, *E. Clement Shute, Jr.*, Assistant Attorney General, and *C. Foster Knight*, Deputy Attorney General, for the State of California, joined by certain officials for their respective States as follows: *Avrum M. Gross*, Attorney General of Alaska, and *Sanford Sagalkin*, Assistant Attorney General; *Arthur K. Bolton*, Attorney General of Georgia, and *Ann Estes*, Staff Assistant Attorney General; *Ronald Y. Amemiya*, Attorney General of Hawaii, and *Laurence K. Lau*, Deputy Attorney General; *John Ashcroft*, Attorney General of Missouri, and *Robert M. Lindholm*, Assistant Attorney General; *Robert P. Kane*, Attorney General of Pennsylvania, and *William Eichbaum*, Assistant Attorney General; and *Bronson C. LaFollette*, Attorney General of Wisconsin, and *Theodore Priebe*, Assistant Attorney General; and by certain officials for their respective States as follows: *Francis B. Burch*, Attorney General of Maryland, and *Warren K. Rich* and *Earl G. Schaffer*, Assistant Attorneys General; *Richard Wier*, Attorney General of Delaware; *Joseph E. Brennan*, Attorney General of Maine; *Warren Spannaus*, Attorney General of Minnesota; *Louis J. Lefkowitz*, Attorney General of New York; *Julius C. Michaelson*, Attorney General of Rhode Island; *Robert L. Shevin*, Attorney General of Florida; and *Wayne L. Kidwell*, Attorney General of Idaho.

[1] Puget Sound is an estuary consisting of 2,500 square miles of inlets, bays, and channels in the northwestern part of Washington. More than 200 islands are located within the Sound, and numerous marshes, tidal flats, wetlands, and beaches are found along the 2,000 miles of shoreline. The Sound's waters and shorelines provide recreational, scientific, and educational opportunities, as well as navigational and commercial uses, for Washington citizens and others. The Sound, which is connected to the Pacific Ocean by the Strait of Juan de Fuca, is constantly navigated by commercial and recreational vessels and is a water resource of great value to the State, as well as to the United States.

Sess., Wash. Rev. Code § 88.16.170 *et seq.* (Supp. 1975) (Tanker Law), was adopted with the aim of regulating in particular respects the design, size, and movement of oil tankers in Puget Sound. In response to the constitutional challenge to the law brought by the appellees herein, the District Court held that under the Supremacy Clause, Art. VI, cl. 2, of the Constitution, which declares that the federal law "shall be the supreme Law of the Land," the Tanker Law could not coexist with the PWSA and was totally invalid. *Atlantic Richfield Co.* v. *Evans,* No. C–75–648–M (WD Wash. Sept. 24, 1976).

I

Located adjacent to Puget Sound are six oil refineries having a total combined processing capacity of 359,500 barrels of oil per day. In 1971, appellee Atlantic Richfield Co. (ARCO) began operating an oil refinery at Cherry Point, situated in the northern part of the Sound. Since then, the crude oil processed at that refinery has been delivered principally by pipeline from Canada[2] and by tankers from the Persian Gulf; tankers will also be used to transport oil there from the terminus of the Trans-Alaska Pipeline at Valdez, Alaska. Of the 105 tanker deliveries of crude oil to the Cherry Point refinery from 1972 through 1975, 95 were by means of tankers in excess of 40,000 deadweight tons (DWT),[3] and, prior to the effective date of the Tanker Law, 15 of them were by means of tankers in excess of 125,000 DWT.

Appellee Seatrain Lines, Inc. (Seatrain), owns or charters 12 tanker vessels in domestic and foreign commerce, of which

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[2] We were informed during oral argument by the Attorney General of Washington that the pipeline from Canada to Cherry Point is no longer in service. Tr. of Oral Arg. 6.

[3] The term "deadweight tons" is defined for purposes of the Tanker Law as the cargo-carrying capacity of a vessel, including necessary fuel oils, stores, and potable waters, as expressed in long tons (2,240 pounds per long ton).

four exceed 125,000 DWT. Seatrain also operates through a wholly owned subsidiary corporation a shipbuilding facility in New York City, where it has recently constructed or is constructing four tankers, each with a 225,000 DWT capacity.

On the day the Tanker Law became effective, ARCO brought suit in the United States District Court for the Western District of Washington, seeking a judgment declaring the statute unconstitutional and enjoining its enforcement. Seatrain was later permitted to intervene as a plaintiff. Named as defendants were the state and local officials responsible for the enforcement of the Tanker Law.[4] The complaint alleged that the statute was pre-empted by federal law, in particular the PWSA, and that it was thus invalid under the Supremacy Clause. It was also alleged that the law imposed an undue burden on interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that it interfered with the federal regulation of foreign affairs. Pursuant to 28 U. S. C. §§ 2281, 2284, a three-judge court was convened to determine the case.

The case was briefed and argued before the District Court on the basis of a detailed stipulation of facts. Also before the court was the brief of the United States as *amicus curiae,* which contended that the Tanker Law was pre-empted in its entirety by the PWSA and other federal legislation.[5] The three-judge court agreed with the plaintiffs and the United States, ruling that all of the operative provisions of the Tanker Law were pre-empted, and enjoining appellants and their successors from enforcing the chapter.[6] We noted probable jurisdiction of

[4] Four environmental groups—Coalition Against Oil Pollution, National Wildlife Federation, Sierra Club, and Environmental Defense Fund, Inc.—and the prosecuting attorney for King County, Wash., intervened as defendants.

[5] The United States has since modified its views and no longer contends that the Tanker Law is in all respects pre-empted by federal law.

[6] The state defendants challenged the District Court's jurisdiction over them, asserting sovereign immunity under the Eleventh Amendment. They

the State's appeal, 430 U. S. 905 (1977), meanwhile having stayed the injunction. 429 U. S. 1035 (1977).

II

The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice, supra,* at 230:

> "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad*

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recognized that in *Ex parte Young,* 209 U. S. 123 (1908), the Court held that the Eleventh Amendment does not bar suit in federal court against a state official for the purpose of obtaining an injunction against his enforcement of a state law alleged to be unconstitutional, but urged the District Court to overrule that decision or to restrict its application. The District Court declined to do so. The request is repeated here, and we reject it.

Commission, 236 U. S. 439; *Charleston & W. C. R. Co.* v. *Varnville Co.,* 237 U. S. 597; *New York Central R. Co.* v. *Winfield,* 244 U. S. 147; *Napier* v. *Atlantic Coast Line R. Co., supra.*"

Accord, *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U. S. 624, 633 (1973).

Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 142–143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941); *Jones* v. *Rath Packing Co., supra,* at 526, 540–541. Accord, *De Canas* v. *Bica,* 424 U. S. 351, 363 (1976).

III

With these principles in mind, we turn to an examination of each of the three operative provisions of the Tanker Law. We address first Wash. Rev. Code § 88.16.180 (Supp. 1975), which requires both enrolled and registered [7] oil tankers of at least 50,000 DWT to take on a pilot licensed by the State of Washington while navigating Puget Sound. The District Court held that insofar as the law required a tanker "enrolled in the coastwise trade" to have a local pilot on board, it was in direct conflict with 46 U. S. C. §§ 215, 364. We agree.

Section 364 provides that "every coastwise seagoing steam vessel subject to the navigation laws of the United States , . . . not sailing under register, shall, when under way, . . . be under

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[7] Enrolled vessels are those "engaged in domestic or coastwide trade or used for fishing," whereas registered vessels are those engaged in trade with foreign countries. *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265, 272–273 (1977).

the control and direction of pilots licensed by the Coast Guard." [8] Section 215 adds that "[n]o State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States . . . ." It goes on to explain that the statute shall not be construed to "affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, *other than coastwise steam vessels,* to take a pilot duly licensed or authorized by the laws of such State . . . ." (Emphasis added.) The Court has long held that these two statutes read together give the Federal Government exclusive authority to regulate pilots on enrolled vessels and that they preclude a State from imposing its own pilotage requirements upon them. See *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187 (1912); *Spraigue* v. *Thompson,* 118 U. S. 90 (1886). Thus, to the extent that the Tanker Law requires enrolled tankers to take on state-licensed pilots, the District Court correctly concluded, as the State now concedes, that it was in conflict with federal law and was therefore invalid.

While the opinion of the court below indicated that the pilot provision of the Tanker Law was void only to the extent that it applied to tankers enrolled in the coastwise trade, the judgment itself declared the statute null and void in its entirety. No part of the statute was excepted from the scope of the injunctive relief. The judgment was overly broad, for just as it is clear that States may not regulate the pilots of enrolled vessels, it is equally clear that they are free to impose pilotage requirements on registered vessels entering and leaving their

[8] Included within the definition of steam vessels are "[a]ll vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, . . . that shall have on board liquid cargo in bulk which is—(A) inflammable or combustible, or (B) oil, of any kind or in any form, . . . or (C) designated as a hazardous polluting substance . . . ." 46 U. S. C. § 391a (2) (1970 ed., Supp. V).

ports. Not only does 46 U. S. C. § 215 so provide, as was noted above, but so also does § 101 (5) of the PWSA, 33 U. S. C. § 1221 (5) (1970 ed., Supp. V), which authorizes the Secretary of Transportation to "require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved . . . ." Accordingly, as appellees now agree, the State was free to require registered tankers in excess of 50,000 DWT to take on a state-licensed pilot upon entering Puget Sound.

IV

We next deal with § 88.16.190 (2) of the Tanker Law, which requires enrolled and registered oil tankers of from 40,000 to 125,000 DWT to possess all of the following "standard safety features":

> "(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and
>
> "(b) Twin screws; and
>
> "(c) Double bottoms, underneath all oil and liquid cargo compartments; and
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> "(d) Two radars in working order and operating, one of which must be collision avoidance radar; and
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> "(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners . . . ."

This section contains a proviso, however, stating that if the "tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker . . . ," the design requirements are not applicable. The District Court held invalid this alternative design/tug requirement of the Tanker Law. We agree insofar as we hold that the foregoing design require-

ments, standing alone, are invalid in the light of the PWSA and its regulatory implementation.

The PWSA contains two Titles representing somewhat overlapping provisions designed to insure vessel safety and the protection of the navigable waters, their resources, and shore areas from tanker cargo spillage. The focus of Title I, 33 U. S. C. §§ 1221–1227 (1970 ed., Supp. V), is traffic control at local ports; Title II's principal concern is tanker design and construction.[9] For present purposes the relevant part is Title II, 46 U. S. C. § 391a (1970 ed., Supp. V), which amended the Tank Vessel Act of 1936, Rev. Stat. § 4417a, as added, 49 Stat. 1889.

Title II begins by declaring that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation" for vessels carrying certain cargoes in bulk, primarily oil and fuel tankers. § 391a (1). To implement the twin goals of providing for vessel safety and protecting the marine environment, it is provided that the Secretary of the Department in which the Coast Guard is located[10] "shall establish" such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels and with respect to a variety of related matters. § 391a (3). In issuing regulations, the Secretary is to consider the kinds and grades of cargo permitted to be on board such vessels, to consult with other federal agencies, and to identify separately the regulations established for vessel safety and those to protect marine environment. *Ibid.*

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[9] The Senate Report compares Title I to "providing safer surface highways and traffic controls for automobiles," while Title II is likened to "providing safer automobiles to transit those highways." S. Rep. No. 92–724, pp. 9–10 (1972) (Senate Report).

[10] The Coast Guard is located in the Department of Transportation. Thus references to the "Secretary" are to the Secretary of that Department.

Section 391a (5) provides for inspection of vessels for compliance with the Secretary's safety regulations.[11] No vessel subject to Title II may have on board any of the specified cargoes until a certificate of inspection has been issued to the vessel and a permit endorsed thereon "indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport." It is provided that in lieu of inspection under this section the Secretary is to accept from vessels of foreign nations valid certificates of inspection "recognized under law or treaty by the United States."

Title II also directs the Secretary to inspect tank vessels for compliance with the regulations which he is required to issue for the protection of the marine environment. § 391a (6).[12] Compliance with these separate regulations, which must

[11] The Secretary's current safety regulations with respect to the design and equipment of tank vessels appear at 46 CFR Parts 30–40 (1976). Section 31.05–1 of the regulations provides for the issuance of certificates of inspection to covered vessels complying with the applicable law and regulations and for endorsement thereon showing approval for the carriage of the particular cargoes specified. The regulation provides that "such endorsement shall serve as a permit for such vessel to operate."

[12] As directed by Title II, the Secretary, through his delegate, the Coast Guard, see 49 CFR § 1.46 (n)(4) (1976), has issued rules and regulations for protection of the marine environment relating to United States tank vessels carrying oil in domestic trade. 33 CFR Part 157 (1977). These regulations were initially designed to conform to the standards specified in a 1973 international convention, but have since been supplemented by additional requirements for new vessels going beyond the convention. 41 Fed. Reg. 54177 (1976). They have also been extended to vessels in the foreign trade, including foreign-flag vessels. *Ibid.* It appears that the Coast Guard is now engaged in a rulemaking proceeding which looks toward the imposition of still more stringent design and construction standards. 42 Fed. Reg. 24868 (1977).

satisfy specified standards,[13] and the consequent privilege of having on board the relevant cargo are evidenced by certificates of compliance issued by the Secretary or by appropriate endorsements on the vessels' certificates of inspection. Certificates are valid for the period specified by the Secretary and are subject to revocation when it is found that the vessel does not comply with the conditions upon which the certificate was issued.[14] In lieu of a certificate of compliance with his own environmental regulations relating to vessel design, construction, alteration, and repair, the Secretary may, but need not, accept valid certificates from foreign vessels evidencing compliance with rules and regulations issued under a treaty, convention, or agreement providing for reciprocity of recognition of certificates or similar documents. § 391a (7)(D).

This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements. In particular, as we

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[13] Title II in relevant part, 46 U. S. C. § 391a (7)(A) (1970 ed., Supp. V), provides:

"Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities."

[14] It should also be noted that the Secretary has authority under Title II to insure that adequately trained personnel are in charge of tankers. He is authorized to certify "tankermen" and to state the kinds of cargo that the holder of such certificate is, in the judgment of the Secretary, qualified to handle aboard vessels with safety. 46 U. S. C. § 391a (9) (1970 ed., Supp. V).

see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.

We do not question in the slightest the prior cases holding that enrolled and registered vessels must conform to "reasonable, nondiscriminatory conservation and environmental protection measures . . ." imposed by a State. *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 277 (1977), citing *Smith* v. *Maryland*, 18 How. 71 (1855); *Manchester* v. *Massachusetts*, 139 U. S. 240 (1891); and *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960). Similarly, the mere fact that a vessel has been inspected and found to comply with the Secretary's vessel safety regulations does not prevent a State or city from enforcing local laws having other purposes, such as a local smoke abatement law. *Ibid.* But in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation. *Huron Portland Cement Co.* v. *Detroit*, for example, made it plain that there was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance . . ." there involved. *Id.*, at 446. The purpose of the "federal inspection statutes [was] to insure the seagoing safety of vessels . . . to affor[d] protection from the perils of maritime navigation," while "[b]y contrast, the sole aim of the Detroit ordinance [was] the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.*, at 445.

Kelly v. *Washington*, 302 U. S. 1 (1937), involved a similar situation. There, the Court concluded that the Federal Motor

Boat Act, although applicable to the vessels in question, was of limited scope and did not include provision for "the inspection of the hull and machinery of respondents' motor-driven tugs in order to insure safety or determine seaworthiness . . . ," as long as the tugs did not carry passengers, freight, or inflammable liquid cargo. *Id.*, at 8. It followed that state inspection to insure safety was not in conflict with federal law, the Court also holding that the limited federal regulations did not imply an intent to exclude state regulation of those matters not touched by the federal statute.

Here, we have the very situation that *Huron Portland Cement Co.* v. *Detroit* and *Kelly* v. *Washington* put aside. Title II aims at insuring vessel safety and protecting the marine environment; and the Secretary must issue all design and construction regulations that he deems necessary for these ends, after considering the specified statutory standards. The federal scheme thus aims precisely at the same ends as does § 88.16.190 (2) of the Tanker Law. Furthermore, under the PWSA, after considering the statutory standards and issuing all design requirements that in his judgment are necessary, the Secretary inspects and certifies each vessel as sufficiently safe to protect the marine environment and issues a permit or its equivalent to carry tank-vessel cargoes. Refusing to accept the federal judgment, however, the State now seeks to exclude from Puget Sound vessels certified by the Secretary as having acceptable design characteristics, unless they satisfy the different and higher design requirements imposed by state law. The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.

Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers. The original Tank Vessel Act, amended

by Title II, sought to effect a "reasonable and uniform set of rules and regulations concerning ship construction . . . ," H. R. Rep. No. 2962, 74th Cong., 2d Sess., 2 (1936); and far from evincing a different purpose, the Title II amendments strongly indicate that insofar as tanker design is concerned, Congress anticipated the enforcement of federal standards that would pre-empt state efforts to mandate different or higher design requirements.[15]

That the Nation was to speak with one voice with respect to tanker-design standards is supported by the legislative history of Title II, particularly as it reveals a decided congressional preference for arriving at international standards for building tank vessels. The Senate Report recognizes that vessel design "has traditionally been an area for international rather than national action," and that "international solutions in this area are preferable since the problem of marine pollution is world-wide." [16] Senate Report 23. Congress did provide that the Secretary's safety regulations would not

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[15] The Court has previously observed that ship design and construction standards are matters for national attention. In *Kelly* v. *Washington*, 302 U. S. 1 (1937), in the course of upholding state inspection of the particular vessels there involved, the Court stated that the state law was "a comprehensive code" and that

"it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on." *Id.*, at 14–15.

Here, Congress has taken unto itself the matter of tanker-design standards, and the Tanker Law's design provisions are unenforceable.

[16] Elsewhere in the Senate Report it is stated: "The committee fully concurs that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards." Senate Report 23.

apply to foreign ships holding compliance certificates under regulations arrived at by international agreement; but, in the end, the environmental protection regulations were made applicable to foreign as well as to American vessels since it was thought to be necessary for the achievement of the Act's purposes.[17]

Although not acceding to the request of those who thought that foreign vessels should be completely exempt from regulation under Title II,[18] Congress did not abandon the effort to achieve international agreement on what the proper design standards should be. It wrote into Title II a deferral procedure, requiring the Secretary at the outset to transmit his proposed environmental protection rules and regulations with respect to vessel design to the appropriate international forums for consideration as international standards. § 391a (7)(B). In order to facilitate the international consideration of these design requirements, Title II specified that the rules and regulations governing foreign vessels and United States vessels engaged in foreign trade could not become effective before January 1, 1974, unless they were consonant with an international agreement. § 391a (7)(C). As noted by the Senate Report, this requirement demonstrated the "committee's strong intention that standards for the protection of the marine environment be adopted, multilaterally if possible, but adopted in any event." Senate Report 28.

Congress expressed a preference for international action and

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[17] The Senate Report notes that eliminating foreign vessels from Title II would be "ineffective, and possibly self-defeating," because approximately 85% of the vessels in the navigable waters of the United States are of foreign registry. *Id.*, at 22. The Report adds that making the Secretary's regulations applicable only to American ships would put them at a competitive disadvantage with foreign-flag ships. *Ibid.*

[18] The Department of State and the Department of Transportation, as well as 12 foreign nations, expressed concern about Title II's authorization of the unilateral imposition of design standards on foreign vessels. *Id.*, at 23.

expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention; it is therefore clear that Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord. A state law in this area, such as the first part of § 88.16.190 (2), would frustrate the congressional desire of achieving uniform, international standards and is thus at odds with "the object sought to be obtained by [Title II] and the character of obligations imposed by it . . . ." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230. In this respect, the District Court was quite correct.[19]

V

Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do

[19] We are unconvinced that because Title II speaks of the establishment of comprehensive "minimum standards" *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132 (1963), requires recognition of state authority to impose higher standards than the Secretary has prescribed. In that case, we sustained the state regulation against claims of pre-emption, but we did not rely solely on the statutory reference to "minimum standards" or indicate that it furnished a litmus-paper test for resolving issues of pre-emption. Indeed, there were other provisions in the Federal Act in question that "militate[d] even more strongly against federal displacement of [the] state regulations." *Id.,* at 148. Furthermore, the federal regulations claimed to pre-empt state law were drafted and administered by local organizations and were "designed to do no more than promote orderly competition among the South Florida [avocado] growers." *Id.,* at 151. Here it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement, with vessels having design characteristics satisfying federal law being privileged to carry tank-vessel cargoes in United States waters.

not constitute design or construction specifications. Registered vessels, for example, as we have already indicated, must observe Washington's pilotage requirement. In our view, both enrolled and registered vessels must also comply with the provision of the Tanker Law that requires tug escorts for tankers over 40,000 DWT that do not satisfy the design provisions specified in § 88.16.190 (2). This conclusion requires analysis of Title I of the PWSA, 33 U. S. C. §§ 1221–1227 (1970 ed., Supp. V).

A

In order to prevent damage to vessels, structures, and shore areas, as well as environmental harm to navigable waters and the resources therein that might result from vessel or structure damage, Title I authorizes the Secretary to establish and operate "vessel traffic services and systems" for ports subject to congested traffic,[20] as well as to require ships to comply with the systems and to have the equipment necessary to do so. §§ 1221 (1) and (2). The Secretary may "control vessel traffic" under various hazardous conditions by specifying the times for vessel movement, by establishing size and speed limitations and vessel operating conditions, and by restricting

[20] From 1950 until the PWSA was enacted, the Coast Guard carried out its port safety program pursuant to a delegation from the President of his authority under the Magnuson Act, 50 U. S. C. § 191. That Act based the President's authority to promulgate rules governing the operation and inspection of vessels upon his determination that the country's national security was endangered. H. R. Rep. No. 92–563, p. 2 (1971) (House Report). The House Committee that considered Title I of the PWSA intended it to broaden the Coast Guard's authority to establish rules for port safety and protection of the environment. The Committee Report states:

"The enactment of H. R. 8140 would serve an important dual purpose. First, it would bolster the Coast Guard's authority and capability to handle adequately the serious problems of marine safety and water pollution that confront us today. Second, it would remedy the long-standing problem concerning the statutory basis for the Coast Guard's port safety program." *Ibid.*

vessel operation to those vessels having the particular operating characteristics which he considers necessary for safe operation under the circumstances. § 1221 (3). In addition, the Secretary may require vessels engaged in foreign trade to carry pilots until the State having jurisdiction establishes a pilot requirement, § 1221 (5); he may establish minimum safety equipment requirements for shore structures, § 1221 (7); and he may establish waterfront safety zones or other measures for limited, controlled, or conditional access when necessary for the protection of vessels, structures, waters, or shore areas, § 1221 (8).

In carrying out his responsibilities under the Act, the Secretary may issue rules and regulations. § 1224. In doing so, he is directed to consider a wide variety of interests that might affect the exercise of his authority, such as possible environmental impact, the scope and degree of the hazards involved, and "vessel traffic characteristics including minimum interference with the flow of commercial traffic, traffic volume, the sizes and types of vessels, the usual nature of local cargoes, and similar factors." § 1222 (e). Section 1222 (b) provides that nothing in Title I is to "prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this chapter."

Exercising this authority, the Secretary, through his delegate, the Coast Guard, has issued Navigation Safety Regulations, 33 CFR Part 164 (adopted at 42 Fed. Reg. 5956 (1977)). Of particular importance to this case, he has promulgated the Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification for precautionary areas and reporting points.[21] 33 CFR Part 161,

[21] Local Coast Guard authorities have published an operating manual

Subpart B (1976), as amended, 42 Fed. Reg. 29480 (1977). There is also delegated to Coast Guard district commanders and captains of ports the authority to exercise the Secretary's powers under § 1221 (3) to direct the anchoring, mooring, and movements of vessels; temporarily to establish traffic routing schemes; and to specify vessel size and speed limitations and operating conditions. 33 CFR § 160.35 (1976). Traffic in Rosario Strait is subject to a local Coast Guard rule prohibiting "the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time." During the periods of bad weather, the size limitation is reduced to approximately 40,000 DWT. App. 65.

B

A tug-escort provision is not a design requirement, such as is promulgated under Title II. It is more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures, and, as such, is a safety measure clearly within the reach of the Secretary's authority under §§ 1221 (3)(iii) and (iv) to establish "vessel size and speed limitations and vessel operating conditions" and to restrict vessel operation to those with "particular operating characteristics and capabilities . . . ." Title I, however, merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title; and assuming that § 1222 (b) prevents a State from issuing "higher safety equipment requirements or safety standards," see *infra,* at 174, it does so only with respect to those requirements or standards "which may be prescribed pursuant to this chapter."

The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such

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containing the vessel traffic system for Puget Sound and explanatory materials. App. 155.

requirement should be imposed at all. It does not appear to us that he has yet taken either course. He has, however, issued an advance notice of proposed rulemaking, 41 Fed. Reg. 18770 (1976), to amend his Navigation Safety Regulations issued under Title I, 33 CFR Part 164 (1977), so as to require tug escorts for certain vessels operating in confined waters.[22] The notice says that these rules, if adopted, "are intended to provide uniform guidance for the maritime industry and Captains of the Port." 41 Fed. Reg. 18771 (1976). It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause.[23]

Nor for constitutional purposes does it make substantial difference that under the Tanker Law those vessels that satisfy the State's design requirements are in effect exempted from

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[22] The advance notice of proposed rulemaking states: "The Coast Guard is considering amending Part 164 of Title 33, Code of Federal Regulations to require minimum standards for tug assistance for vessels operating in confined waters to reduce the potential for collisions, rammings, and groundings in these areas." 41 Fed. Reg. 18770 (1976). It states that the following factors will be considered in developing the rules: size of vessel, displacement, propulsion, availability of multiple screws or bow thrusters, controllability, type of cargo, availability of safety standards, and actual or predicted adverse weather conditions. *Id.*, at 18771.

[23] Appellees insist that the Secretary through his Coast Guard delegates has already exercised his authority to require tugs in Puget Sound to the extent he deems necessary and that the State should therefore not be permitted to impose stricter provisions. Appellees submit letters or other evidence indicating that the local Coast Guard authorities have required tug escorts for carriers of liquefied petroleum gas and on one occasion for another type of vessel. This evidence is not part of the record before us; but even accepting it, we cannot say that federal authorities have settled upon whether and in what circumstances tug escorts for oil tankers in Puget Sound should be required. The entire subject of tug escorts has been placed on the Secretary's agenda, seemingly for definitive action, by the notice of proposed rulemaking referred to in the text.

the tug-escort requirement.[24] Given the validity of a general rule prescribing tug escorts for all tankers, Washington is also privileged, insofar as the Supremacy Clause is concerned, to waive the rule for tankers having specified design characteristics.[25] For this reason, we conclude that the District Court erred in holding that the alternative tug requirement of § 88.16.190 (2) was invalid because of its conflict with the PWSA.

VI

We cannot arrive at the same conclusion with respect to the remaining provision of the Tanker Law at issue here. Section 88.16.190 (1) excludes from Puget Sound under any circumstances any tanker in excess of 125,000 DWT. In our

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[24] In fact, at the time of trial all tankers entering Puget Sound were required to have a tug escort, for no tanker then afloat had all of the design features required by the Tanker Law. App. 66.

[25] We do not agree with appellees' assertion that the tug-escort provision, which is an alternative to the design requirements of the Tanker Law, will exert pressure on tanker owners to comply with the design standards and hence is an indirect method of achieving what they submit is beyond state power under Title II. The cost of tug escorts for all of appellee ARCO's tankers in Puget Sound is estimated at $277,500 per year. While not a negligible amount, it is only a fraction of the estimated cost of outfitting a single tanker with the safety features required by § 88.16.190 (2). The Office of Technology Assessment of Congress has estimated that constructing a new tanker with a double bottom and twin screws, just two of the required features, would add roughly $8.8 million to the cost of a 150,000 DWT tanker. Thus, contrary to the appellees' contention, it is very doubtful that the provision will pressure tanker operators into complying with the design standards specified in § 88.16.190 (2). While the tug provision may be viewed as a penalty for noncompliance with the State's design requirements, it does not "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). The overall effect of § 88.16.190 (2) is to require tankers of over 40,000 DWT to have a tug escort while they navigate Puget Sound, a result in no way inconsistent with the PWSA as it is currently being implemented.

view, this provision is invalid in light of Title I and the Secretary's actions taken thereunder.

We begin with the premise that the Secretary has the authority to establish "vessel size and speed limitations," § 1221 (3)(iii), and that local Coast Guard officers have been authorized to exercise this power on his behalf. Furthermore, § 1222 (b), by permitting the State to impose higher equipment or safety standards "for structures only," impliedly forbids higher state standards for vessels. The implication is strongly supported by the legislative history of the PWSA. The House Report explains that the original wording of the bill did "not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field" and says that § 1222 (b) was amended to provide "a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated." House Report 15.

Relying on the legislative history, the appellants argue that the preclusive effect of § 1222 (b) is restricted to vessel equipment requirements. The statute, however, belies this argument, for it expressly reaches vessel "safety standards" as well as equipment. A limitation on vessel size would seem to fall squarely within the category of safety standards, since the Secretary's authority to impose size limits on vessels navigating Puget Sound is designed to prevent damage to vessels and to the navigable waters and is couched in terms of controlling vessel traffic in areas "which he determines to be especially hazardous."

The pertinent inquiry at this point thus becomes whether the Secretary, through his delegate, has addressed and acted upon the question of size limitations. Appellees and the United States insist that he has done so by his local navigation rule with respect to Rosario Strait: The rule prohibits the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time, and in periods of

bad weather, the "size limitation" is reduced to approximately 40,000 DWT. On the record before us, it appears sufficiently clear that federal authorities have indeed dealt with the issue of size and have determined whether and in what circumstances tanker size is to limit navigation in Puget Sound. The Tanker Law purports to impose a general ban on large tankers, but the Secretary's response has been a much more limited one. Because under § 1222 (b) the State may not impose higher safety standards than those prescribed by the Secretary under Title I, the size limitation of § 88.16.190 (1) may not be enforced.

There is also force to the position of appellees and the United States that the size regulation imposed by the Tanker Law, if not pre-empted under Title I, is similar to or indistinguishable from a design requirement which Title II reserves to the federal regime. This may be true if the size limit represents a state judgment that, as a matter of safety and environmental protection generally, tankers should not exceed 125,000 DWT. In that event, the State should not be permitted to prevail over a contrary design judgment made by federal authorities in pursuit of uniform national and international goals. On the other hand, if Washington's exclusion of large tankers from Puget Sound is in reality based on water depth in Puget Sound or on other local peculiarities, the Tanker Law in this respect would appear to be within the scope of Title I, in which event also state and federal law would represent contrary judgments, and the state limitation would have to give way.[26]

Our conclusion as to the State's ban on large tankers is consistent with the legislative history of Title I. In exercising his authority under the Title, the Secretary is directed

[26] It appears that the minimum water depth in Rosario Strait is 60 feet, App. 65, which according to the design standards used by the United States at the 1973 International Conference on Marine Pollution would accommodate vessels well in excess of 120,000 DWT. *Id.*, at 80.

to consult with other agencies in order "to assure consistency of regulations . . . ," § 1222 (c), and also to "consider fully the wide variety of interests which may be affected . . . ." § 1222 (e). These twin themes—consistency of regulation and thoroughness of consideration—reflect the substance of the Committee Reports. The House Report indicates that a good number of the witnesses who testified before the House subcommittee stated that one of the strong points of Title I was "the imposition of federal control in the areas envisioned by the bill which will insure regulatory and enforcement uniformity throughout all the covered areas." House Report 8.[27] Such a view was expressed by the Commandant of the

[27] During the hearings in the House, for example, Representative Keith expressed concern that States might on their own enact regulations restricting the size of vessels, noting that Delaware had already done so. He stated that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." Hearings on H. R. 867, H. R. 3635, H. R. 8140 before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess., 30 (1971). The Commandant of the Coast Guard, Admiral Bender, responded that the Coast Guard "believe[s] it is preferable for the approach to the problem of the giant tankers in particular to be resolved on an international basis." *Ibid.*

A representative of the Sierra Club testified before the Senate committee considering the PWSA and suggested the advisability of regulations limiting the size of vessels. Hearings on S. 2074 before the Senate Committee on Commerce, 92d Cong., 1st Sess., 78 (1971). In response to this suggestion, Senator Inouye questioned whether the necessary result of such a regulation would not be an increase in the number of tankers, so as to meet the Nation's requirements for oil. The Sierra Club witness acknowledged that there was "some controversy even among the oil company people as to which would be the most hazardous, more smaller ships or fewer bigger ships." *Id.*, at 81. This statement is consistent with the stipulation of facts, App. 84, which states:

"Experts differ and there is good faith dispute as to whether the movement of oil by a smaller number of tankers in excess of 125,000 DWT in Puget Sound poses an increased risk of oil spillage compared to the risk from movement of a similar amount of oil by a larger number of smaller tankers in Puget Sound."

Coast Guard, Admiral Bender, who pointed out that with a federally operated traffic system, the necessary research and development could be carried out by a single authority and then utilized around the country "with differences applied . . . to the particular ports . . . ." *Ibid.* He added that the same agency of the Federal Government that developed the traffic systems should then be responsible for enforcing them. *Ibid.*

While the House Report notes the importance of uniformity of regulation and enforcement, the Senate Report stresses the careful consideration that the Secretary must give to various factors before exercising his authority under Title I. It states that the Secretary "is required to balance a number of considerations including the scope and degree of hazard, vessel traffic characteristics, conditions peculiar to a particular port or waterway, environmental factors, economic impact, and so forth." Senate Report 34. It was also "anticipated that the exercise of the authority provided . . . regarding the establishment of vessels size and speed limitations [would] not be imposed universally, but rather [would] be exercised with due consideration to the factors" set forth above and with due regard for "such matters as combinations of horsepower, drafts of vessels, rivers, depth and width of channels, design types of vessels involved, and other relevant circumstances." *Id.*, at 33.

We read these statements by Congress as indicating that it desired someone with an overview of all the possible ramifications of the regulation of oil tankers to promulgate limitations on tanker size and that he should act only after balancing all of the competing interests. While it was not anticipated that the final product of this deliberation would be the promulgation of traffic safety systems applicable across the board to all United States ports, it was anticipated that there would be a single decisionmaker, rather than a different one in each State.

Against this background, we think the pre-emptive impact

of § 1222 (b) is an understandable expression of congressional intent. Furthermore, even without § 1222 (b), we would be reluctant to sustain the Tanker Law's absolute ban on tankers larger than 125,000 DWT. The Court has previously recognized that "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 774 (1947); *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605 (1926). We think that in this case the Secretary's failure to promulgate a ban on the operations of oil tankers in excess of 125,000 DWT in Puget Sound takes on such a character. As noted above, a clear policy of the statute is that the Secretary shall carefully consider "the wide variety of interests which may be affected by the exercise of his authority," § 1222(e), and that he shall restrict the application of vessel size limitations to those areas where they are particularly necessary. In the case of Puget Sound, the Secretary has exercised his authority in accordance with the statutory directives and has promulgated a vessel-traffic-control system which contains only a narrow limitation on the operation of supertankers. This being the case, we conclude that Washington is precluded from enforcing the size limitation contained in the Tanker Law.[28]

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[28] We find no support for the appellants' position in the other federal environmental legislation they cite, *i. e.,* the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp. V); the Coastal Zone Management Act of 1972, 86 Stat. 1280, 16 U. S. C. § 1451 *et seq.* (1976 ed.); and the Deepwater Port Act of 1974, 88 Stat. 2126, 33 U. S. C. § 1501 *et seq.* (1970 ed., Supp. V). While those statutes contemplate cooperative state-federal regulatory efforts, they expressly state that intent, in contrast to the PWSA. Furthermore, none of them concerns the regulation of the design

VII

We also reject appellees' additional constitutional challenges to the State's tug-escort requirement for vessels not satisfying its design standards.[29] Appellees contend that this provision, even if not pre-empted by the PWSA, violates the Commerce Clause because it is an indirect attempt to regulate the design and equipment of tankers, an area of regulation that appellees contend necessitates a uniform national rule. We have previously rejected this claim, concluding that the provision may be viewed as simply a tug-escort requirement since it does not have the effect of forcing compliance with the design specifications set forth in the provision. See n. 25, *supra.* So viewed, it becomes apparent that the Commerce Clause does not prevent a State from enacting a regulation of this type. Similar in its nature to a local pilotage requirement, a requirement that a vessel take on a tug escort when entering a particular body of water is not the type of regulation that demands a uniform national rule. See *Cooley* v. *Board of Wardens,* 12 How. 299 (1852). Nor does it appear from the record that the requirement impedes the free and

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or size of oil tankers, an area in which there is a compelling need for uniformity of decisionmaking.

Appellees and the United States as *amicus curiae* urge that the Tanker Law's size limit also conflicts with the policy of the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U. S. C. § 1101 *et seq.* (1970 ed. and Supp. V), and the tanker construction program established thereunder by the Maritime Administration in implementation of its duty under the Act to develop an adequate and well-balanced merchant fleet. Under this program the construction of tankers of various sizes is subsidized, including tankers far in excess of 125,000 DWT. The Maritime Administration has rejected suggestions that no subsidies be offered for the building of the larger tankers. There is some force to the argument, but we need not rely on it.

[29] Although the District Court did not reach these additional grounds, the issues involved are legal questions, and the record seems sufficiently complete to warrant their resolution here without a remand to the District Court.

efficient flow of interstate and foreign commerce, for the cost of tug escort for a 120,000 DWT tanker is less than one cent per barrel of oil and the amount of oil processed at Puget Sound refineries has not declined as a result of the provision's enforcement. App. 68. Accordingly, we hold that § 88.16.190 (2) of the Tanker Law is not invalid under the Commerce Clause.

Similarly, we cannot agree with the additional claim that the tug-escort provision interferes with the Federal Government's authority to conduct foreign affairs. Again, appellees' argument is based on the contention that the overall effect of § 88.16.190 (2) is to coerce tanker owners into outfitting their vessels with the specified design requirements. Were that so, we might agree that the provision constituted an invalid interference with the Federal Government's attempt to achieve international agreement on the regulation of tanker design. The provision as we view it, however, does no more than require the use of tug escorts within Puget Sound, a requirement with insignificant international consequences. We, therefore, decline to declare § 88.16.190 (2) invalid for either of the additional reasons urged by appellees.

Accordingly, the judgment of the three-judge District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

The Washington Tanker Law at issue here has three operative provisions: (1) a requirement that every oil tanker of 50,000 deadweight tons (DWT) or larger employ a pilot licensed by the State of Washington while navigating Puget Sound and adjacent waters, Wash. Rev. Code § 88.16.180 (Supp. 1975); (2) a requirement that every oil tanker of from 40,000 to 125,000 DWT either possess certain safety features or

utilize tug escorts while operating in Puget Sound, § 88.16.190 (2); and (3) a size limitation, barring tankers in excess of 125,000 DWT from the Sound, § 88.16.190 (1).

I agree with the Court that the pilotage requirement is pre-empted only with respect to enrolled vessels. I also agree that the tug-escort requirement is fully valid, at least until such time as the Secretary of Transportation or his delegate promulgates a federal tug-escort rule or decides, after full consideration, that no such rule is necessary. I therefore join Parts I, II, III, V, and VII of the Court's opinion.

In the current posture of this case, however, I see no need to speculate, as the Court does, on the validity of the safety features alternative to the tug requirement. Since the effective date of the Tanker Law, all tankers—including those owned or chartered by appellees—have employed tug escorts rather than attempting to satisfy the alternative safety requirements. The relative expense of compliance, moreover, makes it extremely unlikely, at least for the foreseeable future, that any tankers will be constructed or redesigned to meet the law's requirements.[1] Indeed, the Court itself concludes that § 88.16.190 (2) "may be viewed as simply a tug-escort requirement since it does not have the effect of forcing compliance with the design specifications set forth in the provision." *Ante,* at 179; see *ante,* at 173 n. 25, and 180. Accordingly, I cannot join Part IV of the Court's opinion.

I also cannot agree with the Court's conclusion in Part VI of its opinion that the size limitation contained in the Tanker Law

[1] According to the record, no tanker currently afloat has all the design features prescribed by the Tanker Law. Neither Atlantic Richfield nor Seatrain has plans to modify any tankers currently in operation to satisfy the design standards, "because such retrofit is not economically feasible under current and anticipated market conditions." App. 67. Moreover, the vessels being constructed by Seatrain will not meet the majority of the design requirements, and, as the Court convincingly demonstrates, *ante,* at 173 n. 25, the Tanker Law is not likely to induce tanker owners to incorporate the specified design features into new tankers.

is invalid under the Supremacy Clause. To reach this conclusion, the Court relies primarily on an analysis of Title I of the PWSA and the Secretary of Transportation's actions thereunder. I agree with the Court that the Secretary has authority to establish vessel size limitations based on the characteristics of particular waters,[2] and that a State is not free to impose more stringent requirements once the Secretary has exercised that authority or has decided, after balancing all of the relevant factors, that a size limitation would not be appropriate. On the other hand, Title I does not by its own force pre-empt all state regulation of vessel size, since it "merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title." *Ante,* at 171. Thus, as the Court notes, "[t]he pertinent inquiry at this point . . . [is] whether the Secretary, through his delegate, has addressed and acted upon the question of size limitations." *Ante,* at 174.

The Court concludes that the Secretary's delegate, the Coast Guard, has in fact considered the issue of size limitations for Puget Sound and reached a judgment contrary to the one embodied in the Tanker Law. Under well-established principles, however, state law should be displaced " 'only to the extent necessary to protect the achievement of the aims of' "

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[2] The relevant provision of Title I states:

"In order to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss, the Secretary of the department in which the Coast Guard is operating may—

. . . . . .

"(3) control vessel traffic in areas which he determines to be especially hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by—

. . . . . .

"(iii) establishing vessel size and speed limitations and vessel operating conditions . . . ." 33 U. S. C. § 1221 (3)(iii) (1970 ed., Supp. V).

federal law; whenever possible, we should "reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U. S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 361, 357 (1963); accord, *De Canas* v. *Bica,* 424 U. S. 351, 357–358, n. 5 (1976). Viewed in light of these principles, the record simply does not support the Court's finding of conflict between state and federal law.

The Coast Guard's unwritten "local navigation rule," which prohibits passage of more than one 70,000 DWT vessel through Rosario Strait at any given time, is the sole evidence cited by the Court to show that size limitations for Puget Sound have been considered by federal authorities. *Ante,* at 174–175. On this record, however, the rule cannot be said to reflect a determination that the size limitations set forth in the Tanker Law are inappropriate or unnecessary. First, there is no indication that in establishing the vessel traffic rule for Rosario Strait the Coast Guard considered the need for promulgating size limitations for the entire Sound.[3] Second, even assuming that the Rosario Strait rule resulted from consideration of the size issue with respect to the entire area, appellees have not demon-

[3] The Rosario Strait "size limitation" is not contained in any written rule or regulation, and the record does not indicate how it came into existence. The only reference in the record is the following statement in the stipulation of facts:

"The Coast Guard prohibits the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time. During periods of bad weather, the size limitation is reduced to approximately 40,000 DWT." App. 65.

The Puget Sound Vessel Traffic System, 33 CFR Part 161, Subpart B (1976), as amended, 42 Fed. Reg. 29480 (1977), does not contain any size limitation, and the necessity for such a limitation apparently was never considered during the rulemaking process. See 38 Fed. Reg. 21228 (1973) (notice of proposed rulemaking); 39 Fed. Reg. 25430 (1974) (summary of comments received during rulemaking).

strated that the rule evinces a judgment contrary to the provisions of the Tanker Law. Under the express terms of the PWSA, the existence of local vessel-traffic-control schemes must be weighed in the balance in determining whether, and to what extent, federal size limitations should be imposed.[4] There is no evidence in the record that the Rosario Strait "size limitation" was in existence or even under consideration prior to passage of the Tanker Law.[5] Thus appellees have left unrebutted the inference that the Coast Guard's own limited rule was built upon, and is therefore entirely consistent with, the framework already created by the Tanker Law's restrictions.

Perhaps in recognition of the tenuousness of its finding of conflict with federal regulation under Title I, the Court suggests that the size limitation imposed by the Tanker Law might also be pre-empted under Title II of the PWSA. *Ante,* at 175. In particular, the Court theorizes that the state rule might be pre-empted if it "represents a state judgment that, as a matter of safety and environmental protection *generally,* tankers should not exceed 125,000 DWT." *Ibid.* (Emphasis added.) It is clear, however, that the Tanker Law was not merely a reaction to the problems arising out of tanker operations in general, but instead was a measure tailored to respond to unique local conditions—in particular, the unusual

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[4] Title I provides in relevant part:

"In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall, among other things, consider—

. . . . . .

"(6) existing vessel traffic control systems, services, and schemes; and

"(7) local practices and customs . . . ." 33 U. S. C. § 1222 (e) (1970 ed., Supp. V).

[5] The stipulation of facts does not specify when the size rule for Rosario Strait was established. The rule apparently was in force at the time the stipulation was entered, see n. 3, *supra,* but the Tanker Law had gone into effect prior to that time.

susceptibility of Puget Sound to damage from large oil spills and the peculiar navigational problems associated with tanker operations in the Sound.[6] Thus, there is no basis for pre-emption under Title II.[7]

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[6] The Tanker Law contains the following statement of intent and purpose:

"Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.

"The legislature also recognizes Puget Sound and adjacent waters are a relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.

"The legislature further recognizes that certain areas of Puget Sound and adjacent waters have limited space for maneuvering a large oil tanker and that these waters contain many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic." Wash. Rev. Code § 88.16.170 (Supp. 1975).

The natural navigational hazards in the Sound are compounded by fog, tidal currents, and wind conditions, in addition to the high density of vehicle traffic. App. 69.

Among the "areas . . . [with] limited space for maneuvering a large oil tanker," referred to by the Washington Legislature, is undoubtedly Rosario Strait. The Strait is less than one-half mile wide at its narrowest point, Exh. G, and portions of the shipping route through the Strait have a depth of only 60 feet. App. 65. (A 190,000 DWT tanker has a draft of approximately 61 feet, and a 120,000 DWT tanker has a draft of approximately 52 feet. *Id.*, at 80.)

[7] In addition to finding the Tanker Law's size limit to be inconsistent with the PWSA and federal actions thereunder, the Court suggests that "[t]here is some force to the argument" that the size limit conflicts with the tanker construction program established by the Maritime Administration pursuant to the Merchant Marine Act, 1936. *Ante,* at 179 n. 28. The Court does not rely on this argument, however, and it is totally lacking in factual basis. While it is true that construction of tankers larger than 125,000 DWT has been subsidized under the program, almost two-thirds of the tankers that have been or are being constructed have been smaller than 125,000 DWT, App. 60; of the remainder, the smallest

For similar reasons, I would hold that Washington's size regulation does not violate the Commerce Clause. Since water depth and other navigational conditions vary from port to port, local regulation of tanker access—like pilotage and tug requirements, and other harbor and river regulation—is certainly appropriate, and perhaps even necessary, in the absence of determinative federal action. See, *e. g., Cooley* v. *Board of Wardens,* 12 How. 299, 319 (1852); *Packet Co.* v. *Catlettsburg,* 105 U. S. 559, 562–563 (1882). Appellees have not demonstrated that the Tanker Law's size limit is an irrational or ineffective means of promoting safety and environmental pro-

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are 225,000 DWT vessels with drafts well in excess of 60 feet—too large to pass through Rosario Strait, see n. 6, *supra,* or dock at any of the refineries on Puget Sound (Atlantic Richfield's refinery at Cherry Point has a dockside depth of 55 feet; none of the other five refineries on Puget Sound has sufficient dockside depth even to accommodate tankers as large as 125,000 DWT. App. 47–48, 80).

Appellees advance one final argument for invalidating the 125,000 DWT size limit under the Supremacy Clause. Relying on the well-established proposition that federal enrollment and licensing of a vessel give it authority to engage in coastwise trade and to navigate in state waters, *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265, 276, 280–281 (1977); *Gibbons* v. *Ogden,* 9 Wheat. 1, 212–214 (1824), appellees assert that Washington may not exclude from any of its waters tankers that have been enrolled and licensed, or registered, pursuant to the federal vessel registration, enrollment, and licensing laws, 46 U. S. C. §§ 221, 251, 263. Even assuming that registration of a vessel carries with it the same privileges as enrollment and licensing, this argument ignores a proposition as well established as the one relied on by appellees: Notwithstanding the privileges conferred by the federal vessel license, "States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." *Douglas* v. *Seacoast Products, Inc., supra,* at 277; see, *e. g., Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960); *Manchester* v. *Massachusetts,* 139 U. S. 240 (1891); *Smith* v. *Maryland,* 18 How. 71 (1855). The Tanker Law's size limitation appears to be a reasonable environmental protection measure, see n. 8, *infra,* and it is imposed evenhandedly against both residents and nonresidents of the State.

tection,[8] nor have they shown that the provision imposes any substantial burden on interstate or foreign commerce.[9] Consequently, it is clear that appellees have not carried their burden of showing that the provision's impact on interstate or foreign commerce "is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

I do not find any of appellees' other arguments persuasive. I would therefore sustain the size limitation imposed by the Tanker Law.

MR. JUSTICE STEVENS, with whom MR. JUSTICE POWELL joins, concurring in part and dissenting in part.

The federal interest in uniform regulation of commerce on the high seas, reinforced by the Supremacy Clause, "dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ante,* at 165. For that reason, as the Court explains in Part IV of its opinion, we must reject the judgment expressed by the Legislature of the State of Washington that

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[8] The stipulation quoted by the Court, *ante,* at 176 n. 27, merely establishes that there is good-faith dispute as to whether exclusion of large tankers will in fact reduce the risk of oil spillage in Puget Sound. A showing that there is conflicting evidence is not sufficient to undercut the presumption that a State's police power has been exercised in a rational manner. See, *e. g., Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129, 138–139 (1968).

[9] Exclusion of tankers larger than 125,000 DWT has not resulted in any reduction in the amount of oil processed at the Puget Sound refineries. App. 68. Moreover, according to the record, use of a 120,000 DWT tanker rather than a 150,000 DWT tanker increases the cost of shipping oil from Valdez, Alaska, to Cherry Point by a mere $.02 to $.04 per barrel, *id.*, at 64; and the record does not specify the relevant cost data for the Persian Gulf-Cherry Point route. Finally, appellees offered no concrete evidence of any significant disruption in their tanker operations, or of any decrease in the market value of the tankers that they own, as a result of the Tanker Law's provisions.

an oil tanker of 40,000 to 125,000 deadweight tons cannot safely navigate in Puget Sound unless it possesses the "standard safety features" prescribed by § 88.16.190 (2) of the Washington Code.[1] As the Court holds, the state statute imposing those design requirements is invalid. It follows, I believe, that the State may not impose any special restrictions on vessels which do not satisfy these invalid criteria.

The Court correctly holds that the State may not exclude vessels in that category from Puget Sound but it inconsistently allows the State to impose a costly tug-escort requirement on those vessels and no others. This tug-escort requirement is not, by its terms, a general safety rule from which tankers are exempt if they possess the invalid design features.[2] Quite the

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[1] Washington Rev. Code § 88.16.190 (2) (Supp. 1975) reads as follows:

"(2) An oil tanker, whether enrolled or registered, of forty to one hundred and twenty-five thousand deadweight tons may proceed beyond the points enumerated in subsection (1) if such tanker possesses all of the following standard safety features:

"(a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons; and

"(b) Twin screws; and

"(c) Double bottoms, underneath all oil and liquid cargo compartments; and

"(d) Two radars in working order and operating, one of which must be collision avoidance radar; and

"(e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners:

"*Provided,* That, if such forty to one hundred and twenty-five thousand deadweight ton tanker is in ballast or is under escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker, subsection (2) of this section shall not apply: *Provided further,* That additional tug shaft horsepower equivalencies may be required under certain conditions as established by rule and regulation of the Washington utilities and transportation commission pursuant to chapter 34.04 RCW: *Provided further,* That a tanker of less than forty thousand deadweight tons is not subject to the provisions of [this Act]."

[2] The Court, *ante,* at 173, seems to characterize the tug-escort requirement as such a "general rule."

contrary, the tug-escort requirement is merely a proviso in § 88.16.190 (2)—the section of the Washington Tanker Law that prescribes the design requirements; it is imposed only on tankers that do not comply with those requirements. The federal interest that prohibits state enforcement of those requirements should also prohibit state enforcement of a special penalty for failure to comply with them.

If the federal interest in uniformity is to be vindicated, the magnitude of the special burden imposed by any one State's attempt to penalize noncompliance with its invalid rules is of no consequence. The tug-escort penalty imposed by Washington will cost appellee ARCO approximately $277,500 per year. The significance of that cost cannot be determined simply by comparison with the capital investment which would be involved in complying with Washington's invalid design specifications. Rather, it should be recognized that this initial burden is subject to addition and multiplication by similar action in other States.[3] Moreover, whether or not so multiplied, the imposition of any special restriction impairs the congressional determination to provide uniform standards for vessel design and construction.[4]

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[3] The possibility of States' enacting legislation similar to Washington's is not remote. Alaska has enacted legislation requiring payment of a "risk charge" by vessels that do not conform to state design requirements, Alaska Stat. Ann. § 30.20.010 *et seq.* (Sept. 1977), and California is considering comparable legislation. See Brief for State of California et al. as *Amici Curiae* 3 n. 2.

[4] No matter how small the cost in the individual case, the State's effort here to enforce its general determinations on vessel safety must be viewed as an "obstacle" to the attainment of Congress' objective of providing comprehensive standards for vessel design. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67. This does not mean that the State cannot adopt any general rules imposing tug-escort requirements, but it does mean that it cannot condition those requirements on safety determinations that are pre-empted by federal law, thus "impos[ing] additional burdens not contemplated by Congress." *De Canas* v. *Bica*, 424 U. S. 351, 358 n. 6.

Since I am persuaded that the tug-escort requirement is an inseparable appendage to the invalid design requirements, the invalidity of one necessarily infects the other. I therefore respectfully dissent from Parts V and VII of the Court's opinion.[5]

[5] The validity of Washington's tug-escort provision may be short lived, despite today's opinion. The Secretary is now contemplating regulations in this area, and even the majority concedes that they may pre-empt the State's regulation. *Ante,* at 172. While this lessens the impact of the State's regulation and the threat it poses to the federal scheme, the legal issue is not affected by the imminence of agency action.

Syllabus

OLIPHANT *v.* SUQUAMISH INDIAN TRIBE ET AL.

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

No. 76–5729. Argued January 9, 1978—Decided March 6, 1978*

Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. Pp. 195–212.

(a) From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have such jurisdiction absent a congressional statute or treaty provision to that effect, and at least one court held that such jurisdiction did not exist. Pp. 196–201.

(b) Congress' actions during the 19th century reflected that body's belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians. Pp. 201–206.

(c) The presumption, commonly shared by Congress, the Executive Branch, and lower federal courts, that tribal courts have no power to try non-Indians, carries considerable weight. P. 206.

(d) By submitting to the overriding sovereignty of the United States, Indian tribes necessarily yield the power to try non-Indians except in a manner acceptable to Congress, a fact which seems to be recognized by the Treaty of Point Elliott, signed by the Suquamish Indian Tribe. Pp. 206–211.

544 F. 2d 1007 (*Oliphant* judgment), and *Belgarde* judgment, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 212. BRENNAN, J., took no part in the consideration or decision of the cases.

Philip P. Malone argued the cause and filed briefs for petitioners. *Slade Gorton,* Attorney General, argued the cause for the State of Washington as *amicus curiae* urging reversal. With him on the brief were *Edward B. Mackie,* Deputy

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*Together with *Belgarde* v. *Suquamish Indian Tribe et al.*, on certiorari before judgment to the same court (see this Court's Rule 23 (5)).

Attorney General, and *Timothy R. Malone,* Assistant Attorney General.

Barry D. Ernstoff argued the cause for respondents. With him on the brief was *Steven H. Chestnut. H. Bartow Farr III* argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorneys General Days* and *Moorman, Louis F. Claiborne,* and *Miriam R. Eisenstein.*†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, 12 Stat. 927, the Suquamish Indian Tribe

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†*William J. Janklow,* Attorney General, and *David L. Knudson* and *Tom D. Tobin,* Special Assistant Attorneys General, filed a brief for the State of South Dakota et al. as *amici curiae* urging reversal, joined by the Attorneys General for their respective States as follows: *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Robert F. List* of Nevada, *Toney Anaya* of New Mexico, *Allen I. Olson* of North Dakota, *James A. Redden* of Oregon, and *V. Frank Mendicino* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed by *Arthur Lazarus, Jr.,* for the Association on American Indian Affairs, Inc., et al.; by *Bryan N. Freeman, Z. Simpson Cox,* and *Richard B. Wilks* for the Colorado Indian Tribes et al.; by *Robert L. Pirtle* for the Confederated Tribes of the Colville Indian Reservation, Washington, et al.; by *Charles A. Hobbs* for the National Congress of American Indians et al.; and by *Stephen G. Boyden* and *Scott C. Pugsley* for the Ute Indian Tribe of the Uintah and Ouray Reservation.

Briefs of *amici curiae* were filed by *C. Danny Clem* for Kitsap County; by *Michael Taylor* and *Daniel A. Raas* for the Lummi Indian Tribe et al.; by *David H. Getches* and *Ralph W. Johnson* for the National American Indian Court Judges Assn.; and by *George B. Christensen* and *Joseph S. Fontana* for the National Tribal Chairmen's Assn.

relinquished all rights that it might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.[1]

The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians.[2] Proceedings are held in the Suquamish

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[1] According to the District Court's findings of fact: "[The] Port Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest." App. 75.

The Suquamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U. S. C. § 348 and 43 U. S. C. §§ 1195–1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation has allowed such sales where the allotments were in heirship, fell to "incompetents," or were surrendered in lieu of other selections. The substantial non-Indian landholdings on the Reservation are also a result of the lifting of various trust restrictions, a factor which has enabled individual Indians to sell their allotments. See 25 U. S. C. §§ 349, 392.

[2] Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the Reservation

Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U. S. C. § 1302, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings.[3] However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.[4]

Both petitioners are non-Indian residents of the Port Madison Reservation. Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal Code with "recklessly endangering another person" and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court dis-

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would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.

[3] In *Talton* v. *Mayes,* 163 U. S. 376 (1896), this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments.

[4] The Indian Civil Rights Act of 1968 provides for "a trial by jury of not less than six persons," 25 U. S. C. § 1302 (10), but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

agreed with petitioners' argument and denied the petitions. On August 24, 1976, the Court of Appeals for the Ninth Circuit affirmed the denial of habeas corpus in the case of petitioner Oliphant. *Oliphant* v. *Schlie,* 544 F. 2d 1007. Petitioner Belgarde's appeal is still pending before the Court of Appeals.[5] We granted certiorari, 431 U. S. 964, to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

I

Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision.[6] Instead, respondents

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[5] Belgarde's petition for certiorari was granted while his appeal was still pending before the Court of Appeals for the Ninth Circuit. No further proceedings in that court have been held pending our decision.

[6] Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and to punish non-Indians through the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. § 476, and the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302. Neither Act, however, addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law." The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.

As respondents note, an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' argument that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates

urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," see, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 554 (1974), the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.[7] Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

The effort by Indian tribal courts to exercise criminal

Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress.

[7] Of the 127 courts currently operating on Indian reservations, 71 (including the Suquamish Indian Provisional Court) are tribal courts, established and functioning pursuant to tribal legislative powers; 30 are "CFR Courts" operating under the Code of Federal Regulations, 25 CFR § 11.1 *et seq.* (1977); 16 are traditional courts of the New Mexico pueblos; and 10 are conservation courts. The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233. See W. Hagan, Indian Police and Judges (1966). By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. 25 CFR § 11.2 (a) (1977). The case before us is concerned only with the criminal jurisdiction of tribal courts.

jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." H. R. Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports. But the problem did not lie entirely dormant for two centuries. A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe "the jurisdiction and government of all the persons and property that may be within their limits." Despite the broad terms of this governmental guarantee, however, the Choctaws at the conclusion of this treaty provision "express *a wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations." [8] Art. 4, 7 Stat. 333 (emphasis added). Such a

[8] The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction

request for affirmative congressional authority is inconsistent with respondents' belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty. Faced by attempts

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over non-Indians without the permission of Congress. The earliest treaties typically expressly provided that "any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." See, *e. g.*, Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786). While, as elaborated further below, these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes, they would naturally have served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits of the Indian tribes. The same treaties generally provided that "[i]f any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." See, *e. g.*, Treaty with the Choctaws, Art. IV, 7 Stat. 22 (1786). Far from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory, in contravention of treaty provisions to the contrary. See 5 Annals of Cong. 903–904 (1796). Later treaties dropped this provision and provided instead that non-Indian settlers would be removed by the United States upon complaint being lodged by the tribe. See, *e. g.*, Treaty with the Sacs and Foxes, 7 Stat. 84 (1804).

As the relationship between Indian tribes and the United States developed through the passage of time, specific provisions for the punishment of non-Indians by the United States, rather than by the tribes, slowly disappeared from the treaties. Thus, for example, none of the treaties signed by Washington Indians in the 1850's explicitly proscribed criminal prosecution and punishment of non-Indians by the Indian tribes. As discussed below, however, several of the treaty provisions can be read as recognizing that criminal jurisdiction over non-Indians would be in the United States rather than in the tribes. The disappearance of provisions explicitly providing for the punishment of non-Indians by the United States, rather than by the Indian tribes, coincides with and is at least partly explained by the extension of federal enclave law over non-Indians in the Trade and Intercourse Acts and the general recognition by Attorneys General and lower federal courts that Indians did not have jurisdiction

of the Choctaw Tribe to try non-Indian offenders in the early 1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians is, *inter alia,* inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.

At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction.[9] In *Ex parte Kenyon,* 14 F. Cas. 353 (No. 7,720)

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to try non-Indians. See *infra,* at 198–201. When it was felt necessary to expressly spell out respective jurisdictions, later treaties still provided that criminal jurisdiction over non-Indians would be in the United States. See, *e. g.,* Treaty with the Utah-Tabeguache Band, Art. 6, 13 Stat. 674 (1863).

Only one treaty signed by the United States has ever provided for any form of tribal criminal jurisdiction over non-Indians (other than in the illegal-settler context noted above). The first treaty signed by the United States with an Indian tribe, the 1778 Treaty with the Delawares, provided that neither party to the treaty could "proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries *of both parties,* as near as can be to the laws, customs and usages of the contracting parties and natural justice: *The mode of such tryals to be hereafter fixed by the wise men of the United States in Congress assembled,* with the assistance of . . . deputies of the Delaware nation . . . ." Treaty with the Delawares, Art. IV, 7 Stat. 14 (emphasis added). While providing for Delaware participation in the trial of non-Indians, this treaty section established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress.

[9] According to Felix Cohen's Handbook of Federal Indian Law 148 (U. S. Dept. of the Interior 1941) "attempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody."

(WD Ark. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians,[10] held that to give an Indian tribal court "jurisdiction of the person of an offender, such offender must be an Indian." *Id.*, at 355. The conclusion of Judge Parker was reaffirmed

[10] Judge Parker sat as the judge of the United States District Court for the Western District of Arkansas from 1875 until 1896. By reason of the laws of Congress in effect at the time, that particular court not only handled the normal docket of federal cases arising in the Western District of Arkansas, but also had criminal jurisdiction over what was then called the "Indian Territory." This area varied in size during Parker's tenure; at one time it extended as far west as the eastern border of Colorado, and always included substantial parts of what would later become the State of Oklahoma. In the exercise of this jurisdiction over the Indian Territory, the Court in which he sat was necessarily in constant contact with individual Indians, the tribes of which they were members, and the white men who dealt with them and often preyed upon them.

Judge Parker's views of the law were not always upheld by this Court. See 2 J. Wigmore, Evidence § 276, pp. 115–116, n. 3 (3d ed. 1940). A reading of Wigmore, however, indicates that he was as critical of the decisions of this Court there mentioned as this Court was of the evidentiary rulings of Judge Parker. Nothing in these long forgotten disputes detracts from the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker. One of his biographers, describing the judge's funeral, states that after the grave was filled "[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave." H. Croy, He Hanged Them High 222 (1952).

It may be that Judge Parker's views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject, but we have observed in more than one of our cases that the views of the people on this issue as reflected in the judgments of Congress itself have changed from one era to the next. See *Kake Village* v. *Egan*, 369 U. S. 60, 71–74 (1962). There cannot be the slightest doubt that Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of his court, as well as familiar with the law which governed them. See generally Hell on the Border (1971, J. Gregory & R. Strickland, eds.)

only recently in a 1970 opinion of the Solicitor of the Department of the Interior. See *Criminal Jurisdiction of Indian Tribes over Non-Indians,* 77 I. D. 113.[11]

While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians. For the reasons previously stated, there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians because of the absence of formal tribal judicial systems. Instead, Congress' concern was with providing effective protection for the Indians "from the violences of the lawless part of our frontier inhabitants." Seventh Annual Address of President George Washington, 1 Messages and Papers of the Presidents, 1789–1897, pp. 181, 185 (J. Richardson ed., 1897). Without such protection, it was felt that "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory." *Ibid.* Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians which "would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof." In 1817, Congress went one step further and extended federal enclave law to the Indian country; the only exception was for "any offence committed by one Indian against another." 3 Stat. 383, now codified, as amended, 18 U. S. C. § 1152.

It was in 1834 that Congress was first directly faced with the prospect of Indians trying non-Indians. In the Western Territory bill,[12] Congress proposed to create an Indian territory beyond the western-directed destination of the settlers;

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[11] The 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal.

[12] See H. R. Rep. No. 474, 23d Cong., 1st Sess., 36 (1834).

the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union. While the bill would have created a political territory with broad governing powers, Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area.[13] The reasons were quite practical:

> "Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection should be extended." H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834).

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[13] The Western Territory bill, like the early Indian treaties, see n. 6, *supra*, did not extend the protection of the United States to non-Indians who *settled* without Government business in Indian territory. See Western Territory bill, § 6, in H. R. Rep. No. 474, *supra*, at 35; *id.*, at 18. This exception, like that in the early treaties, was presumably meant to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes. Today, many reservations, including the Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture. Respondents point to no statute, in comparison to the Western Territory bill, where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations.

Even as drafted, many Congressmen felt that the bill was too radical a shift in United States-Indian relations and the bill was tabled. See 10 Cong. Deb. 4779 (1834). While the Western Territory bill was resubmitted several times in revised form, it was never passed. See generally R. Gittinger, The Formation of the State of Oklahoma (1939).

Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.

This unspoken assumption was also evident in other congressional actions during the 19th century. In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. § 3, 10 Stat. 270, now codified, as amended, 18 U. S. C. § 1152. No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians. Similarly, in the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who commit certain specified major offenses. Act of Mar. 3, 1885, § 9, 23 Stat. 385, now codified, as amended, 18 U. S. C. § 1153. If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses.[14]

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[14] The Major Crimes Act provides that Indians committing any of the enumerated offenses "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, *within the exclusive jurisdiction of the United States.*" (Emphasis added.) While the question has never been directly addressed by this Court, Courts of Appeals have read this language to exclude tribal jurisdiction over the Indian offender. See, *e. g., Sam* v. *United States,* 385 F. 2d 213, 214 (CA10 1967); *Felicia* v. *United States,* 495 F. 2d 353, 354 (CA8 1974). We have no reason to decide today whether jurisdiction under the Major Crimes Act is exclusive.

The legislative history of the original version of the Major Crimes Act, which was introduced as a House amendment to the Indian Appropriation

In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield,* 141 U. S. 107, 115–116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

In a 1960 Senate Report, that body expressly confirmed its

Act of 1855, creates some confusion on the question of exclusive jurisdiction. As originally worded, the amendment would have provided for trial in the United States courts *"and not otherwise."* Apparently at the suggestion of Congressman Budd, who believed that concurrent jurisdiction in the courts of the United States was sufficient, the words "and not otherwise" were deleted when the amendment was later reintroduced. See 16 Cong. Rec. 934–935 (1885). However, as finally accepted by the Senate and passed by both Houses, the amendment did provide that the Indian offender would be punished as any other offender, "within the exclusive jurisdiction of the United States." The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500.

assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.[15] In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted:

> "The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.*
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> . . . . .
>
> "*Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass*

[15] In 1977, a congressional Policy Review Commission, citing the lower court decisions in *Oliphant* and *Belgarde,* concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, 152–154 (1977). However, the Commission's report does not deny that for almost 200 years before the lower courts decided *Oliphant* and *Belgarde,* the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice Chairman of the Commission, Congressman Lloyd Meeds, noted in dissent, "such jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." Final Report, *supra,* at 587.

charges. Further, there are no Federal laws which can be invoked against trespassers.

. . . . .

"The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property." S. Rep. No. 1686, 86th Cong., 2d Sess., 2–3 (1960) (emphasis added).

II

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. Cf. *Draper* v. *United States,* 164 U. S. 240, 245–247 (1896); *Morris* v. *Hitchcock,* 194 U. S. 384, 391–393 (1904); *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685, 690 (1965); *DeCoteau* v. *District County Court,* 420 U. S. 425, 444–445 (1975). "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. *Ibid.*

While in isolation the Treaty of Point Elliott, 12 Stat. 927 (1855), would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction.[16] In the Ninth Article, for example, the Suquamish

[16] When treaties with the Washington Tribes were first contemplated, the Commissioner of Indian Affairs sent instructions to the Commission to Hold Treaties with the Indian Tribes in Washington Territory and in the Blackfoot Country. Included with the instructions were copies of treaties

"acknowledge their dependence on the government of the United States." As Mr. Chief Justice Marshall explained in *Worcester* v. *Georgia,* 6 Pet. 515, 551–552, 554 (1832), such an acknowledgment is not a mere abstract recognition of the United States' sovereignty. "The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country." *Id.,* at 555. By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation. Other pro-

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previously negotiated with the Omaha Indians, 10 Stat. 1043 (1854), and with the Ottoe and Missouria Indians, 10 Stat. 1038 (1854), which the Commissioner "regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians" and which he felt would "afford valuable suggestions." The criminal provisions of the Treaty of Point Elliott are clearly patterned after the criminal provisions in these "exemplary" treaties, in most respects copying the provisions verbatim. Like the Treaty of Point Elliott, the treaties with the Omahas and with the Ottoes and Missourias did not specifically address the issue of tribal criminal jurisdiction over non-Indians.

Sometime after the receipt of these instructions, the Washington treaty Commission itself prepared and discussed a draft treaty which specifically provided that "[i]njuries committed by whites towards them [are] not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished." For some unexplained reason, however, in negotiating a treaty with the Indians, the Commission went back to the language used in the two "exemplary" treaties sent by the Commissioner of Indian Affairs. Although respondents contend that the Commission returned to the original language because of tribal opposition to relinquishment of criminal jurisdiction over non-Indians, there is no evidence to support this view of the matter. Instead, it seems probable that the Commission preferred to use the language that had been recommended by the Office of Indian Affairs. As discussed below, the language ultimately used, wherein the Tribe acknowledged its dependence on the United States and promised to be "friendly with all citizens thereof," could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians.

visions of the Treaty also point to the absence of tribal jurisdiction. Thus the Tribe "agree[s] not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Read in conjunction with 18 U. S. C. § 1152, which extends federal enclave law to non-Indian offenses on Indian reservations, this provision implies that the Suquamish are to promptly deliver up any non-Indian offender, rather than try and punish him themselves.[17]

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 15 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."* *Oliphant* v. *Schlie,* 544 F. 2d, at 1009 (emphasis added).

Indian reservations are "a part of the territory of the United

[17] In interpreting Indian treaties and statutes, "'[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 174 (1973), see *Kansas Indians,* 5 Wall. 737, 760 (1866); *United States* v. *Nice,* 241 U. S. 591, 599 (1916). But treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history." Cf. *DeCoteau* v. *District County Court,* 420 U. S. 425, 444 (1975).

States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574 (1823).

We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States. In *Johnson* v. *M'Intosh, supra,* we noted that the Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased," was inherently lost to the overriding sovereignty of the United States. And in *Cherokee Nation* v. *Georgia, supra,* the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." 5 Pet., at 17–18.

Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*" *Fletcher* v. *Peck,* 6 Cranch 87, 147 (1810) (emphasis added). Protection of territory within its

external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

In *Ex parte Crow Dog,* 109 U. S. 556 (1883), the Court was faced with almost the inverse of the issue before us here—whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land. In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the "nature and circumstances of the case." The United States was seeking to extend United States

> "law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of

> their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . ." *Id.*, at 571.

These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.

As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States.

In summary, respondents' position ignores that

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." *United States* v. *Kagama*, 118 U. S. 375, 379 (1886).

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many

respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians.[18] But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. The judgments below are therefore

Reversed.

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

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

I agree with the court below that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." *Oliphant* v. *Schlie,* 544 F. 2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.

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[18] See 4 National American Indian Court Judges Assn., Justice and the American Indian 51–52 (1974); Hearings on S. 1 and S. 1400 (reform of the Federal Criminal Laws) before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 6469 *et seq.* (1973).

Per Curiam

CLELAND, ADMINISTRATOR OF VETERANS' ADMINISTRATION, ET AL. *v.* NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

No. 77-716. Decided March 20, 1978

Provisions of the GI Bill requiring the Administrator of the Veterans' Administration to disapprove the application of a veteran seeking educational assistance benefits if the veteran enrolls in a course in which more than 85% of the students are receiving financial assistance from the educational institution, the VA, or other federal agency (85–15 requirement), or if the course has been offered for less than two years, *held* not to violate the Due Process Clause of the Fifth Amendment. Experience with administration of the veterans' educational assistance program since World War II having revealed to Congress a need for legislation that would minimize the risk that veterans' benefits would be wasted on educational programs of little value, it was rational for Congress to conclude that established courses with a substantial enrollment of nonsubsidized students were more likely to be quality courses, and thus the 85–15 and two-year requirements both satisfy the constitutional test normally applied in cases like this. Such requirements are not made irrational by virtue of their absence from other federal educational assistance programs.

433 F. Supp. 605, reversed.

PER CURIAM.

The question presented is whether the Due Process Clause of the Fifth Amendment prohibits Congress from restricting the educational courses for which veterans' benefits are available under the GI Bill [1] without including identical course limitations in other federal educational assistance programs.

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[1] The various provisions dealing with veterans' benefits are contained in Title 38 of the United States Code. Title 38 U. S. C. § 1651 *et seq.* relate specifically to the veterans' educational assistance program. While the term GI Bill is often used to describe veterans' benefits legislation generally,

A veteran seeking educational assistance benefits must file an application with the Administrator of the Veterans' Administration. Before approving the application, the Administrator must determine whether the veteran's proposed educational program satisfies various requirements, including the so-called 85–15 requirement and the two-year rule.

The 85–15 requirement requires the Administrator to disapprove an application if the veteran enrolls in a course in which more than 85% of the students "are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration . . . and/or by grants from any Federal agency." [2] The Administrator, however, may waive the requirement if he determines that it would be in the interest of both the veteran and the Federal Government.

The two-year rule requires the Administrator to disapprove the enrollment of an eligible veteran in a course that has been offered by a covered educational institution for less than two years. The rule applies to courses offered at branches and extensions of proprietary educational institutions located beyond the normal commuting distance of the institution.[3]

Appellee National College of Business is a proprietary edu-

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for purposes of this opinion it refers to legislation dealing specifically with veterans' educational assistance benefits.

[2] 38 U. S. C. § 1673 (d) (1976 ed.), as amended by § 205 of Pub. L. 94–502, 90 Stat. 2387. While this appeal was pending, the 85–15 requirement was amended in several respects. See § 305 (a) of the GI Bill Improvement Act of 1977, Pub. L. 95–202, 91 Stat. 1442. However, the amendments have not made the requirement inapplicable to appellee's students.

[3] See 38 U. S. C. § 1789 (1976 ed.), as amended by § 509 (b) of Pub. L. 94–502, 90 Stat. 2401. The rule was recently amended by § 305 (a) of the GI Bill Improvement Act of 1977, *supra*. The amendment authorizes the Administrator to waive the two-year rule if he determines that it would be in the interest of the veteran and the Federal Government. The Administrator, however, does not suggest that the rule will be waived with respect to appellee's students.

cational institution which has extension programs in several States. Most of its courses have a veteran enrollment of 85% or more. Appellee is therefore affected by both the 85–15 requirement and the two-year rule.

Appellee brought this action in the United States District Court for the District of South Dakota, challenging the constitutionality of the restrictions.[4] Appellee contended that the restrictions arbitrarily denied otherwise eligible veterans of educational benefits and denied veterans equal protection because they were not made applicable to persons whose educations were being subsidized under other federal educational assistance programs.[5] The District Court held the 85–15 requirement and the two-year rule unconstitutional and permanently enjoined their enforcement. 433 F. Supp. 605 (1977). We reverse.[6]

I

The course restrictions challenged by appellee evolved in response to problems experienced in the administration of

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[4] Other District Courts have upheld the challenged restrictions. See, *e. g.*, *Fielder* v. *Cleland*, 433 F. Supp. 115 (ED Mich. 1977); *Rolle* v. *Cleland*, 435 F. Supp. 260 (RI 1977).

[5] Joining appellee as plaintiffs in the District Court were four veterans who were students or former students at the National College of Business. The court held they lacked standing because they had not demonstrated how they would be affected by the restrictions. The court, however, held that appellee, which would suffer serious economic harm from application of the restrictions to its students, had standing under the *jus tertii* doctrine to assert the constitutional claims of its students. Neither of the court's standing rulings is challenged in this Court.

[6] Appellee advanced several other theories of unconstitutionality in the District Court and reasserts two of them in this Court: (1) the restrictions violate substantive due process because they interfere with freedom of educational choice, and (2) they violate procedural due process because the affected veterans are not afforded a hearing on the question whether the requirements should be applied or waived. The District Court characterized these contentions as less meritorious than the equal protection claim. We agree. Neither raises a substantial constitutional question.

earlier versions of the veterans' educational assistance program. When extension of the World War II GI Bill to veterans of the Korean war was under consideration by Congress in 1952, the House Select Committee to Investigate Educational Training and Loan Guarantee Programs under the GI Bill studied the problems that had arisen under the earlier program. The Committee's work led to passage of the first version of the 85–15 requirement, which applied only to nonaccredited courses not leading to a college degree that were offered by proprietary institutions. Pub. L. 82–550, 66 Stat. 667.

The purpose of the requirement is not disputed:

> "Congress was concerned about schools which developed courses specifically designed for those veterans with available Federal moneys to purchase such courses. . . . The ready availability of these funds obviously served as a strong incentive to some schools to enroll eligible veterans. The requirement of a minimum enrollment of students not wholly or partially subsidized by the Veterans' Administration was a way of protecting veterans by allowing the free market mechanism to operate.
>
> "The price of the course was also required to respond to the general demands of the open market as well as to those with available Federal moneys to spend. A minimal number of nonveterans were required to find the course worthwhile and valuable or the payment of Federal funds to veterans who enrolled would not be authorized." S. Rep. No. 94–1243, p. 88 (1976) (Senate Report).

These same considerations prompted extension of the requirement in 1974 to courses not leading to a standard college degree offered by *accredited* institutions. § 203 (3) of Pub. L. 93–508, 88 Stat. 1582. See also Senate Report 88.

In 1976 the 85–15 requirement was further extended to courses leading to a standard college degree. The Veterans' Administration had found increased recruiting by institutions

within this category "directed exclusively at veterans." In recommending approval of the extension, the Senate Committee on Veterans' Affairs agreed with the Veterans' Administration that " 'if an institution of higher learning cannot attract sufficient nonveteran and nonsubsidized students to its programs, it presents a great potential for abuse of our GI educational programs.' " *Id.*, at 89. The Committee further noted that, in view of the magnitude of the expenditures under the GI Bill, it was essential "to limit those situations in which substantial abuse could occur." *Ibid.* Finally, the Committee emphasized that "the requirement that no more than 85% of the student body be in receipt of VA benefits is not onerous particularly given the fact that under today's GI Bill . . . veterans do not comprise a major portion of those attending institutions of higher learning . . . ." *Ibid.*[7]

The two-year rule is also a product of Congress' judgment regarding potential abuses of the veterans' educational assistance program based upon experience with administration of earlier versions of the GI Bill. Thus, following World War II schools and courses developed "which were almost exclusively aimed at veterans eligible for GI bill payments." *Id.*, at 128. In response, the first version of the rule was enacted. It barred the payment of benefits to veterans attending institutions in operation less than one year. Pub. L. 81–266, 63 Stat. 653. As with the 85–15 requirement, the rule "was a

[7] The 1976 amendments also changed the computation base of the 85–15 requirement, for the first time including students subsidized under other federal assistance programs within the 85% calculation. This change, however, was recently modified by Congress to exclude from the 85% quota students receiving federal assistance from sources other than the Veterans' Administration, until such time as the Administrator has completed a study regarding the need for and feasibility of including them within the 85% computation. § 305 (a) of the GI Bill Improvement Act of 1977. This change has no bearing on this case because appellee has a veterans enrollment of more than 85%.

device intended by Congress to allow the free market mechanism to operate and weed out those institutions [which] could survive only by the heavy influx of Federal payments." Senate Report 128.

Following the Korean war, Congress amended the rule to cover courses that had not been in operation for at least two years. § 227 of the Korean Conflict GI Bill (Veterans' Readjustment Assistance Act of 1952), Pub. L. 82–550, 66 Stat. 667. In its report accompanying the amendment, the House Veterans' Affairs Committee characterized the rule as "a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions" and observed that had the rule been in effect during the administration of the World War II GI Bill "considerable savings would have resulted and . . . much better training would have been realized in many areas." H. R. Rep. No. 1943, 82d Cong., 2d Sess., 30 (1952).

In 1976, Congress again amended the two-year rule, making it applicable to, among other institutions, branches of private institutions such as appellee that are located beyond the normal commuting distance from the main institution. The considerations underlying the extended coverage are fully set forth in the Report of the Senate Committee on Veterans' Affairs accompanying the legislation. Senate Report, *supra*. There had been a "spectacular" rise in both the number of institutions establishing branch campuses and in the veteran enrollment at those extensions. These institutions were entering into "extensive recruiting contracts directed almost exclusively at veterans." Senate Report 129. In a report dealing with the problems generated by these developments, the Veterans' Administration had stated:

> " '[A] number of instances have been brought to our attention which represent abuse of our educational programs. Some of these cases involved contracting between non-

> profit schools and profit schools or organizations whereby courses designed by the latter are offered by the non-profit, accredited school on a semester- or quarter-hour basis. In others, there are arrangements between nonprofit, accredited schools and outside profit firms whereby the latter, for a percentage of the tuition payment, perform recruiting services primarily for the establishing of these branch locations for the school. These recruiting efforts are aimed almost exclusively at veterans.' " *Ibid.*[8]

In recommending adoption of the amendment, the Committee concluded that the situation presented "great potential for abuse and in several instances that potential appear[ed] to have been realized." *Id.*, at 130.

II

As the legislative history demonstrates, the 85–15 requirement and the two-year rule are valid exercises of Congress' power. Experience with administration of the veterans' educational assistance program since World War II revealed a need for legislation that would minimize the risk that veterans' benefits would be wasted on educational programs of little value. It was not irrational for Congress to conclude that restricting benefits to established courses that have attracted a substantial number of students whose educations are not being subsidized would be useful in accomplishing this objective and "prevent charlatans from grabbing the veteran's education money." Both restrictions are based upon the rational assumption that if "the free market mechanism [were allowed] to operate," it would "weed out those institutions [which] could survive only by the heavy influx of Federal payments." *Id.*, at 128.

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[8] The Administrator amplified on these problems in testimony before Congress. See Senate Report 129–130.

The otherwise reasonable restrictions are not made irrational by virtue of their absence from other federal educational assistance programs. They were imposed in direct response to problems experienced in the administration of this country's GI bills. There is no indication that identical abuses have been encountered in other federal grant programs. In any event, the Constitution does not require Congress to detect and correct abuses in the administration of all related programs before acting to combat those experienced in one. For "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause [generally] goes no further . . . ." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). (Citations omitted.)

When tested by their rationality, therefore, the 85–15 requirement and the two-year rule are plainly proper exercises of Congress' authority. While agreeing that the restrictions were rationally related to legitimate legislative objectives, the District Court concluded that veterans' educational benefits approach "fundamental and personal rights" and therefore a more "elevated standard of review" was appropriate. Subjecting the 85–15 and two-year requirements to this heightened scrutiny, the court observed that they were not precisely tailored to prevent federal expenditures on courses of little value. Since some quality courses would be affected by the restrictions, the court held them unconstitutional.

The District Court's error was not its recognition of the importance of veterans' benefits but its failure to give appropriate deference to Congress' judgment as to how best to combat abuses that had arisen in the administration of those

benefits. Legislative precision has never been constitutionally required in cases of this kind.[9]

> "The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' . . . In enacting legislation of this kind a government does not deny equal protection 'merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge* v. *Williams,* 397 U. S. 471, 485." *Mathews* v. *De Castro,* 429 U. S. 181, 185 (1976).

Since it was rational for Congress to conclude that established courses with a substantial enrollment of nonsubsidized students were more likely to be quality courses, the 85–15 and

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[9] Appellee contends that the challenged restrictions will completely deprive some veterans—those who live in areas where there are no programs which satisfy the two requirements—of veterans' educational assistance. While the restrictions on their face simply channel veterans toward courses which Congress has determined are more likely to be worthwhile, they may in fact operate to make benefits functionally unavailable to some veterans not living in close proximity to schools offering qualified programs and unwilling or unable to move to take advantage of the federal assistance. Nevertheless, the fact that Congress' judgment may deprive some veterans of the opportunity to take full advantage of the benefits made available to veterans by Congress is not a sufficient basis for greater judicial oversight of that judgment. As the Court noted in *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 35 (1973), "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing . . . social and economic legislation."

two-year requirements satisfy "the constitutional test normally applied in cases like this." *Califano* v. *Jobst,* 434 U. S. 47, 54 (1977).

The judgment is reversed.

It is so ordered.

MR. JUSTICE MARSHALL.

I believe that substantial constitutional questions are presented by appellee's due process claims, see *ante,* at 215 n. 6, as well as by its equal protection claim. I would therefore note probable jurisdiction and set this case for oral argument.

BALLEW *v.* GEORGIA

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 76–761. Argued November 1, 1977—Decided March 21, 1978

Petitioner, who was charged with committing a misdemeanor, was tried before a five-person jury pursuant to Georgia law, and convicted. Though a criminal trial by a six-person jury is permissible under *Williams* v. *Florida*, 399 U. S. 78, petitioner maintains that a trial before a jury of less than six is unconstitutional, a contention that the Georgia courts rejected. *Held:* The judgment is reversed and the case is remanded. Pp. 229–245; 245; 245–246.

138 Ga. App. 530, 227 S. E. 2d 65, reversed and remanded.

MR. JUSTICE BLACKMUN, joined by MR. JUSTICE STEVENS, concluded that a criminal trial to a jury of less than six persons substantially threatens Sixth and Fourteenth Amendment guarantees. Georgia has presented no persuasive argument to the contrary. Neither the financial benefit nor the more dubious time-saving benefit claimed is a factor of sufficient significance to offset the substantial threat to the constitutional guarantees that reducing the jury from six to five would create. Pp. 229–245.

MR. JUSTICE WHITE concluded that a jury of less than six would not satisfy the fair-cross-section requirement of the Sixth and Fourteenth Amendments. P. 245.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST joined, concluded that, though the line between five- and six-member juries is difficult to justify, a line has to be drawn somewhere if the substance of jury trial in criminal cases is to be preserved. Pp. 245–246.

BLACKMUN, J., announced the Court's judgment and delivered an opinion, in which STEVENS, J., joined. STEVENS, J., filed a concurring statement, *post*, p. 245. WHITE, J., filed a statement concurring in the judgment, *post*, p. 245. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 245. BRENNAN, J., filed a separate opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 246.

Michael Clutter argued the cause for petitioner *pro hac vice*. With him on the brief was *Robert Eugene Smith*.

Leonard W. Rhodes argued the cause and filed a brief for respondent.*

MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEVENS joined.

This case presents the issue whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

I

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Adult Theatre at 320 Peachtree Street, Atlanta, Ga. On November 9 two investigators from the Fulton County Solicitor General's office viewed at the theater a motion picture film entitled "Behind the Green Door." Record 46–48, 90. After they had seen the film, they obtained

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**Charles H. Keating, Jr.*, and *James J. Clancy* filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae* urging affirmance.

[1] The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

a warrant for its seizure, returned to the theater, viewed the film once again, and seized it. *Id.*, at 48–50, 91. Petitioner and a cashier were arrested. Investigators returned to the theater on November 26, viewed the film in its entirety, secured still another warrant, and on November 27 once again viewed the motion picture and seized a second copy of the film. *Id.*, at 53–55.

On September 14, 1974, petitioner was charged in a two-count misdemeanor accusation with

> "distributing obscene materials in violation of Georgia Code Section 26–2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled 'Behind the Green Door' that contained obscene and indecent scenes . . . ." App. 4–6.[2]

Petitioner was brought to trial in the Criminal Court of Fulton County.[3] After a jury of 5 persons had been selected

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[2] Georgia Code Ann. § 26–2101 (1972), in effect at the time of the alleged offenses, was entitled "Distributing obscene materials" and read:

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . ."

1975 Ga. Laws No. 204, p. 498, now Ga. Code Ann. § 26–2101 (Supp. 1977), entirely superseded the earlier version.

[3] The name of the Criminal Court of Fulton County was changed,

and sworn, petitioner moved that the court impanel a jury of 12 persons. Record 37–38.[4] That court, however, tried its misdemeanor cases before juries of five persons pursuant to Ga. Const., Art. 6. § 16, ¶ 1, codified as Ga. Code § 2–5101 (1975), and to 1890–1891 Ga. Laws, No. 278, pp. 937–938, and 1935 Ga. Laws, No. 38, p. 498.[5] Petitioner contended that for an obscenity trial, a jury of only five was

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effective January 2, 1977, by the merger of that court with the Civil Court of Fulton County into a tribunal now known as the State Court of Fulton County. 1976 Ga. Laws No. 1004, p. 3023.

[4] Petitioner asked, in the alternative, that the case be transferred to the Fulton County Superior Court. That court had concurrent jurisdiction over the case. Ga. Const., Art. 6, § 4, ¶ 1, codified as Ga. Code § 2–3901 (1975); *Nobles* v. *State*, 81 Ga. App. 229, 58 S. E. 2d 496 (1950). The Superior Court could have impaneled a jury of 12. Ga. Const., Art. 6, § 16, ¶ 1, codified as Ga. Code § 2–5101 (1975). Because the State had the choice of bringing the case in either the Criminal Court or the Superior Court, petitioner argued that trial before the smaller jury violated equal protection and due process guaranteed him under the Fourteenth Amendment. Record 12–13. The transfer was denied. He has not pressed the contention before this Court, and we do not reach it.

[5] 1890–1891 Ga. Laws, No. 278, pp. 937–938, states in part:

"The proceedings [in the Criminal Court of Atlanta] after information or accusation, shall conform to the rules governing like proceedings in the Superior Courts, except that the jury in said court, shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four (4) strikes and the State three (3) and the five remaining jurors shall compose the jury."

The cited 1935 statute changed the name of the Criminal Court of Atlanta to the Criminal Court of Fulton County. It was intimated at oral argument that only this particular court in Georgia employed fewer than six jurors. Tr. of Oral Arg. 25.

Effective March 24, 1976, the number of jurors in the Criminal Court of Fulton County was changed from five to six. 1976 Ga. Laws No. 1003, p. 3019.

Irrespective of its size, the Georgia jury in a criminal trial, in order to convict, must do so by unanimous vote. *Ball* v. *State*, 9 Ga. App. 162, 70 S. E. 888 (1911).

constitutionally inadequate to assess the contemporary standards of the community. Record 13, 38. He also argued that the Sixth and Fourteenth Amendments required a jury of at least six members in criminal cases. *Id.*, at 38.

The motion for a 12-person jury was overruled, and the trial went on to its conclusion before the 5-person jury that had been impaneled. At the conclusion of the trial, the jury deliberated for 38 minutes and returned a verdict of guilty on both counts of the accusation. *Id.*, at 205–208. The court imposed a sentence of one year and a $1,000 fine on each count, the periods of incarceration to run concurrently and to be suspended upon payment of the fines. *Id.*, at 16–17, 209. After a subsequent hearing, the court denied an amended motion for a new trial.[6]

Petitioner took an appeal to the Court of Appeals of the State of Georgia. There he argued: First, the evidence was insufficient. Second, the trial court committed several First Amendment errors, namely, that the film as a matter of law was not obscene, and that the jury instructions incorrectly explained the standard of scienter, the definition of obscenity, and the scope of community standards. Third, the seizures of the films were illegal. Fourth, the convictions on both counts had placed petitioner in double jeopardy because he had shown only one motion picture. Fifth, the use of the five-member jury deprived him of his Sixth and Fourteenth Amendment right to a trial by jury. *Id.*, at 222–224.

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[6] Petitioner, in his amended motion for a new trial, argued that the films were seized illegally under a defective warrant; that the obscenity statute, § 26–2101, violated the First, Fourth, Fifth, Sixth, and Fourteenth Amendments; that the double conviction had placed petitioner in double jeopardy, in violation of the Fifth Amendment and Ga. Code § 2–108 (1975); that the evidence was insufficient to support the verdicts; that the trial court erroneously excluded the testimony of a defense expert witness; and that the court's instruction on scienter improperly shifted the burden of proof to the defense. Record 19–21.

The Court of Appeals rejected petitioner's contentions. 138 Ga. App. 530, 227 S. E. 2d 65 (1976). The court independently reviewed the film in its entirety and held it to be "hard core pornography" and "obscene as a matter of constitutional law and fact." *Id.*, at 532–533, 227 S. E. 2d, at 67–68. The evidence was sufficient to support the jury's conclusion that petitioner possessed the requisite scienter. As manager of the theater, petitioner had advertised the movie, had sold tickets, was present when the films were exhibited, had pressed the button that allowed entrance to the seating area, and had locked the door after each arrest. This evidence, according to the court, met the constructive-knowledge standard of § 26–2101. The court found no errors in the instructions, in the issuance of the warrants, or in the presence of the two convictions. In its consideration of the five-person-jury issue, the court noted that *Williams* v. *Florida* had not established a constitutional minimum number of jurors. Absent a holding by this Court that a five-person jury was constitutionally inadequate, the Court of Appeals considered itself bound by *Sanders* v. *State,* 234 Ga. 586, 216 S. E. 2d 838 (1975), cert. denied, 424 U. S. 931 (1976), where the constitutionality of the five-person jury had been upheld. The court also cited the earlier case of *McIntyre* v. *State,* 190 Ga. 872, 11 S. E. 2d 5 (1940), a holding to the same general effect but without elaboration.

The Supreme Court of Georgia denied certiorari. App. 26.

In his petition for certiorari here, petitioner raised three issues: the unconstitutionality of the five-person jury; the constitutional sufficiency of the jury instructions on scienter and constructive, rather than actual, knowledge of the contents of the film; and obscenity *vel non.* We granted certiorari. 429 U. S. 1071 (1977). Because we now hold that the five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States through the Fourteenth, we do not reach the other issues.

II

The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases. *Duncan* v. *Louisiana,* 391 U. S. 145, 159–162 (1968). The Court in *Duncan* applied this Sixth Amendment right to the States because "trial by jury in criminal cases is fundamental to the American scheme of justice." *Id.,* at 149. The right attaches in the present case because the maximum penalty for violating § 26–2101, as it existed at the time of the alleged offenses, exceeded six months' imprisonment.[7] See *Baldwin* v. *New York,* 399 U. S. 66, 68–69 (1970) (opinion of WHITE, J.).

In *Williams* v. *Florida,* 399 U. S., at 100, the Court reaffirmed that the "purpose of the jury trial, as we noted in *Duncan,* is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan* v. *Louisiana,* [391 U. S.,] at 156." See *Apodaca* v. *Oregon,* 406 U. S. 404, 410 (1972) (opinion of WHITE, J.). This purpose is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case. *Williams* v. *Florida,* 399 U. S., at 100.

Williams held that these functions and this purpose could be fulfilled by a jury of six members. As the Court's opinion in that case explained at some length, *id.,* at 86–90, common-law juries included 12 members by historical accident, "unrelated to the great purposes which gave rise to the jury in the

[7] The maximum penalty for a conviction of a misdemeanor in Georgia in 1973 was imprisonment for not to exceed 12 months, or a fine not to exceed $1,000, or both. Ga. Code Ann. § 27–2506 (1972). With the change in § 26–2101 effected by 1975 Ga. Laws No. 204, p. 498, the offenses charged against petitioner would now be punishable as for "a misdemeanor of a high and aggravated nature," and the maximum penalty is imprisonment for not to exceed 12 months, or a fine not to exceed $5,000, or both. Ga. Code § 27–2506 (c) (Supp. 1977).

first place." *Id.*, at 89–90. The Court's earlier cases that had *assumed* the number 12 to be constitutionally compelled were set to one side because they had not considered history and the function of the jury.[8] *Id.*, at 90–92. Rather than requiring 12 members, then, the Sixth Amendment mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. *Id.*, at 100. Although recognizing that by 1970 little empirical research had evaluated jury performance, the Court found no evidence that the reliability of jury verdicts diminished with six-member panels. Nor did the Court anticipate significant differences in result, including the frequency of "hung" juries. *Id.*, at 101–102, and nn. 47 and 48. Because the reduction in size did not threaten exclusion of any particular class from jury roles, concern that the representative or cross-section character of the jury would suffer with a decrease to six members seemed "an unrealistic one." *Id.*, at 102. As a consequence, the six-person jury was held not to violate the Sixth and Fourteenth Amendments.

III

When the Court in *Williams* permitted the reduction in jury size—or, to put it another way, when it held that a jury of six was not unconstitutional—it expressly reserved ruling on the issue whether a number smaller than six passed constitutional scrutiny. *Id.*, at 91 n. 28.[9] See *Johnson* v. *Louisiana*, 406

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[8] The Court rejected the assumption, made in *Thompson* v. *Utah*, 170 U. S. 343, 349 (1898), and certain later cases, see *Patton* v. *United States*, 281 U. S. 276, 288 (1930); *Rassmussen* v. *United States*, 197 U. S. 516, 519, 528 (1905); and *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900), that the 12-member feature was a constitutional requirement.

[9] In the cited footnote the Court said: "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum."

Respondent picks up the last phrase with absolute literalness here when

U. S. 356, 365–366 (1972) (concurring opinion). The Court refused to speculate when this so-called "slippery slope" would become too steep. We face now, however, the two-fold question whether a further reduction in the size of the state criminal trial jury does make the grade too dangerous, that is, whether it inhibits the functioning of the jury as an institution to a significant degree, and, if so, whether any state interest counterbalances and justifies the disruption so as to preserve its constitutionality.

Williams v. *Florida* and *Colgrove* v. *Battin*, 413 U. S. 149 (1973) (where the Court held that a jury of six members did not violate the Seventh Amendment right to a jury trial in a civil case), generated a quantity of scholarly work on jury size.[10] These writings do not draw or identify a bright line

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it argues: "If six is above the minimum, five cannot be below the minimum. There is no number in between." Brief for Respondent 4; Tr. of Oral Arg. 24. We, however, do not accept the proposition that by stating the number six was "above" the constitutional minimum the Court, by implication, held that at least the number five was constitutional. Instead, the Court was holding that six passed constitutional muster but was reserving judgment on *any* number less than six.

[10] *E. g.*, M. Saks, Jury Verdicts (1977) (hereinafter cited as Saks); Bogue & Fritz, The Six-Man Jury, 17 S. D. L. Rev. 285 (1972); Davis, Kerr, Atkin, Holt, & Mech, The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. of Personality & Soc. Psych. 1 (1975); Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Reform 520 (1974); Friedman, Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors, 26–2 Am. Stat. 21 (Apr. 1972) (hereinafter cited as Friedman); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases, 73 Mich. L. Rev. 643 (1975) (hereinafter cited as Lempert); Nagel & Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict, 1975 Wash. U. L. Q. 933 (hereinafter cited as Nagel & Neef); New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 326 (1972) (here-

below which the number of jurors would not be able to function as required by the standards enunciated in *Williams*. On the other hand, they raise significant questions about the wisdom and constitutionality of a reduction below six. We examine these concerns:

First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group per-

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inafter cited as Pabst); Saks, Ignorance of Science Is No Excuse, 10 Trial 18 (Nov.-Dec. 1974); Thompson, Six Will Do!, 10 Trial 12 (Nov.-Dec. 1974); Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971) (hereinafter cited as Zeisel); Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (1972); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974) (hereinafter cited as Zeisel & Diamond); Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams* v. *Florida*, 22 Case W. Res. L. Rev. 529 (1971) (hereinafter cited as Note, Case W. Res.); Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973); Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973).

Some of these studies have been pressed upon us by the parties. Brief for Petitioner 7–9; Tr. of Oral Arg. 26–27.

We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of MR. JUSTICE POWELL that "a line has to be drawn somewhere." We also note that THE CHIEF JUSTICE did not shrink from the use of empirical data in *Williams* v. *Florida*, 399 U. S. 78, 100–102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in *Colgrove* v. *Battin*, 413 U. S. 149, 158–160 (1973), a decision also joined by MR. JUSTICE REHNQUIST.

formance and group productivity.[11] A variety of explanations have been offered for this conclusion. Several are particularly applicable in the jury setting. The smaller the group, the less likely are members to make critical contributions necessary for the solution of a given problem.[12] Because most juries are not permitted to take notes, see Forston, Sense and Non-Sense: Jury Trial Communication, 1975 B. Y. U. L. Rev. 601, 631–633, memory is important for accurate jury deliberations. As juries decrease in size, then, they are less likely to have members who remember each of the important pieces of evidence or argument.[13] Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result.[14] When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups also exhibited increased motivation and self-criticism. All these advantages, except, perhaps, self-motivation, tend to diminish as the size of the group diminishes.[15] Because juries frequently face complex problems laden with value choices, the benefits are important and should be retained. In par-

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[11] Two researchers have summarized the findings of 31 studies in which the size of groups from 2 to 20 members was an important variable. They concluded that there were no conditions under which smaller groups were superior in the quality of group performance and group productivity. Thomas & Fink, Effects of Group Size, 60 Psych. Bull. 371, 373 (1963), cited in Lempert 685. See Saks 77 *et seq.*, 107.

[12] See Faust, Group versus Individual Problem-Solving, 59 J. Ab. & Soc. Psych. 68, 71 (1959), cited in Lempert 685 and 686.

[13] Saks 77 *et seq.*; see Kelley & Thibaut, Group Problem Solving, 4 Handbook of Soc. Psych. 68–69 (2d ed., G. Lindzey & E. Anderson 1969) (hereinafter cited as Kelley & Thibaut).

[14] Lempert 687–688, citing Barnlund, A Comparative Study of Individual, Majority, and Group Judgment, 58 J. Ab. & Soc. Psych. 55, 59 (1959); see Kelley & Thibaut 67.

[15] Lempert 687–688, citing Barnlund, *supra* n. 14, pp. 58–59.

ticular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.

Second, the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person (Type I error) rises as the size of the jury diminishes.[16] Because the risk of not convicting a guilty person (Type II error) increases with the size of the panel,[17] an optimal jury size can be selected as a function of the interaction between the two risks. Nagel and Neef concluded that the optimal size, for the purpose of minimizing errors, should vary with the importance attached to the two types of mistakes. After weighting Type I error as 10 times more significant than Type II, perhaps not an unreasonable assumption, they concluded that the optimal jury size was between six and eight. As the size diminished to five and below, the weighted sum of errors increased because of the enlarging risk of the conviction of innocent defendants.[18]

Another doubt about progressively smaller juries arises from the increasing inconsistency that results from the decreases. Saks argued that the "more a jury type fosters consistency, the greater will be the proportion of juries which select the correct (*i. e.*, the same) verdict and the fewer 'errors' will be made." Saks 86–87. From his mock trials held before undergraduates and former jurors, he computed the percentage of "correct" decisions rendered by 12-person and 6-person panels. In the student experiment, 12-person groups reached correct

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[16] Friedman; Nagel & Neef.

[17] Nagel & Neef 945.

[18] *Id.*, at 946–948, 956, 975. Friedman reached a similar conclusion. He varied the appearance of guilt in his statistical study. The more guilty the person appeared, the greater the chance that a 6-member panel would convict when a 12-member panel would not. As jury size was reduced, the risk of Type I error would increase, Friedman said, without a significant corresponding advantage in reducing Type II error. Friedman 23.

verdicts 83% of the time; 6-person panels reached correct verdicts 69% of the time. The results for the former-juror study were 71% for the 12-person groups and 57% for the 6-person groups. *Ibid.* Working with statistics described in H. Kalven & H. Zeisel, The American Jury 460 (1966), Nagel and Neef tested the average conviction propensity of juries, that is, the likelihood that any given jury of a set would convict the defendant.[19] They found that half of all 12-person juries would have average conviction propensities that varied by no more than 20 points. Half of all six-person juries, on the other hand, had average conviction propensities varying by 30 points, a difference they found significant in both real and percentage terms.[20] Lempert reached similar results when he considered the likelihood of juries to compromise over the various views of their members, an important phenomenon for the fulfillment of the commonsense function. In civil trials averaging occurs with respect to damages amounts. In criminal trials it relates to numbers of counts and lesser included offenses.[21] And he predicted that compromises would be more consistent when larger juries were employed. For example, 12-person juries could be expected to reach extreme compromises in 4% of the cases, while 6-person panels would reach extreme results in 16%.[22] All three of these *post*-Williams studies, therefore, raise significant doubts about the consistency and reliability of the decisions of smaller juries.

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[19] Nagel & Neef 952, 971, concluded that the average juror had a propensity to convict more frequently than to acquit, a tendency designated by the figure .677. In other words, if the average jury considered the average case, 67.7% of the jurors would vote to convict.

[20] With the average juror having a conviction propensity of .677, the average 12-member jury propensities ranged from .579 to .775. The average six-member jury propensities ranged from .530 to .830. *Id.*, at 971–972.

[21] Lempert 680.

[22] Accord, Zeisel 718; Note, Case W. Res. 547.

Third, the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense. Both Lempert and Zeisel found that the number of hung juries would diminish as the panels decreased in size. Zeisel said that the number would be cut in half—from 5% to 2.4% with a decrease from 12 to 6 members.[23] Both studies emphasized that juries in criminal cases generally hang with only one, or more likely two, jurors remaining unconvinced of guilt.[24] Also, group theory suggests that a person in the minority will adhere to his position more frequently when he has at least one other person supporting his argument.[25] In the jury setting the significance of this tendency is demonstrated by the following figures: If a minority viewpoint is shared by 10% of the community, 28.2% of 12-member juries may be expected to have no minority representation, but 53.1% of 6-member juries would have none. Thirty-four percent of 12-member panels could be expected to have two minority members, while only 11% of 6-member panels would have two.[26] As the numbers diminish below six, even fewer panels would have one member with the minority viewpoint and still fewer would have two. The chance for hung juries would decline accordingly.

Fourth, what has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decisionmaking, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other

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[23] Zeisel 720; accord, Lempert 676. But see Saks 89–90.

[24] Lempert 674–677; Zeisel 719.

[25] Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments in Group Dynamics Research and Theory, 189, 195–197 (2d ed., 1960), cited in Lempert 673.

[26] *Id.*, at 669, 677.

identifiable groups from jury service. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas,* 311 U. S. 128, 130 (1940). The exclusion of elements of the community from participation "contravenes the very idea of a jury . . . composed of 'the peers or equals of the person whose rights it is selected or summoned to determine.'" *Carter* v. *Jury Comm'n,* 396 U. S. 320, 330 (1970), quoting *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880). Although the Court in *Williams* concluded that the six-person jury did not fail to represent adequately a cross-section of the community, the opportunity for meaningful and appropriate representation does decrease with the size of the panels. Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 89% not to have two.[27] Further reduction in size will erect additional barriers to representation.

Fifth, several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries.[28] For example, because the judicial system handles so many clear cases, decisionmakers will reach similar results through similar analyses most of the time. One study concluded that smaller and larger juries could disagree in their verdicts in no more than 14% of the cases.[29] Disparities, therefore, appear in only small percentages. Nationwide, however, these small percentages will represent a large number of cases. And it is with respect to those cases that the jury trial right has its

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[27] *Ibid.;* Saks 90.

[28] Lempert 648–653; Nagel & Neef 934–937; Saks, Ignorance of Science Is No Excuse, *supra* n. 10, at 19; Zeisel & Diamond 283–291; Note, Case W. Res. 535.

[29] Lempert 648–653.

greatest value. When the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will insure evaluation by the sense of the community and will also tend to insure accurate factfinding.[30]

Studies that aggregate data also risk masking case-by-case differences in jury deliberations. The authors, H. Kalven and H. Zeisel, of The American Jury (1966), examined the judge-jury disagreement. They found that judges held for plaintiffs 57% of the time and that juries held for plaintiffs 59%, an insignificant difference. Yet case-by-case comparison revealed judge-jury disagreement in 22% of the cases. *Id.*, at 63, cited in Lempert 656. This casts doubt on the conclusion of another study that compared the aggregate results of civil cases tried before 6-member juries with those of 12-member jury trials.[31] The investigator in that study had claimed support for his hypothesis that damages awards did

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[30] Zeisel and Diamond have criticized one of the more important studies supporting smaller juries. See n. 34, *infra*. In Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973), the author tested the deliberations of larger and smaller panels by showing to sets of both sizes the video tape of a single mock civil trial. The case concerned an automobile accident and turned on whether the plaintiff had been speeding. If so, Michigan law precluded recovery because of contributory negligence. Of the 16 juries tested, not one found for the plaintiff. This led Zeisel and Diamond to conclude: "The evidence in the case overwhelmingly favored the defendant . . . . This overpowering bias makes the experiment irrelevant. On the facts of this case, any jury under any rules would probably have arrived at the same verdict. Hence, to conclude from this experiment that jury size generally has no effect on the verdict is impermissible." Zeisel & Diamond 287.

See also Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Reform 520 (1974). The criticized study was cited and relied upon by the Court in *Colgrove* v. *Battin*, 413 U. S. 149, 159 n. 15 (1973).

[31] See Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973). This also was cited and relied upon in *Colgrove* v. *Battin*, 413 U. S., at 159 n. 15.

not vary with the reduction in jury size. Although some might say that figures in the aggregate may have supported this conclusion, a closer view of the cases reveals greater variation in the results of the smaller panels, *i. e.,* a standard deviation of $58,335 for the 6-member juries, and of $24,834 for the 12-member juries.[32] Again, the averages masked significant case-by-case differences that must be considered when evaluating jury function and performance.

IV

While we adhere to, and reaffirm our holding in *Williams* v. *Florida,* these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

Georgia here presents no persuasive argument that a reduction to five does not offend important Sixth Amendment interests. First, its reliance on *Johnson* v. *Louisiana,* 406 U. S. 356 (1972), for the proposition that the Court previously has approved the five-person jury is misplaced. In *Johnson* the

[32] Zeisel & Diamond 289–290. These authors also criticized the Michigan study because it ignored two other important changes that had occurred when the size of civil juries was decreased from 12 to 6 members: A mediation board, which encouraged settlements, had been introduced, and rules that permitted discovery of insurance policy limits had taken effect. See Saks 43.

petitioner challenged the Louisiana statute that permitted felony convictions on less-than-unanimous verdicts. The prosecution had to garner only nine votes of the 12-member jury to convict in a felony trial. The Court held that the statute did not violate the due process guarantee by diluting the reasonable-doubt standard. *Id.*, at 363. The only discussion of the five-person panels, which heard less serious offenses, was with respect to the petitioner's equal protection challenge. He contended that requiring only nine members of a 12-person panel to convict in a felony case was a deprival of equal protection when a unanimous verdict was required from the 5-member panel used in a misdemeanor trial. The Court held merely that the classification was not invidious. *Id.*, at 364. Because the issue of the constitutionality of the five-member jury was not then before the Court, it did not rule upon it.

Second, Georgia argues that its use of five-member juries does not violate the Sixth and Fourteenth Amendments because they are used only in misdemeanor cases. If six persons may constitutionally assess the felony charge in *Williams,* the State reasons, five persons should be a constitutionally adequate number for a misdemeanor trial. The problem with this argument is that the purpose and functions of the jury do not vary significantly with the importance of the crime. In *Baldwin* v. *New York,* 399 U. S. 66 (1970), the Court held that the right to a jury trial attached in both felony and misdemeanor cases. Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to trial by jury. In the present case the possible deprivation of liberty is substantial. The State charged petitioner with misdemeanors under Ga. Code Ann. § 26–2101 (1972), and he has been given concurrent sentences of imprisonment, each for one year, and fines totaling $2,000 have been imposed. We cannot conclude that there is less need for the imposition and

the direction of the sense of the community in this case than when the State has chosen to label an offense a felony.[33] The need for an effective jury here must be judged by the same standards announced and applied in *Williams* v. *Florida.*

Third, the retention by Georgia of the unanimity requirement does not solve the Sixth and Fourteenth Amendment problem. Our concern has to do with the ability of the smaller group to perform the functions mandated by the Amendments. That a five-person jury may return a unanimous decision does not speak to the questions whether the group engaged in meaningful deliberation, could remember all the important facts and arguments, and truly represented the sense of the entire community. Despite the presence of the unanimity requirement, then, we cannot conclude that "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" by the five-person panel. *Apodaca* v. *Oregon,* 406 U. S., at 411 (opinion of WHITE, J.).

Fourth, Georgia submits that the five-person jury adequately represents the community because there is no arbitrary exclusion of any particular class. We agree that it has not been demonstrated that the Georgia system violates the Equal Protection Clause by discriminating on the basis of race or some other improper classification. See *Carter* v. *Jury*

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[33] We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. See *Miller* v. *California,* 413 U. S. 15 (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled a misdemeanor and the robbery a felony.

Comm'n, 396 U. S. 320 (1970); *Smith* v. *Texas*, 311 U. S. 128 (1940). But the data outlined above raise substantial doubt about the ability of juries truly to represent the community as membership decreases below six. If the smaller and smaller juries will lack consistency, as the cited studies suggest, then the sense of the community will not be applied equally in like cases. Not only is the representation of racial minorities threatened in such circumstances, but also majority attitude or various minority positions may be miscontrued or misapplied by the smaller groups. Even though the facts of this case would not establish a jury discrimination claim under the Equal Protection Clause, the question of representation does constitute one factor of several that, when combined, create a problem of constitutional significance under the Sixth and Fourteenth Amendments.

Fifth, the empirical data cited by Georgia do not relieve our doubts. The State relies on the Saks study for the proposition that a decline in the number of jurors will not affect the aggregate number of convictions or hung juries. Tr. of Oral Arg. 27. This conclusion, however, is only one of several in the Saks study; that study eventually concludes:

> "Larger juries (size twelve) are preferable to smaller juries (six). They produce longer deliberations, more communication, far better community representation, and, possibly, greater verdict reliability (consistency)." Saks 107.

Far from relieving our concerns, then, the Saks study supports the conclusion that further reduction in jury size threatens Sixth and Fourteenth Amendment interests.

Methodological problems prevent reliance on the three studies that do purport to bolster Georgia's position. The reliability of the two Michigan studies cited by the State has been criticized elsewhere.[34] The critical problem with the

[34] Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973) (a statistical study of

Michigan laboratory experiment, which used a mock civil trial, was the apparent clarity of the case. Not one of the juries found for the plaintiff in the tort suit; this masked any potential difference in the decisionmaking of larger and smaller panels. The results also have been doubted because in the experiment only students composed the juries, only 16 juries were tested, and only a video tape of the mock trial was presented.[35] The statistical review of the results of actual jury trials in Michigan erroneously aggregated outcomes. It is also said that it failed to take account of important changes of court procedure initiated at the time of the reduction in size from 12 to 6 members.[36] The Davis study, which employed a mock criminal trial for rape, also presented an extreme set of facts so that none of the panels rendered a guilty verdict.[37] None of these three reports, therefore, convinces us that a reduction in the number of jurors below six will not affect to a constitutional degree the functioning of juries in criminal trials.

V

With the reduction in the number of jurors below six creating a substantial threat to Sixth and Fourteenth Amendment guarantees, we must consider whether any interest of the State justifies the reduction. We find no significant state advantage in reducing the number of jurors from six to five.

The States utilize juries of less than 12 primarily for administrative reasons. Savings in court time and in financial costs

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actual jury results), and Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973) (a laboratory experiment using a mock trial), were both criticized in Saks 43–46, and in Zeisel & Diamond 286–290. The second study was criticized in Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Reform 520 (1974). The Michigan studies were advanced by the State at oral argument. Tr. of Oral Arg. 27.

[35] Saks 45.

[36] *Id.*, at 43–44; Zeisel & Diamond 288–290.

[37] Davis, et al., *supra* n. 10, at 7, criticized in Saks 49–51.

are claimed to justify the reductions.[38] The financial benefits of the reduction from 12 to 6 are substantial; this is mainly because fewer jurors draw daily allowances as they hear cases.[39] On the other hand, the asserted saving in judicial time is not so clear. Pabst in his study found little reduction in the time for *voir dire* with the six-person jury because many questions were directed at the veniremen as a group.[40] Total trial time did not diminish, and court delays and backlogs improved very little.[41] The point that is to be made, of course, is that a reduction in size from six to five or four or even three would save the States little. They could reduce slightly the daily allowances, but with a reduction from six to five the saving would be minimal. If little time is gained by the reduction from 12 to 6, less will be gained with a reduction from 6 to 5. Perhaps this explains why only two States, Georgia and Virginia,[42] have reduced the size of juries in certain nonpetty criminal cases to five. Other States appear content with six members or more.[43] In short, the State has offered little or no justification for its reduction to five members.

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[38] See New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Bogue & Fritz, The Six-Man Jury, 17 S. D. L. Rev. 285 (1972).

[39] It has been said that a reduction from 12 jurors to 6 throughout the federal system could save at least $4 million annually. Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974). Another study calculated a saving in jury man-hours of 41.9% with the reduction to six members. Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 326, 328 (1972).

[40] *Id.*, at 327; Zeisel, Twelve is Just, *supra*. But see Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts 27–28 (1972); New Jersey Criminal Law Revision Commission, Six-Member Juries 3–4 (1971); Thompson, Six Will Do, 10 Trial 12, 14 (Nov.-Dec. 1974).

[41] Pabst, *supra*, at 327–328.

[42] Virginia Code § 19.2–262 (2) (1975) permits juries of five in misdemeanor cases.

[43] Several States have provided for six-member juries for selected

Petitioner, therefore, has established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

VI

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, concurring.

While I join MR. JUSTICE BLACKMUN's opinion, I have not altered the views I expressed in *Marks* v. *United States,* 430 U. S. 188.

MR. JUSTICE WHITE, concurring in the judgment.

Agreeing that a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments, I concur in the judgment of reversal.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

I concur in the judgment, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the opinion of MR. JUSTICE BLACKMUN indicates, the line between five-

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criminal cases. *E. g.,* Colo. Rule Crim. Proc. 23 (1974); Fla. Stat. Ann. § 913.10 (West 1973); Ky. Rev. Stat. § 29.015 (1971); Mass. Gen. Laws Ann., ch. 218, § 27A (West Supp. 1977). Other States provide for smaller juries upon stipulation of the parties. *E. g.,* Ark. Stat. Ann. § 43–1901 (1977); Cal. Civ. Proc. Code Ann. § 194 (West 1954). The Federal Indian Civil Rights Act, § 202, 82 Stat. 77, 25 U. S. C. § 1302 (10), provides for a right of jury trial in certain cases before a jury of not less than six persons.

and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca* v. *Oregon,* 406 U. S. 404, 414 (1972) (POWELL, J., concurring). Because the opinion of MR. JUSTICE BLACKMUN today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca,* I do not join it. Also, I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join.

I join MR. JUSTICE BLACKMUN's opinion insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons. However, I cannot agree that petitioner can be subjected to a new trial, since I continue to adhere to my belief that Ga. Code Ann. § 26–2101 (1972) is overbroad and therefore facially unconstitutional. See *Sanders* v. *Georgia,* 424 U. S. 931 (1976) (dissent from denial of certiorari). See also *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting).

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*The opinion of MR. JUSTICE BLACKMUN acknowledges, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante,* at 237. See also *ante,* at 242–243.

Syllabus

CAREY ET AL. *v.* PIPHUS ET AL.

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

No. 76–1149. Argued December 6, 1977—Decided March 21, 1978

In actions by public school students under 42 U. S. C. § 1983 against school officials, wherein the students were found to have been suspended from school without procedural due process, the students, absent proof of actual injury, are entitled to recover only nominal damages. Pp. 253–267.

(a) The basic purpose of a § 1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights. Pp. 254–257.

(b) To further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question, just as the common-law rules of damages were defined by the interests protected in the various branches of tort law. Pp. 257–259.

(c) Mental and emotional distress caused by the denial of procedural due process cannot be presumed to occur, as in the case of presumed damages in the common law of defamation *per se*, but, although such distress is compensable, neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused. Pp. 259–264.

(d) The issues of what elements and prerequisites for recovery of damages are appropriate to compensate for injuries caused by the deprivation of constitutional rights must be considered with reference to the nature of the interests protected by the particular right in question. Therefore, cases dealing with awards of damages for injuries caused by the deprivation of constitutional rights other than the right to procedural due process, are not controlling in this case. Pp. 264–265.

(e) Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury, and therefore if it is determined that the suspensions of the students in

this case were justified, they nevertheless will be entitled to recover nominal damages. Pp. 266–267.

545 F. 2d 30, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., concurred in the result. BLACKMUN, J., took no part in the consideration or decision of the case.

Earl B. Hoffenberg argued the cause for petitioners. With him on the briefs was *Michael J. Murray.*

John Elson argued the cause for respondents. With him on the brief was *David Goldberger.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In this case, brought under 42 U. S. C. § 1983, we consider the elements and prerequisites for recovery of damages by students who were suspended from public elementary and secondary schools without procedural due process. The Court of Appeals for the Seventh Circuit held that the students are entitled to recover substantial nonpunitive damages even if their suspensions were justified, and even if they do not prove that any other actual injury was caused by the denial of procedural due process. We disagree, and hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.

I

Respondent Jarius Piphus was a freshman at Chicago Vocational High School during the 1973–1974 school year. On January 23, 1974, during school hours, the school principal saw Piphus and another student standing outdoors on school property passing back and forth what the principal described as an irregularly shaped cigarette. The principal approached the students unnoticed and smelled what he believed was the

**Leon Fieldman* filed a brief for the National School Boards Assn. as *amicus curiae* urging reversal.

strong odor of burning marihuana. He also saw Piphus try to pass a packet of cigarette papers to the other student. When the students became aware of the principal's presence, they threw the cigarette into a nearby hedge.

The principal took the students to the school's disciplinary office and directed the assistant principal to impose the "usual" 20-day suspension for violation of the school rule against the use of drugs.[1] The students protested that they had not been smoking marihuana, but to no avail. Piphus was allowed to remain at school, although not in class, for the remainder of the school day while the assistant principal tried, without success, to reach his mother.

A suspension notice was sent to Piphus' mother, and a few days later two meetings were arranged among Piphus, his mother, his sister, school officials, and representatives from a legal aid clinic. The purpose of the meetings was not to determine whether Piphus had been smoking marihuana, but rather to explain the reasons for the suspension. Following an unfruitful exchange of views, Piphus and his mother, as guardian *ad litem,* filed suit against petitioners in Federal District Court under 42 U. S. C. § 1983 and its jurisdictional

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[1] At the time of the suspensions, the Board of Education's general rule governing suspensions provided:

"For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Each such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." Rule 6–9 of the Rules of the Board of Education of the city of Chicago (1973), quoted in District Court opinion, App. to Pet. for Cert. A9.

The District Court held that the terms "gross disobedience" and "misconduct" in this general rule are not unconstitutionally vague because they were narrowed by the school principals' issuance of the particular rules allegedly violated here. *Id.,* at A9–A10. Rule 6–9 was amended following this Court's decision in *Goss* v. *Lopez,* 419 U. S. 565 (1975). See App. to Pet. for Cert. A10–A11, n. 3.

counterpart, 28 U. S. C. § 1343, charging that Piphus had been suspended without due process of law in violation of the Fourteenth Amendment. The complaint sought declaratory and injunctive relief, together with actual and punitive damages in the amount of $3,000.[2] Piphus was readmitted to school under a temporary restraining order after eight days of his suspension.

Respondent Silas Brisco was in the sixth grade at Clara Barton Elementary School in Chicago during the 1973–1974 school year. On September 11, 1973, Brisco came to school wearing one small earring. The previous school year the school principal had issued a rule against the wearing of earrings by male students because he believed that this practice denoted membership in certain street gangs and increased the likelihood that gang members would terrorize other students. Brisco was reminded of this rule, but he refused to remove the earring, asserting that it was a symbol of black pride, not of gang membership.

The assistant principal talked to Brisco's mother, advising her that her son would be suspended for 20 days if he did not remove the earring. Brisco's mother supported her son's position, and a 20-day suspension was imposed. Brisco and his mother, as guardian *ad litem,* filed suit in Federal District Court under 42 U. S. C. § 1983 and 28 U. S. C. § 1343, charging that Brisco had been suspended without due process of law in violation of the Fourteenth Amendment.[3] The complaint

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[2] The complaint named as defendants, individually and in their official capacities, the principal of the school; the General Superintendent of Schools of the city of Chicago; and the members of the Board of Education of the city of Chicago.

[3] Also named as plaintiff in Brisco's suit was People United to Save Humanity (PUSH), a religious corporation organized under the laws of Illinois, the membership of which includes parents of children in the Chicago public schools. The District Court held that PUSH had standing to maintain this suit, a ruling not challenged on appeal.

In addition to the procedural due process claim, Brisco's complaint

sought declaratory and injunctive relief, together with actual and punitive damages in the amount of $5,000.[4] Brisco was readmitted to school during the pendency of proceedings for a preliminary injunction after 17 days of his suspension.

Piphus' and Brisco's cases were consolidated for trial and submitted on stipulated records. The District Court held that both students had been suspended without procedural due process.[5] It also held that petitioners were not entitled to qualified immunity from damages under the second branch of *Wood* v. *Strickland,* 420 U. S. 308 (1975), because they "should have known that a lengthy suspension without any adjudicative hearing of any type" would violate procedural due process. App. to Pet. for Cert. A14.[6] Despite these holdings, the District Court declined to award damages because:

"Plaintiffs put no evidence in the record to quantify their

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alleged that enforcement of the "no-earring" rule violated his right to freedom of expression under the First and Fourteenth Amendments. Neither court below passed on this claim, nor do we.

[4] The complaint named as defendants, individually and in their official capacities, the principal of the school; the General Superintendent of Schools of the city of Chicago; the members of the Board of Education of the city of Chicago; and the Illinois Superintendent of Public Instruction. The District Court granted the latter party's motion to dismiss.

[5] The District Court read *Goss* v. *Lopez, supra,* as requiring "more formal procedures" for suspensions of more than 10 days than for suspensions of less than 10 days, and it set forth a detailed list of procedural requirements. See App. to Pet. for Cert. A11–A12. Petitioners have not challenged either the holding that respondents were denied procedural due process, or the listing of rights that must be granted.

[6] Although respondents' suspensions occurred before *Goss* v. *Lopez* was decided, the District Court thought that petitioners should have been placed on notice that the suspensions violated procedural due process by *Linwood* v. *Board of Ed. of City of Peoria,* 463 F. 2d 763 (CA7), cert. denied, 409 U. S. 1027 (1972). Petitioners have not challenged this holding.

The District Court expressly held that petitioners did *not* lose their immunity under the first branch of *Wood* v. *Strickland, i. e.,* that they

damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof." *Ibid.*

The court also stated that the students were entitled to declaratory relief and to deletion of the suspensions from their school records, but for reasons that are not apparent the court failed to enter an order to that effect. Instead, it simply dismissed the complaints. No finding was made as to whether respondents would have been suspended if they had received procedural due process.

On respondents' appeal, the Court of Appeals reversed and remanded. 545 F. 2d 30 (1976). It first held that the District Court erred in not granting declaratory and injunctive relief. It also held that the District Court should have considered evidence submitted by respondents after judgment that tended to prove the pecuniary value of each day of school that they missed while suspended. The court said, however, that respondents would not be entitled to recover damages representing the value of missed school time if petitioners showed on remand "that there was just cause for the suspension[s] and that therefore [respondents] would have been suspended even if a proper hearing had been held." *Id.*, at 32.

Finally, the Court of Appeals held that even if the District Court found on remand that respondents' suspensions were justified, they would be entitled to recover substantial "nonpunitive" damages simply because they had been denied procedural due process. *Id.*, at 31. Relying on its earlier

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did not act "with the malicious intention to cause a deprivation of constitutional rights or other injury to the student," 420 U. S., at 322:

"Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly defendants believed that they were protecting the integrity of the educational process." App. to Pet. for Cert. A13.

decision in *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F. 2d 569 (CA7 1975), cert. denied, 425 U. S. 963 (1976), the court stated that such damages should be awarded "even if, as in the case at bar, there is no proof of individualized injury to the plaintiff, such as mental distress . . . ." 545 F. 2d, at 31. We granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial "nonpunitive" damages. 430 U. S. 964 (1977).

II

Title 42 U. S. C. § 1983, Rev. Stat. § 1979, derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The legislative history of § 1983, elsewhere detailed, *e. g., Monroe* v. *Pape,* 365 U. S. 167, 172–183 (1961); *id.,* at 225–234 (Frankfurter, J., dissenting in part); *Mitchum* v. *Foster,* 407 U. S. 225, 238–242 (1972), demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" to them by the Constitution. *Imbler* v. *Pachtman,* 424 U. S. 409, 417 (1976).

Petitioners contend that the elements and prerequisites for recovery of damages under this "species of tort liability" should parallel those for recovery of damages under the common law of torts. In particular, they urge that the purpose of an award of damages under § 1983 should be to compensate

persons for injuries that are caused by the deprivation of constitutional rights; and, further, that plaintiffs should be required to prove not only that their rights were violated, but also that injury was caused by the violation, in order to recover substantial damages. Unless respondents prove that they actually were injured by the deprivation of procedural due process, petitioners argue, they are entitled at most to nominal damages.

Respondents seem to make two different arguments in support of the holding below. First, they contend that substantial damages should be awarded under § 1983 for the deprivation of a constitutional right *whether or not* any injury was caused by the deprivation. This, they say, is appropriate both because constitutional rights are valuable in and of themselves, and because of the need to deter violations of constitutional rights. Respondents believe that this view reflects accurately that of the Congress that enacted § 1983. Second, respondents argue that even if the purpose of a § 1983 damages award is, as petitioners contend, primarily to compensate persons for injuries that are caused by the deprivation of constitutional rights, every deprivation of procedural due process may be *presumed* to cause some injury. This presumption, they say, should relieve them from the necessity of proving that injury actually was caused.

A

Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-

American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956) (emphasis in original).[7] The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found . . . to have been violative of . . . constitutional rights *and to have caused compensable injury* . . . ." *Wood* v. *Strickland,* 420 U. S., at 319 (emphasis supplied); see *Codd* v. *Velger,* 429 U. S. 624, 630–631 (1977) (BRENNAN, J., dissenting); *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 232 (1970) (BRENNAN, J., concurring and dissenting); see also *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 397 (1971) (action for damages directly under Fourth Amendment); *id.,* at 408–409 (Harlan, J., concurring in judgment). The lower federal courts appear generally to agree that damages awards under § 1983 should be determined by the compensation principle.[8]

The Members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871.[9] Two other

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[7] See also D. Dobbs, Law of Remedies § 3.1, pp. 135–138 (1973); C. McCormick, Law of Damages § 1 (1935); W. Prosser, Law of Torts § 2, p. 7 (4th ed. 1971).

[8] See, *e. g., United States ex rel. Tyrrell* v. *Speaker,* 535 F. 2d 823, 829–830, and n. 13 (CA3 1976); *United States ex rel. Larkins* v. *Oswald,* 510 F. 2d 583, 590 (CA2 1975); *Magnett* v. *Pelletier,* 488 F. 2d 33, 35 (CA1 1973); *Stolberg* v. *Members of Bd. of Trustees for State Colleges of Conn.,* 474 F. 2d 485, 488–489 (CA2 1973); *Donovan* v. *Reinbold,* 433 F. 2d 738, 743 (CA9 1970).

[9] See 1 F. Hilliard, Law of Torts, ch. 3, § 5 (3d ed. 1866); T. Sedgwick, Measure of Damages 25–35 (5th ed. 1869). Thus, one proponent of § 1 of the Civil Rights Act of 1871 asked during debate: "[W]hat legislation

sections of the Civil Rights Act of 1871 appear to incorporate this principle, and no reason suggests itself for reading § 1983 differently.[10] To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of

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could be more appropriate than to give a person injured by another under color of . . . State laws a remedy by civil action?" Cong. Globe, 42d Cong., 1st Sess., 482 (1871) (remarks of Rep. Wilson). And one opponent of § 1 complained: "The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States." *Id.*, at App. 216 (remarks of Sen. Thurman). See also Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Ind. L. J. 5, 10 (1974).

[10] Section 2 of the Act, 17 Stat. 13–14, now codified at 42 U. S. C. § 1985 (3), made it unlawful to conspire, *inter alia*, "for the purpose of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws . . . ." It further provided (emphasis supplied):

"[I]f any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of *damages occasioned by such* injury or *deprivation of rights and privileges* against any one or more of the persons engaged in such conspiracy . . . ."

Section 6 of the Act, 17 Stat. 15, now codified at 42 U. S. C. § 1986, provided (emphasis supplied):

"[A]ny person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons *shall be liable to the person injured,* or his legal representatives, *for all damages caused by any such wrongful act* . . . ."

compensatory damages. See *Imbler* v. *Pachtman,* 424 U. S., at 442 (WHITE, J., concurring in judgment).[11]

B

It is less difficult to conclude that damages awards under § 1983 should be governed by the principle of compensation than it is to apply this principle to concrete cases.[12] But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages

[11] This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights. See, *e. g., Silver* v. *Cormier,* 529 F. 2d 161, 163–164 (CA10 1976); *Stengel* v. *Belcher,* 522 F. 2d 438, 444 n. 4 (CA6 1975), cert. dismissed, 429 U. S. 118 (1976); *Spence* v. *Staras,* 507 F. 2d 554, 558 (CA7 1974); *Caperci* v. *Huntoon,* 397 F. 2d 799, 801 (CA1), cert. denied, 393 U. S. 940 (1968); *Mansell* v. *Saunders,* 372 F. 2d 573, 576 (CA5 1967); *Basista* v. *Weir,* 340 F. 2d 74, 84–88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n. 6, *supra,* and the Court of Appeals approved only the award of "non-punitive" damages, 545 F. 2d 30, 31 (1976).

We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, amending 42 U. S. C. § 1988, provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights. See also 18 U. S. C. § 242, the criminal counterpart of § 1983.

[12] For discussions of the problems of fashioning damages awards under § 1983, see generally McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part 1, 60 Va. L. Rev. 1, 55–66 (1974); Nahmod, *supra* n. 9, at 25–27, n. 89; Yudof, Liability for Constitutional Torts and the Risk-Averse Public School Official, 49 S. Cal. L. Rev. 1322, 1366–1383 (1976); Comment, Civil Actions for Damages under the Federal Civil Rights Statutes, 45 Texas L. Rev. 1015, 1023–1035 (1967).

and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.[13]

It is not clear, however, that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case. In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S., at 231–232 (BRENNAN, J., concurring and dissenting). In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. See *Monroe* v. *Pape*, 365 U. S., at 196, and n. 5 (Harlan, J., concurring); *id.*, at 250–251 (Frankfurter, J., dissenting in part); *Adickes* v. *S. H. Kress & Co.*, *supra*, at 232 (BRENNAN, J., concurring and dissenting); *Bivens* v. *Six Unknown Fed. Narcotic Agents*, 403 U. S., at 394; *id.*, at 408–409 (Harlan, J., concurring in judgment). In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.

Although this task of adaptation will be one of some delicacy—as this case demonstrates—it must be undertaken. The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action. Cf. *Jones* v. *Hildebrant*, 432 U. S. 183, 190–191 (1977) (WHITE, J., dissenting); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 240 (1969). In order to further

[13] The Court has looked to the common law of torts in similar fashion in constructing immunities under § 1983. See *Imbler* v. *Pachtman*, 424 U. S. 409, 417–419 (1976), and cases there discussed. Title 42 U. S. C. § 1988 authorizes courts to look to the common law of the States where this is "necessary to furnish suitable remedies" under § 1983.

the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law. We agree with Mr. Justice Harlan that "the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." *Bivens* v. *Six Unknown Fed. Narcotics Agents, supra,* at 409 (Harlan, J., concurring in judgment). With these principles in mind, we now turn to the problem of compensation in the case at hand.

C

The Due Process Clause of the Fourteenth Amendment provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

This Clause "raises no impenetrable barrier to the taking of a person's possessions," or liberty, or life. *Fuentes* v. *Shevin,* 407 U. S. 67, 81 (1972). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . ." *Mathews* v. *Eldridge,* 424 U. S. 319, 344 (1976).[14] Such rules "mini-

[14] See, *e. g., Dixon* v. *Love,* 431 U. S. 105, 112–114 (1977); *Ingraham* v. *Wright,* 430 U. S. 651, 675, 677–678, 682 (1977); *Arnett* v. *Kennedy,* 416 U. S. 134, 170 (1974) (POWELL, J., concurring in part and in result in part); *id.,* at 201 (WHITE, J., concurring and dissenting); *id.,* at 214–215

mize substantively unfair or mistaken deprivations of" life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes* v. *Shevin, supra,* at 81.

In this case, the Court of Appeals held that if petitioners can prove on remand that "[respondents] would have been suspended even if a proper hearing had been held," 545 F. 2d, at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. *Ibid.;* cf. *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 285–287 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 270–271, n. 21 (1977). The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. 545 F. 2d, at 32, citing *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F. 2d, at 579; cf. *Mt. Healthy City Board of Ed.* v. *Doyle, supra,* at 285–286. We do not understand the parties to disagree with this conclusion. Nor do we.[15]

The parties do disagree as to the further holding of the Court of Appeals that respondents are entitled to recover substantial—although unspecified—damages to compensate them for "the injury which is 'inherent in the nature of the

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(MARSHALL, J., dissenting); *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 609–610, 618 (1974); *Goldberg* v. *Kelly,* 397 U. S. 254, 266 (1970).

[15] A few courts appear to have taken a contrary view in cases where public employees holding property interests in their jobs were discharged with cause but without procedural due process. *E. g., Thomas* v. *Ward,* 529 F. 2d 916, 920 (CA4 1975); *Zimmerer* v. *Spencer,* 485 F. 2d 176, 178–179 (CA5 1973); *Horton* v. *Orange County Bd. of Ed.,* 464 F. 2d 536, 537–538 (CA4 1972). See also *Burt* v. *Board of Trustees of Edgefield County School Dist.,* 521 F. 2d 1201, 1207–1208 (CA4 1975) (opinion of Winter, J.).

wrong,'" 545 F. 2d, at 31, even if their suspensions were justified and even if they fail to prove that the denial of procedural due process actually caused them some real, if intangible, injury. Respondents, elaborating on this theme, submit that the holding is correct because injury fairly may be "presumed" to flow from every denial of procedural due process. Their argument is that in addition to protecting against unjustified deprivations, the Due Process Clause also guarantees the "feeling of just treatment" by the government. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 162 (1951) (Frankfurter, J., concurring). They contend that the deprivation of protected interests without procedural due process, even where the premise for the deprivation is not erroneous, inevitably arouses strong feelings of mental and emotional distress in the individual who is denied this "feeling of just treatment." They analogize their case to that of defamation *per se,* in which "the plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured" in order to recover substantial compensatory damages. C. McCormick, Law of Damages § 116, p. 423 (1935).[16]

[16] Respondents also contend that injury should be presumed because, even if they were guilty of the conduct charged, they were deprived of the chance to present facts or arguments in mitigation to the initial decisionmaker. Cf. *Gagnon* v. *Scarpelli,* 411 U. S. 778, 784–785 (1973); *Morrissey* v. *Brewer,* 408 U. S. 471, 479–480, 488 (1972). They claim that "[i]t can never be known . . . what, if anything, the exercise of such an opportunity to plead one's cause on judgmental or discretionary grounds would have availed." Brief for Respondents 28. But, as previously indicated, the Court of Appeals held that respondents cannot recover damages for injuries caused by their suspensions if the District Court determines that "[respondents] would have been suspended even if a proper hearing had been held." 545 F. 2d, at 32. This holding, which respondents do not challenge, necessarily assumes that the District Court *can* determine what the outcome would have been if respondents had received their hearing. We presume that this determination will include consideration of the likelihood that any mitigating circumstances to which respondents can point would have swayed the initial decisionmakers.

Petitioners do not deny that a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests. They go so far as to concede that, in a proper case, persons in respondents' position might well recover damages for mental and emotional distress caused by the denial of procedural due process. Petitioners' argument is the more limited one that such injury cannot be presumed to occur, and that plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions.

We agree with petitioners in this respect. As we have observed in another context, the doctrine of presumed damages in the common law of defamation *per se* "is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349 (1974). The doctrine has been defended on the grounds that those forms of defamation that are actionable *per se* are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove. See *id.*, at 373, 376 (WHITE, J., dissenting).[17] Moreover, statements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either.[18]

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[17] "By the very nature of harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle." 1 F. Harper & F. James, Law of Torts § 5.30, p. 468 (1956); see also Restatement of Torts § 621, comment *a*, p. 314 (1938).

[18] The essence of libel *per se* is the publication in writing of false statements that tend to injure a person's reputation. The essence of slander *per se* is the publication by spoken words of false statements imputing to a person a criminal offense; a loathsome disease; matter affecting adversely a person's fitness for trade, business, or profession; or serious sexual misconduct. 1 F. Harper & F. James, Law of Torts §§ 5.9–5.13 (1956);

But these considerations do not support respondents' contention that damages should be presumed to flow from every deprivation of procedural due process.

First, it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation and distress. Where the deprivation of a protected interest is substantively justified but procedures are deficient in some respect, there may well be those who suffer no distress over the procedural irregularities. Indeed, in contrast to the immediately distressing effect of defamation *per se,* a person may not even know that procedures *were* deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation.

Moreover, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. But as the Court of Appeals held, the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983.[19] This ambiguity in causation, which is absent in the case of defamation *per se,* provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itelf.

Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by

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Restatement (Second) of Torts §§ 558, 559, 569–574 (1977); W. Prosser, Law of Torts § 112 (4th ed. 1971).

[19] In this case, for example, respondents denied the allegations against them. They may well have been distressed that their denials were not believed. They might have been equally distressed if they had been disbelieved only after a full-dress hearing, but in that instance they would have no cause of action against petitioners.

showing the nature and circumstances of the wrong and its effect on the plaintiff.[20] In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

D

The Court of Appeals believed, and respondents urge, that cases dealing with awards of damages for racial discrimination, the denial of voting rights, and the denial of Fourth Amendment rights support a presumption of damages where procedural due process is denied.[21] Many of the cases relied upon do not help respondents because they held or implied that some actual, if intangible, injury must be proved before compensatory damages may be recovered. Others simply did not address the issue.[22] More importantly, the elements and

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[20] We use the term "distress" to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974).

[21] See cases cited in *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569, 579 (CA7 1975), cert. denied, 425 U. S. 963 (1976).

[22] In *Jeanty* v. *McKey & Poague, Inc.*, 496 F. 2d 1119 (CA7 1974), and *Seaton* v. *Sky Realty Co.*, 491 F. 2d 634 (CA7 1974), cited in *Hostrop, supra*, at 579, the court held that damages may be awarded for humiliation and distress caused by discriminatory refusals to lease housing to plaintiffs. The court's comment in *Seaton* that "[h]umiliation can be inferred from the circumstances as well as established by the testimony," 491 F. 2d, at 636, suggests that the court considered the question of actual injury to be one of fact. See generally Annot., Recovery of Damages for Emotional Distress Resulting from Racial, Ethnic, or Religious Abuse or Discrimination, 40 A. L. R. 3d 1290 (1971).

In *Basista* v. *Weir*, 340 F. 2d 74 (CA3 1965); *Sexton* v. *Gibbs*, 327 F. Supp. 134 (ND Tex. 1970), aff'd, 446 F. 2d 904 (CA5 1971), cert. denied,

prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, *supra,* at 258–259, these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question. For this reason, and without intimating an opinion as to their merits, we do not deem the cases relied upon to be controlling.

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404 U. S. 1062 (1972); and *Rhoads* v. *Horvat,* 270 F. Supp. 307 (Colo. 1967), cited in *Hostrop, supra,* at 579, the courts indicated that damages may be awarded for humiliation and distress caused by unlawful arrests, searches, and seizures. In *Basista* v. *Weir,* the court held that nominal damages could be awarded for an illegal arrest even if compensatory damages were waived; and that such nominal damages would, in an appropriate case, support an award of punitive damages. 340 F. 2d, at 87–88. Because it was unclear whether the plaintiff had waived his claim for compensatory damages, that issue was left open upon remand. *Id.,* at 88. In *Sexton* v. *Gibbs,* where the court found "that Plaintiff suffered humiliation, embarrassment and discomfort," substantial compensatory damages were awarded. 327 F. Supp., at 143. In *Rhoads* v. *Horvat,* the court allowed a jury award of $5,000 in compensatory damages for an illegal arrest to stand, stating that it did "not doubt that the plaintiff was outraged by the arrest." 270 F. Supp., at 311.

Wayne v. *Venable,* 260 F. 64 (CA8 1919), cited in *Hostrop, supra,* at 579, and *Ashby* v. *White,* 1 Bro. P. C. 62, 1 Eng. Rep. 417 (H. L. 1703), rev'g 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K. B. 1703), do appear to support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote. Citing *Ashby* v. *White,* this Court has held that actions for damages may be maintained for wrongful deprivations of the right to vote, but it has not considered the prerequisites for recovery. *Nixon* v. *Herndon,* 273 U. S. 536, 540 (1927); see also *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Coleman* v. *Miller,* 307 U. S. 433, 469 (1939) (opinion of Frankfurter, J.); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Myers* v. *Anderson,* 238 U. S. 368 (1915); *Giles* v. *Harris,* 189 U. S. 475 (1903); *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Wiley* v. *Sinkler,* 179 U. S. 58 (1900). The common-law rule of damages for wrongful deprivations of voting rights embodied in *Ashby* v. *White* would, of course, be quite relevant to the analogous question under § 1983.

III

Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . . ." *Fuentes* v. *Shevin,* 407 U. S., at 87; see *Codd* v. *Velger,* 429 U. S., at 632 (STEVENS, J., dissenting); *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424 (1915).

Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money.[23] By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie* v. *Connecticut,* 401 U. S. 371, 375 (1971); *Anti-Fascist Committee* v. *McGrath,* 341 U. S., at 171–172 (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.[24] We therefore hold that

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[23] See D. Dobbs, Law of Remedies § 3.8, pp. 191–193 (1973); C. McCormick, Law of Damages §§ 20–22 (1935); Restatement of Torts § 907 (1939).

[24] A number of lower federal courts have approved the award of nominal damages under § 1983 where deprivations of constitutional rights are not

if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.[25]

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

It is so ordered.

MR. JUSTICE MARSHALL concurs in the result.

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

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shown to have caused actual injury. *E. g., Thompson* v. *Burke,* 556 F. 2d 231, 240 (CA3 1977); *United States ex rel. Tyrrell* v. *Speaker,* 535 F. 2d, at 829–830; *Magnett* v. *Pelletier,* 488 F. 2d 33, 35 (CA1 1973); *Basista* v. *Weir,* 340 F. 2d, at 87; *Bell* v. *Gayle,* 384 F. Supp. 1022, 1026–1027 (ND Tex. 1974); *United States ex rel. Myers* v. *Sielaff,* 381 F. Supp. 840, 844 (ED Pa. 1974); *Berry* v. *Macon County Bd. of Ed.,* 380 F. Supp. 1244, 1248 (MD Ala. 1971).

[25] Respondents contend that the Court of Appeals' holding could be affirmed on the ground that the District Court held them to too high a standard of proof of the amount of damages appropriate to compensate intangible injuries that are proved to have been suffered. Brief for Respondents 49–52. It is true that plaintiffs ordinarily are not required to prove with exactitude the amount of damages that should be awarded to compensate intangible injury. See *Gertz* v. *Robert Welch, Inc.,* 418 U. S., at 350. But, as the Court of Appeals said, "in the case at bar, there is no proof of individualized injury to [respondents], such as mental distress . . . ." 545 F. 2d, at 31. With the case in this posture, there is no occasion to consider the quantum of proof required to support a particular damages award where actual injury is proved.

UNITED STATES *v.* CECCOLINI

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

No. 76–1151. Argued December 5, 1977—Decided March 21, 1978

A police officer (Biro), while taking a break in respondent's flower shop and conversing with an employee of the shop (Hennessey), noticed an envelope with money protruding therefrom lying on the cash register. Upon examination, he found it contained not only money but policy slips. Biro then placed the envelope back on the register and without telling Hennessey what he had found asked her to whom the envelope belonged. She told him it belonged to respondent. Biro's finding was reported to local detectives and to the FBI, who interviewed Hennessey some four months later without referring to the incident involving Biro. About six months after that incident respondent was summoned before a federal grand jury where he testified that he had never taken policy bets at his shop, but Hennessey testified to the contrary, and shortly thereafter respondent was indicted for perjury. Hennessey testified against respondent at his trial, but after a finding of guilt the District Court granted respondent's motion to suppress Hennessey's testimony and set aside that finding. The Court of Appeals affirmed, noting that the "road" to that testimony from the concededly unconstitutional search was "both straight and uninterrupted." *Held:* The Court of Appeals erred in concluding that the degree of attenuation between Biro's search of the envelope and Hennessey's testimony at the trial was not sufficient to dissipate the connection between the illegality of the search and challenged testimony. Pp. 273–280.

(a) In determining whether the exclusionary rule with its deterrent purpose should be applied, its benefits should be balanced against its costs, and, in evaluating the standards for application of the rule to live-witness testimony in light of this balance, material factors to be considered are the length of the "road" between the Fourth Amendment violation and the witness' testimony; the degree of free will exercised by the witness; and the fact that exclusion of the witness' testimony would perpetually disable the witness from testifying about relevant and material facts regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby. Pp. 273–279.

(b) Here, where the evidence indicates overwhelmingly that Hennesey's

testimony was an act of her own free will in no way coerced or induced by official authority as a result of Biro's discovery of the policy slips, where substantial time elapsed between the illegal search and the initial contact with the witness and between the latter and her trial testimony, and where both Hennessey's identity and her relationship with respondent were well known to the investigating officers, and there is no evidence that Biro entered the shop or picked up the envelope with the intent of finding evidence of an illicit gambling operation, application of the exclusionary rule could not have the slightest deterrent effect on the behavior of an officer such as Biro, and the cost of permanently silencing Hennessey is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect. Pp. 279–280.

(c) The exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. P. 280.

542 F. 2d 136, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post,* p. 280. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 285. BLACKMUN, J., took no part in the consideration or decision of the case.

Richard A. Allen argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti, Deputy Solicitor General Frey,* and *Sidney M. Glazer.*

Leon J. Greenspan argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In December 1974, Ronald Biro, a uniformed police officer on assignment to patrol school crossings, entered respondent's place of business, the Sleepy Hollow Flower Shop, in North Tarrytown, N. Y. He went behind the customer counter and, in the words of Ichabod Crane, one of Tarrytown's more

illustrious inhabitants of days gone past, "tarried," spending his short break engaged in conversation with his friend Lois Hennessey, an employee of the shop. During the course of the conversation he noticed an envelope with money sticking out of it lying on the drawer of the cash register behind the counter. Biro picked up the envelope and, upon examining its contents, discovered that it contained not only money but policy slips. He placed the envelope back on the register, and, without telling Hennessey what he had seen, asked her to whom the envelope belonged. She replied that the envelope belonged to respondent Ceccolini, and that he had instructed her to give it to someone.

The next day, Officer Biro mentioned his discovery to North Tarrytown detectives who in turn told Lance Emory, an FBI agent. This very ordinary incident in the lives of Biro and Hennessey requires us, over three years later, to decide whether Hennessey's testimony against respondent Ceccolini should have been suppressed in his trial for perjury. Respondent was charged with that offense because he denied that he knew anything of, or was in any way involved with, gambling operations. Respondent was found guilty after a bench trial in the United States District Court for the Southern District of New York, but immediately after the finding of guilt the District Court granted respondent's motion to "suppress" the testimony of Hennessey because the court concluded that the testimony was a "fruit of the poisonous tree"; assuming respondent's motion for a directed verdict included a motion to set aside the verdict of guilty, the District Court granted the motion because it concluded that without Hennessey's testimony there was insufficient evidence of respondent's guilt. The Government appealed these rulings to the Court of Appeals for the Second Circuit.

That court rightly concluded that the Government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty, since

further proceedings if the Government were successful on the appeal would not be barred by the Double Jeopardy Clause.[1] 542 F. 2d 136, 139–140 (1976). The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt. *United States* v. *Morrison,* 429 U. S. 1 (1976); *United States* v. *Wilson,* 420 U. S. 332, 352–353 (1975).

The Government, however, was not successful on the merits of its appeal; the Court of Appeals by a divided vote affirmed the District Court's suppression ruling. 542 F. 2d, at 140–142. We granted certiorari to consider the correctness of this ruling of the Court of Appeals. 431 U. S. 903 (1977).

I

During the latter part of 1973, the Federal Bureau of Investigation was exploring suspected gambling operations in North Tarrytown. Among the establishments under surveillance was respondent's place of business, which was a frequent and regular stop of one Francis Millow, himself a suspect in the investigation. While the investigation continued on a reduced scale after December 1973,[2] surveillance of the flower

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[1] Appeal from the suppression order is, of course, authorized by the clear language of 18 U. S. C. § 3731 (1976 ed.). That section permits "[a]n appeal by the United States . . . from a decision or order of a district courts [*sic*] suppressing or excluding evidence . . . , not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information . . . ." If Congress had intended only pretrial suppression orders to be appealable, it would not have added the phrase "and before the verdict or finding on an indictment or information."

[2] The extent of the continued investigation is not made clear on the record but we do know at least that on December 3, 1974, a telephone conversation between Millow and Ceccolini, which implicated the latter in a policy betting operation, was intercepted by local police participating in a combined federal-state gambling investigation.

shop was curtailed at that time. It was thus a full year after this discontinuance of FBI surveillance that Biro spent his patrol break behind the counter with Hennessey. When Biro's discovery of the policy slips was reported the following day to Emory, Emory was not fully informed of the manner in which Biro had obtained the information. Four months later, Emory interviewed Hennessey at her home for about half an hour in the presence of her mother and two sisters. He identified himself, indicated that he had learned through the local police department that she worked for respondent, and told her that the Government would appreciate any information regarding respondent's activities that she had acquired in the shop. Emory did not specifically refer to the incident involving Officer Biro. Hennessey told Emory that she was studying police science in college and would be willing to help. She then related the events which had occurred during her visit with Officer Biro.

In May 1975, respondent was summoned before a federal grand jury where he testified that he had never taken policy bets for Francis Millow at the flower shop. The next week Hennessey testified to the contrary, and shortly thereafter respondent was indicted for perjury.[3] Respondent waived a jury, and with the consent of all parties the District Court considered simultaneously with the trial on the merits respondent's motion to suppress both the policy slips and the testimony of Hennessey. At the conclusion of the evidence, the District Court excluded from its consideration "the envelope and the contents of the envelope," but nonetheless found respondent guilty of the offense charged. The court then, as previously

[3] Respondent was also indicted on a second count which charged that he had knowingly made a false statement when he testified that he did not know Hank Bucci was involved in gambling operations. The judge found respondent not guilty on this count, however, because "although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt." App. to Pet. for Cert. 28a.

described, granted respondent's motion to suppress the testimony of Hennessey, because she "first came directly to the attention of the government as a result of an illegal search" and the Government had not "sustained its burden of showing that Lois Henness[e]y's testimony definitely would have been obtained without the illegal search." App. to Pet. for Cert. 28a–29a.

The Court of Appeals affirmed this ruling on the Government's appeal, reasoning that "the road to Miss Henness[e]y's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted." 542 F. 2d, at 142. The Court of Appeals also concluded that there was support in the record for the District Court's finding that the ongoing investigation would not have inevitably led to the evidence in question without Biro's discovery of the two policy slips. *Id.*, at 141. Because of our traditional deference to the "two court rule," *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949), and the fact that the Government has not sought review of this latter ruling, we leave undisturbed this part of the Court of Appeals' decision. Because we decide that the Court of Appeals was wrong in concluding that there was insufficient attenuation between Officer Biro's search and Hennessey's testimony at the trial, we also do not reach the Government's contention that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove a subsequent crime such as perjury.

II

The "road" to which the Court of Appeals analogized the train of events from Biro's discovery of the policy slips to Hennessey's testimony at respondent's trial for perjury is one of literally thousands of such roads traveled periodically between an original investigative discovery and the ultimate trial of the accused. The constitutional question under the Fourth Amendment was phrased in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), as whether "the connection

between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *Id.*, at 487, 491. The question was in turn derived from the Court's earlier decision in *Nardone* v. *United States,* 308 U. S. 338, 341 (1939), where Mr. Justice Frankfurter stated for the Court:

> "Here, as in the *Silverthorne* case [*Silverthorne Lumber Co.* v. *United States*], the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U. S. 385, 392.
>
> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

This, of course, makes it perfectly clear, if indeed ever there was any doubt about the matter, that the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well. And our cases subsequent to *Nardone, supra,* have laid out the fundamental tenets of the exclusionary rule, from which the elements that are relevant to the causal inquiry can be divined.

An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proxi-

mate the connection between it and a violation of the Fourth Amendment. We also reaffirm the holding of *Wong Sun, supra,* at 485, that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." We are of the view, however, that cases decided since *Wong Sun* significantly qualify its further observation that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence." 371 U. S., at 486. Rather, at least in a case such as this, where not only was the alleged "fruit of the poisonous tree" the testimony of a live witness, but unlike *Wong Sun* the witness was not a putative defendant, an examination of our cases persuades us that the Court of Appeals was simply wrong in concluding that if the road were uninterrupted, its length was immaterial. Its length, we hold, *is* material, as are certain other factors enumerated below to which the court gave insufficient weight.

In *Stone* v. *Powell,* 428 U. S. 465, 486 (1976), we observed that "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." Recognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule, we have said that "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). In that case, we refused to require that illegally seized evidence be excluded from presentation to a grand jury. We have likewise declined to prohibit the use of such evidence for the purpose of impeaching a defendant who testifies in his own behalf. *Walder* v. *United States,* 347 U. S. 62 (1954).

We have limited the standing requirement in the exclusionary rule context because the "additional benefits of extending

the . . . rule" to persons other than the ones subject to the illegal search are outweighed by the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969). Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a *"per se* or 'but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest. *Brown* v. *Illinois,* 422 U. S. 590, 603 (1975).

Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong Sun, supra,* at 491; *Brown* v. *Illinois, supra,* and *a fortiori* is true of testimony given by nondefendants.

The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness.[4] Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony

[4] Of course, the analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses.

than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Smith* v. *United States,* 117 U. S. App. D. C. 1, 3–4, 324 F. 2d 879, 881–882 (1963) (Burger, J.) (footnotes omitted), cert. denied, 377 U. S. 954 (1964).

Another factor which not only is relevant in determining the usefulness of the exclusionary rule in a particular context, but also seems to us to differentiate the testimony of all live witnesses—even putative defendants—from the exclusion of the typical documentary evidence, is that such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby. Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions." C. McCormick, Law of Evidence § 71 (1954). Alluding to the enormous cost engendered by

such a permanent disability in an analogous context, we have specifically refused to hold that "making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *United States* v. *Bayer,* 331 U. S. 532, 541 (1947). For many of these same reasons, the Court has also held admissible at trial testimony of a witness whose identity was disclosed by the defendant's statement given after inadequate *Miranda* warnings. *Michigan* v. *Tucker,* 417 U. S. 433, 450–451 (1974).

> "For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . . . Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case pursuant to this Court's *Johnson* [v. *New Jersey,* 384 U. S. 719 (1966)] decision. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent."

In short, since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required.

This is not to say, of course, that live-witness testimony is always or even usually more reliable or dependable than inanimate evidence. Indeed, just the opposite may be true. But a determination that the discovery of certain evidence is sufficiently unrelated to or independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence. Attenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evi-

dence, can consistently focus on the factors enumerated above with respect to the former, but on different factors with respect to the latter.

In holding that considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis, we do no more than reaffirm an observation made by this Court half a century ago:

> "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States,* 273 U. S. 95, 99 (1927).

The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

III

Viewing this case in the light of the principles just discussed, we hold that the Court of Appeals erred in holding that the degree of attenuation was not sufficient to dissipate the connection between the illegality and the testimony. The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of Biro's discovery of the policy slips. Nor were the slips themselves used in questioning Hennessey. Substantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which Hennessey testified at trial can be logically traced back to Biro's discovery of the policy slips, both the identity of Hennessey and her relationship with the respondent were well known to those investigating the case. There is, in addition, not the slightest evidence to sug-

gest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro. The cost of permanently silencing Hennessey is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. The judgment of the Court of Appeals is accordingly

Reversed.

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

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with the Court's ultimate conclusion that there is a fundamental difference, for purposes of the exclusionary rule, between live-witness testimony and other types of evidence. I perceive this distinction to be so fundamental, however, that I would not prevent a factfinder from hearing and considering the relevant statements of any witness, except perhaps under the most remarkable of circumstances—although none such have ever been postulated that would lead me to exclude the testimony of a live witness.

To appreciate this position, it is essential to bear in mind the purported justification for employing the exclusionary rule in a Fourth Amendment context: deterrence of official misconduct. See *Stone* v. *Powell,* 428 U. S. 465, 486 (1976); *United States* v. *Janis,* 428 U. S. 433, 458–459, n. 35 (1976). As an abstract intellectual proposition this can be buttressed by a plausible rationale since there is at least some comprehensible connection—albeit largely and dubiously speculative—between the exclusion of evidence and the deterrence of intentional illegality on the part of a police officer.[1] But if that is the purpose of the rule, it seems to me that the appropriate inquiry in every case in which a defendant seeks the exclusion of otherwise admissible and reliable evidence is whether official conduct in reality will be measurably altered by taking such a course.

On the facts of this case the Court is, of course, correct in holding that the "[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro." *Ante,* at 280. Reaching this result, however, requires no judicial excursion into an area about which "philosophers have been able to argue endlessly," [2] namely, the degree of "free will" excercised by a person when engaging in an act such as speaking.

In the history of ideas many thinkers have maintained with persuasion that there is no such thing as "free will," in the sense that the term implies the independent ability of an actor to regulate his or her conduct. Others have steadfastly maintained the opposite, arguing that the human personality is one innately free to choose among alternatives. Still a third group

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[1] Empirically speaking, though, I have the gravest doubts as to whether the exclusion of evidence, in and of itself, has any direct appreciable effect on a policeman's behavior in most situations—emergency actions in particular. See *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 416–417, 426–427 (1971) (BURGER, C. J., dissenting).

[2] J. Sartre, Being and Nothingness 433 (Barnes trans. 1956).

would deny that the very term "free will" has coherent meaning. These are only a few of the many perspectives on a subject which lies at the core of our intellectual and religious heritage. While this ancient debate will undoubtedly continue, "society and the law have no choice in the matter. We must proceed . . . on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as by personal standards." *Blocker* v. *United States,* 110 U. S. App. D. C. 41, 53, 288 F. 2d 853, 865 (1961) (Burger, J., concurring in result). Mr. Justice Jackson expressed this in *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 80 (1942): "[T]he practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct." And in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 590 (1937), Mr. Justice Cardozo put it thus: "Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."

We are nonetheless cognizant of the fact that this assumption must continually confront the inherent practical obstacle of one person's being unable to know with certainty the content of another's mind. We cross this barrier daily, of course, in the process of determining criminal culpability.[3] Yet in criminal trials we are willing to bear the risk of error—substantially diminished by the requirement of proof beyond a reasonable doubt—in order to effectuate the common-law tradition of

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[3] A somewhat similar hurdle is presented in civil cases, which may rest decision on the standard of a "reasonable man's" actions. In those circumstances we assume that a person is ordinarily capable of conforming conduct to an objective standard of reasonableness. Consequently, while the *assumption* is indulged that the person possesses control over his actions, there is generally no need to inquire into mental processes as such.

imposing punishment only upon those who can be said to be morally responsible for their acts. There is no analogue to this concern, however, in the area of Fourth Amendment exclusion, which has an admitted pragmatic purpose—based as I suggested on speculative hypotheses which ought to lead us to apply it with reasoned discrimination, not as an automatic response. In short, the results achieved from current exclusionary rule standards are bizarre enough without steering the analysis in the direction of areas which offer no reasonable hope of a comprehensible framework for inquiry.

It would be obvious nonsense to postulate that during his brief encounter in the florist shop Officer Biro was making a painstaking analysis of the extent to which Lois Hennessey's "free will" would affect her disposition to testify against respondent at some future point. It is one thing to engage in scholastic hindsight, particularly as the dissent has done here, in which speculation proceeds from unfounded hypotheses as to the *probable* explanations for the decision of a live witness to come forward and testify. But it is quite another to suppose that the police officer, assuming he is contemplating illegal action, will, or would be able to, engage in a similar inquiry.

There are several reasons which support this analysis, which, I might add, is found acceptable in every other legal system in the world. Initially, I would point out that the concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct. The officer must be cognizant of at least the possibility that his actions—because of possible suppression—will undermine the chances of convicting a known criminal. I strongly suspect that in the vast majority of instances in this setting the officer accused of a Fourth Amendment violation will not be even remotely aware of the existence of a witness, as for example, where seizure of an item of evidence guides official inquiry to an eye-

witness. Of course, an officer conducting a search later held illegal may have some hope that his inquiry will lead to persons who can come forward with testimony. It is not plausible, however, that a police officer would consciously engage in illegal action simply to gain access to a witness, knowing full well that under prevailing legal doctrine the result will be the certain exclusion of whatever tangible evidence might be found.[4]

Even if we suppose that the officer suspects that his illegal actions will produce a lead to a witness, he faces the intractable problem of understanding how valuable that person will be to his investigation. As one philosopher has aptly stated the matter, "[t]he freedom of the will consists in the impossibility of knowing actions that still lie in the future." L. Wittgenstein, Tractatus Logico-Philosophicus ¶ 5.1362 (Pears & McGuinness trans. 1961). In *Smith* v. *United States,* 117 U. S. App. D. C. 1, 3–4, 324 F. 2d 879, 881–882 (1963), cert. denied, 377 U. S. 954 (1964), this point was applied to the case of a live witness testifying under oath:

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what

[4] Perhaps a case might arise in which the police conducted a search only for the purpose of obtaining the names of witnesses. In such a circumstance it is possibly arguable that the exclusion of any testimony gained as a result of the search would have an effect on official behavior. This clearly did not occur here, nor can I conceive of many instances in which it would. In any event, the decision to exclude such testimony should depend on the *officers'* motivation and not on the "free will" of the witnesses. I would not want to speculate, however, as to whether such an unlikely case would justify modifying a *per se* approach to this general problem.

testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a [living] *witness* from the relative immutability of inanimate evidence." (Emphasis added.) (Footnotes omitted.)

It can, of course, be argued, that the prospect of finding a helpful witness may play *some* role in a policeman's decision to be indifferent about Fourth Amendment procedures. The answer to this point, however, is that we have never insisted on employing the exclusionary rule whenever there is some possibility, no matter how remote, of deterring police misconduct. Rather, we balance the cost to society of losing perfectly competent evidence against the prospect of incrementally enhancing Fourth Amendment values. See, *e. g.*, *Stone,* 428 U. S., at 486; *United States* v. *Calandra,* 414 U. S. 338, 350–351 (1974); *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969).

Using this approach it strikes me as evident that the permanent silencing of a witness—who, after all, is appearing under oath—is not worth the high price the exclusionary rule exacts. Any rule of law which operates to keep an eyewitness to a crime—a murder, for example—from telling the jury what that person saw has a rational basis roughly comparable to the primitive rituals of human sacrifice.

I would, therefore, resolve the case of a living witness on a *per se* basis, holding that such testimony is always admissible, provided it meets all other traditional evidentiary requirements. At very least this solution would alleviate the burden—now squarely thrust upon courts—of determining in each instance whether the witness possessed that elusive quality characterized by the term "free will."

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

While "reaffirm[ing]" the holding of *Wong Sun* v. *United States,* 371 U. S. 471, 485 (1963), that verbal evidence, like

physical evidence, may be "fruit of the poisonous tree," the Court today "significantly qualif[ies]" *Wong Sun*'s further conclusion, *id.*, at 486, that no " 'logical distinction' " can be drawn between verbal and physical evidence for purposes of the exclusionary rule. *Ante,* at 275. In my view, the distinction that the Court attempts to draw cannot withstand close analysis. To extend "a time-worn metaphor," *Harrison* v. *United States,* 392 U. S. 219, 222 (1968), I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with one kind less susceptible than the other of exclusion on Fourth Amendment grounds. I therefore dissent.

The Court correctly states the question before us: whether the connection between the police officer's concededly unconstitutional search and Hennessey's disputed testimony was "so attenuated as to dissipate the taint," *Nardone* v. *United States,* 308 U. S. 338, 341 (1939). See *ante,* at 274. In resolving questions of attenuation, courts typically scrutinize the facts of the individual case, with particular attention to such matters as the "temporal proximity" of the official illegality and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois,* 422 U. S. 590, 603–604 (1975). The Court retains this general framework, but states that "[a]ttenuation analysis" should be "concerned with the differences between live-witness testimony and inanimate evidence." *Ante,* at 278–279. The differences noted by the Court, however, have to a large extent already been accommodated by current doctrine. Where they have not been so accommodated, it is because the differences asserted are either illusory or of no relevance to the issue of attenuation.

One difference mentioned by the Court is that witnesses, unlike inanimate objects, "can, and often do, come forward and offer evidence entirely of their own volition." *Ante,* at 276. Recognition of this obvious fact does nothing to advance

the attenuation inquiry. We long ago held that, if knowledge of evidence is gained from a source independent of police illegality, the evidence should be admitted. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920) (Holmes, J.). This "independent source" rule would plainly apply to a witness whose identity is discovered in an illegal search but who later comes to the police for reasons unrelated to the official misconduct. In the instant case, however, as the Court recognizes, *ante,* at 273, there is a " 'straight and uninterrupted' " road between the illegal search and the disputed testimony.

Even where the road is uninterrupted, in some cases the Government may be able to show that the illegally discovered evidence would inevitably have come to light in the normal course of a legal police investigation. Assuming such evidence is admissible—a proposition that has been questioned, *Fitzpatrick* v. *New York,* 414 U. S. 1050 (1973) (WHITE, J., dissenting from denial of certiorari)—this "inevitable discovery" rule would apply to admit the testimony of a witness who, in the absence of police misconduct, would have come forward "entirely of [his or her] own volition." Again, however, no such situation is presented by this case, since the Court accepts the findings of the two lower courts that Hennessey's testimony would not inevitably have been discovered. *Ante,* at 273.

Both the independent-source and inevitable-discovery rules, moreover, can apply to physical evidence as well as to verbal evidence. The police may show, for example, that they learned from an independent source, or would inevitably have discovered through legal means, the location of an object that they also knew about as a result of illegal police activity. It may be that verbal evidence is more likely to have an independent source, because live witnesses can indeed come forward of their own volition, but this simply underscores the degree to which the Court's approach involves a form of judicial "double counting." The Court would apparently first

determine whether the evidence stemmed from an independent source or would inevitably have been discovered; if neither of these rules was found to apply, as here, the Court would still somehow take into account the fact that, as a general proposition (but not in the particular case), witnesses sometimes do come forward of their own volition.

The Court makes a related point that "[t]he greater the willingness of the witness to freely testify, . . . the smaller the incentive to conduct an illegal search to discover the witness." *Ante,* at 276. The somewhat incredible premise of this statement is that the police in fact refrain from illegal behavior in which they would otherwise engage because they know in advance both that a witness will be willing to testify and that he or she "will be discovered by legal means." *Ibid.* This reasoning surely reverses the normal sequence of events; the instances must be very few in which a witness' willingness to testify is known before he or she is discovered. In this case, for example, the police did not even know that Hennessey was a potentially valuable witness, much less whether she would be willing to testify, prior to conducting the illegal search. See *ante,* at 279–280. When the police are certain that a witness "will be discovered by legal means," *ante,* at 276—if they ever can be certain about such a fact—they of course have no incentive to find him or her by illegal means, but the same can be said about physical objects that the police know will be discovered legally.

The only other point made by the Court is that exclusion of testimony "perpetually disable[s] a witness from testifying about relevant and material facts." *Ante,* at 277. The "perpetual . . . disable[ment]" of which the Court speaks, however, applies as much to physical as to verbal evidence. When excluded, both types of evidence are lost for the duration of the particular trial, despite their being "relevant and material . . . [and] unrelated . . . to the purpose of the originally

illegal search." *Ibid.* Moreover, while it is true that "often" the exclusion of testimony will be very costly to society, *ante,* at 278, at least as often the exclusion of physical evidence—such as heroin in a narcotics possession case or business records in a tax case—will be as costly to the same societal interests. But other, more important societal interests, see *Brown* v. *Illinois,* 422 U. S., at 599–600; *Wong Sun* v. *United States,* 371 U. S., at 486, have led to the rule, which the Court today reaffirms, that "fruits of the poisonous tree" must be excluded despite their probative value, unless the facts of the case justify a finding of sufficient attenuation.

The facts of this case do not justify such a finding. Although, as the Court notes, *ante,* at 272; see *ante,* at 279, four months elapsed between the illegal search and the FBI's first contact with Hennessey, the critical evidence was provided at the time and place of the search, when the police officer questioned Hennessey and she identified respondent, *ante,* at 270. The time that elapsed thereafter is of no more relevance than would be a similar time period between the discovery of an object during an illegal search and its later introduction into evidence at trial. In this case, moreover, there were no intervening circumstances between Hennessey's statement at the time of the search and her later testimony. She did not come to the authorities and ask to testify, despite being a student of police science; an FBI agent had to go to her home and interrogate her. *Ante,* at 272.

Finally, whatever the police officer's purpose in the flower shop on the day of the search, the search itself was not even of arguable legality, as was conceded by the Government below. 542 F. 2d 136, 140 n. 5 (CA2 1976). It is also undisputed that the shop had been under surveillance as part of an ongoing gambling investigation in which the local police force had actively participated; its participation included interception of at least one of respondent's telephone conversations

in the very month of the search. *Ante,* at 271–272, and n. 2. Under all of the circumstances, the connection here between the official illegality and the disputed testimony cannot be deemed "so attenuated as to dissipate the taint." The District Court therefore properly excluded the testimony.

I would affirm the judgment of the Court of Appeals.

Syllabus

FOLEY *v.* CONNELIE, SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76–839. Argued November 8, 1977—Decided March 22, 1978

New York statute limiting appointment of members of state police force to citizens of the United States *held* not to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 294–300.

(a) Citizenship may be a relevant qualification for fulfilling those "important nonelective . . . positions" held by "officers who participate directly in the formulation, execution, or review of broad public policy," *Sugarman* v. *Dougall*, 413 U. S. 634, 647. Strict equal protection scrutiny is not required to justify classifications applicable to such positions; a State need only show some rational relationship between the interest sought to be protected and the limiting classification. In deciding what level of scrutiny is to be applied, each position in question must be examined to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community. Pp. 294–297.

(b) Police officials are clothed with authority to exercise an almost infinite variety of discretionary powers, calling for a very high degree of judgment and discretion, the exercise of which can seriously affect individuals. Police officers fall within the category of "important nonelective . . . officers who participate directly in the . . . *execution* . . . of broad public policy." *Dougall, supra,* at 647 (emphasis added). In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position, and a State may therefore confine the performance of this important public responsibility to those who are citizens. Pp. 297–300.

419 F. Supp. 889, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, *post,* p. 300. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 300. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post,* p. 302. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 307.

Jonathan A. Weiss argued the cause for appellant. With him on the briefs was *David S. Preminger.*

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

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

We noted probable jurisdiction in this case to consider whether a State may constitutionally limit the appointment of members of its police force to citizens of the United States. 430 U. S. 944 (1977).

The appellant, Edmund Foley, is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident. He applied for appointment as a New York State trooper, a position which is filled on the basis of competitive examinations. Pursuant to a New York statute, N. Y. Exec. Law § 215 (3) (McKinney 1972), state authorities refused to allow Foley to take the examination. The statute provides:

> "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States."

Appellant then brought this action in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the State's exclusion of aliens from its police force violates the Equal Protection Clause of the Fourteenth Amendment. After Foley was certified as representative of a class of those similarly situated, a three-judge

**Vilma S. Martinez* and *Morris J. Baller* filed a brief for the Mexican American Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging reversal.

District Court was convened to consider the merits of the claim. The District Court held the statute to be constitutional. 419 F. Supp. 889 (1976). We affirm.

I

The essential facts in this case are uncontroverted. New York Exec. Law § 215 (3) (McKinney 1972) prohibits appellant and his class from becoming state troopers. It is not disputed that the State has uniformly complied with this restriction since the statute was enacted in 1927. Under it, an alien who desires to compete for a position as a New York State trooper must relinquish his foreign citizenship and become an American citizen. Some members of the class, including appellant, are not currently eligible for American citizenship due to waiting periods imposed by congressional enactment.[1]

A trooper in New York is a member of the state police force, a law enforcement body which exercises broad police authority throughout the State. The powers of troopers are generally described in the relevant statutes as including those functions traditionally associated with a peace officer. Like most peace officers, they are charged with the prevention and detection of crime, the apprehension of suspected criminals, investigation of suspect conduct, execution of warrants and have powers of search, seizure and arrest without a formal warrant under limited circumstances. In the course of carrying out these responsibilities an officer is empowered by New York law to resort to lawful force, which may include the use of any weapon that he is required to carry while on duty. All troopers are on call 24 hours a day and are required to take appropriate action whenever criminal activity is observed.

[1] We recognize that New York's statute may effectively prevent some class members from ever becoming troopers since state law limits eligibility for these positions to those between the age of 21 and 29 years. N. Y. Exec. Law § 215 (3) (McKinney 1972).

Perhaps the best shorthand description of the role of the New York State trooper was that advanced by the District Court: "State police are charged with the enforcement of the law, not in a private profession and for the benefit of themselves and their clients, but for the benefit of the people at large of the State of New York." 419 F. Supp., at 896.

II

Appellant claims that the relevant New York statute violates his rights under the Equal Protection Clause.

The decisions of this Court with regard to the rights of aliens living in our society have reflected fine, and often difficult, questions of values. As a Nation we exhibit extraordinary hospitality to those who come to our country,[2] which is not surprising for we have often been described as "a nation of immigrants." Indeed, aliens lawfully residing in this society have many rights which are accorded to noncitizens by few other countries. Our cases generally reflect a close scrutiny of restraints imposed by States on aliens. But we have never suggested that such legislation is inherently invalid, nor have we held that all limitations on aliens are suspect. See *Sugarman* v. *Dougall,* 413 U. S. 634, 648 (1973). Rather, beginning with a case which involved the denial of welfare assistance essential to life itself, the Court has treated certain restrictions on aliens with "heightened judicial solicitude," *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), a treatment deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938).[3]

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[2] One indication of this attitude is Congress' determination to make it relatively easy for immigrants to become naturalized citizens. See 8 U. S. C. § 1427 (1976 ed.).

[3] The alien's status is, at least for a time, beyond his control since

Following *Graham,* a series of decisions has resulted requiring state action to meet close scrutiny to exclude aliens as a class from educational benefits, *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977); eligibility for a broad range of public employment, *Sugarman* v. *Dougall, supra;* or the practice of licensed professions, *Examining Board* v. *Flores de Otero,* 426 U. S. 572 (1976); *In re Griffiths,* 413 U. S. 717 (1973). These exclusions struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence. See *Graham, supra,* at 377–378; Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role For Equal Protection?, 1976 B. Y. U. L. Rev. 89, 101.[4]

It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of "strict scrutiny," because to do so would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship." *Mauclet, supra,* at 14 (BURGER, C. J., dissenting). The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. Cf. *Worcester* v. *Georgia,* 6 Pet. 515, 559 (1832). The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized "a State's historical power to exclude aliens from participation in its democratic political institutions," *Dougall, supra,* at 648, as

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Congress has imposed durational residency requirements for the attainment of citizenship. Federal law generally requires an alien to lawfully reside in this country for five years as a prerequisite to applying for naturalization. 8 U. S. C. § 1427 (a) (1976 ed.).

[4] In *Mauclet,* for example, New York State policy reflected a legislative judgment that higher education was " 'no longer . . . a luxury; it is a necessity for strength, fulfillment and survival.' " 432 U. S., at 8 n. 9.

part of the sovereign's obligation " 'to preserve the basic conception of a political community.' " 413 U. S., at 647.

The practical consequence of this theory is that "our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives." *Dougall, supra,* at 648. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification. This is not intended to denigrate the valuable contribution of aliens who benefit from our traditional hospitality. It is no more than recognition of the fact that a democratic society is ruled by its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. See 413 U. S., at 647–649. Similar considerations support a legislative determination to exclude aliens from jury service. See *Perkins* v. *Smith,* 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976). Likewise, we have recognized that citizenship may be a relevant qualification for fulfilling those "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy." *Dougall, supra,* at 647. This is not because our society seeks to reserve the better jobs to its members. Rather, it is because this country entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator. In sum, then, it represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.[5]

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[5] This is not to say, of course, that a State may accomplish this end with

The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.

III

A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se,* but they are clothed with authority to exercise an almost infinite variety of discretionary powers.[6] The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life. Our Constitution, of course, provides safeguards to persons, homes and possessions, as well as guidance to police officers. And few countries, if any, provide more protection to individuals by limitations on the power and discretion of the police. Nonetheless, police may, in the exercise of their discretion, invade the privacy of an individual in public places, *e. g., Terry* v. *Ohio,* 392 U. S. 1 (1968). They may under some conditions break down a door to enter a dwelling or other building in the execution of a warrant, *e. g., Miller* v. *United States,* 357 U. S. 301 (1958), or without a formal warrant in very limited circumstances; they may stop vehicles traveling on public highways, *e. g., Pennsylvania* v. *Mimms,* 434 U. S. 106 (1977).

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a citizenship restriction that "sweeps indiscriminately," *Dougall,* 413 U. S., at 643, without regard to the differences in the positions involved.

[6] See ABA Project on Standards for Criminal Justice, The Urban Police Function 119 (App. Draft 1973); National Advisory Commission on Criminal Justice Standards and Goals, Police 22–23 (1973); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 10 (1967).

An arrest, the function most commonly associated with the police, is a serious matter for any person even when no prosecution follows or when an acquittal is obtained. Most arrests are without prior judicial authority, as when an officer observes a criminal act in progress or suspects that felonious activity is afoot. Even the routine traffic arrests made by the state trooper—for speeding, weaving, reckless driving, improper license plates, absence of inspection stickers, or dangerous physical condition of a vehicle, to describe only a few of the more obvious common violations—can intrude on the privacy of the individual. In stopping cars, they may, within limits, require a driver or passengers to disembark and even search them for weapons, depending on time, place and circumstances. That this prophylactic authority is essential is attested by the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations—for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle occupants are armed and engaged in or embarked on serious criminal conduct.

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals.[7] The office of a policeman is in no sense one of "the common occupations of the community" that the then Mr. Justice Hughes referred to in *Truax* v. *Raich,* 239 U. S. 33, 41 (1915). A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other "common occupations of the community" who exercises no broad power over people gen-

[7] After the event, some abuses of power may be subject to remedies by one showing injury. See *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971). And conclusive evidence of criminal conduct may be kept from the knowledge of a jury because of police error or misconduct.

erally. Indeed, the rationale for the qualified immunity historically granted to the police rests on the difficult and delicate judgments these officers must often make. See *Pierson* v. *Ray,* 386 U. S. 547, 555–557 (1967); cf. *Scheuer* v. *Rhodes,* 416 U. S. 232, 245–246 (1974).

In short, it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of non-citizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens. It is not surprising, therefore, that most States expressly confine the employment of police officers to citizens,[8] whom the State may reasonably presume to be more familiar with and sym-

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[8] Twenty-four States besides New York specifically require United States citizenship as a prerequisite for becoming a member of a statewide law enforcement agency: see Ark. Stat. Ann. § 42–406 (1964); Cal. Govt. Code Ann. § 1031 (West Supp. 1978); Fla. Stat. Ann. § 943.13 (2) (West Supp. 1976); Ga. Code § 92A–214 (Supp. 1977); Ill. Rev. Stat., ch. 121, § 307.9 (1975); Ind. Rules & Regs., Tit. 10, Art. 1, ch. 1, § 4–7 (1976); Iowa Code § 80.15 (1977); Kan. Stat. Ann. § 74–2113 (c) (Supp. 1976); Ky. Rev. Stat. § 16.040 (2)(c) (1971); Mich. Comp. Laws § 28.4 (1967); Miss. Code Ann. § 45–3–9 (Supp. 1977); Mo. Rev. Stat. § 43.060 (1969); Mont. Rev. Codes Ann. § 31–105 (3)(a)(v) (Supp. 1977); Nev. Rev. Stat. § 281.060 (1) (1975); N. H. Rev. Stat. Ann. § 106–B:20 (Supp. 1975); N. J. Stat. Ann. § 53:1–9 (West Supp. 1977); N. M. Stat. Ann. § 39–2–6 (1972); N. D. Cent. Code § 39–03–04 (4) (Supp. 1977); Ore. Rev. Stat. § 181.260 (1)(a) (1977); Pa. Stat. Ann., Tit. 71, § 1193 (Purdon 1962); R. I. Gen. Laws § 42–28–10 (1970); S. D. Comp. Laws Ann. § 3–7–9 and § 3–1–4 (1974); Tex. Rev. Civ. Stat. Ann., Art. 4413 (9)(2) (Vernon 1976); Utah Code Ann. § 27–11–11 (1976). Oklahoma requires its officers to be citizens of the State. See Okla. Stat., Tit. 47, § 2–105 (a) (Supp. 1976). Nine other States require American citizenship as part of a general requirement applicable to all types of state officers or employees: see Ala. Code, Tit. 36, § 2–1 (a)(1) (1977); Ariz. Rev. Stat. Ann. § 38–201 (1974); Haw. Rev. Stat. § 78–1 (1976); Idaho Code § 59–101 (1976) and Idaho Const., Art. 6, § 2; Me. Rev. Stat. Ann., Tit. 5, § 556 (Supp. 1977); Mass. Gen. Laws Ann., ch. 31, § 12 (West Supp. 1977); Ohio Rev. Code Ann. § 124.22 (1978); Tenn. Code Ann. § 8–1801 (Supp. 1977); Vt. Stat. Ann., Tit. 3, § 262 (1972); W. Va. Const., Art. 4, § 4.

pathetic to American traditions.[9] Police officers very clearly fall within the category of "important nonelective . . . officers who participate directly in the . . . *execution* . . . of broad public policy." *Dougall,* 413 U. S., at 647 (emphasis added). In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States.[10]

Accordingly, the judgment of the District Court is

Affirmed.

MR. JUSTICE STEWART, concurring.

The dissenting opinions convincingly demonstrate that it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case.

MR. JUSTICE BLACKMUN, concurring in the result.

Once again the Court is called upon to adjudicate the constitutionality of one of New York's many statutes that impose

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[9] Police powers in many countries are exercised in ways that we would find intolerable and indeed violative of constitutional rights. To take only one example, a large number of nations do not share our belief in the freedom of movement and travel, requiring persons to carry identification cards at all times. This, *inter alia,* affords a rational basis for States to require that those entrusted with the execution of the laws be individuals who, even if not native Americans, have indicated acceptance and allegiance to our Constitution by becoming citizens.

[10] Cf. *McCarthy* v. *Philadelphia Civil Service Comm'n,* 424 U. S. 645 (1976); *Detroit Police Officers Assn.* v. *Detroit,* 385 Mich. 519, 190 N. W. 2d 97 (1971), dismissed for want of substantial federal question, 405 U. S. 950 (1972).

a requirement of citizenship for occupational activity.* Although I have joined the Court in striking down citizenship requirements of this kind, see *Graham* v. *Richardson,* 403 U. S. 365 (1971); *In re Griffiths,* 413 U. S. 717 (1973); *Examining Board* v. *Flores de Otero,* 426 U. S. 572 (1976), including, specifically, some imposed by the State of New York, see *Sugarman* v. *Dougall,* 413 U. S. 634 (1973); and *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977), I have no difficulty in agreeing with the result the Court reaches here.

The Court's prior cases clearly establish the standards to be applied in this one. *Mauclet,* of course, decided just last Term, is our most recent pronouncement in this area of constitutional law. There, citing *Graham* v. *Richardson,* 403 U. S., at 372, we observed once again that a State's classifications based on alienage "are inherently suspect and subject to close judicial scrutiny," and, citing *Flores de Otero,* 426 U. S., at 605, we went on to say that " '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.' " 432 U. S., at 7. In the same opinion, however, limitations were intimated when, citing *Sugarman* v. *Dougall,* 413 U. S., at 642 and 647, we said:

> "[T]he 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

*One of the appellees in *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977), listed a succession of New York statutes requiring citizenship, or a declaration of intent to become a citizen, for no fewer than 37 occupations. Brief for Appellee Mauclet, O. T. 1976, No. 76–208, pp. 19–22, nn. 8–44, inclusive. Some of the statutes have been legislatively repealed or modified, or judicially invalidated. Others, apparently, are still in effect; among them are those relating to the occupations of inspector, certified shorthand reporter, funeral director, masseur, physical therapist, and animal health technician.

> 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, or of 'elective or important nonelective' officials 'who participate directly in the formulation, execution, or review of broad public policy.' [413 U. S.], at 647. See *id.*, at 648." 432 U. S., at 11.

When the State is so acting, it need justify its discriminatory classifications only by showing some rational relationship between its interest in preserving the political community and the classification it employs.

I agree with the Court's conclusion that the State of New York has vested its state troopers with powers and duties that are basic to the function of state government. The State may rationally conclude that those who are to execute these duties should be limited to persons who can be presumed to share in the values of its political community as, for example, those who possess citizenship status. New York, therefore, consistent with the Federal Constitution, may preclude aliens from serving as state troopers.

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

Almost a century ago, in the landmark case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886), this Court recognized that aliens are "persons" within the meaning of the Fourteenth Amendment. Eighty-five years later, in *Graham* v. *Richardson,* 403 U. S. 365 (1971), the Court concluded that aliens constitute a " 'discrete and insular' minority," and that laws singling them out for unfavorable treatment "are therefore subject to strict judicial scrutiny." *Id.*, at 372, 376. During the ensuing six Terms, we have invalidated state laws discriminating against aliens on four separate occasions, finding

that such discrimination could not survive strict scrutiny. *Sugarman* v. *Dougall,* 413 U. S. 634 (1973) (competitive civil service); *In re Griffiths,* 413 U. S. 717 (1973) (attorneys); *Examining Board* v. *Flores de Otero,* 426 U. S. 572 (1976) (civil engineers); *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977) (financial assistance for higher education).

Today the Court upholds a law excluding aliens from public employment as state troopers. It bases its decision largely on dictum from *Sugarman* v. *Dougall, supra,* to the effect that aliens may be barred from holding "state elective or important nonelective executive, legislative, and judicial positions," because persons in these positions "participate directly in the formulation, execution, or review of broad public policy." 413 U. S., at 647.[1] I do not agree with the Court that state troopers perform functions placing them within this "narro[w] . . . exception," *Nyquist* v. *Mauclet, supra,* at 11, to our usual rule that discrimination against aliens is presumptively unconstitutional. Accordingly I dissent.

In one sense, of course, it is true that state troopers participate in the execution of public policy. Just as firefighters

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[1] In *Sugarman,* the Court indicated that, if the State were to exclude aliens from these positions, the exclusion would be scrutinized under a standard less demanding than that normally accorded classifications involving a "'discrete and insular' minority." 413 U. S., at 642. The Court did not explain why the level of scrutiny should vary with the nature of the job from which aliens are being excluded, and the focus of this part of the opinion was on the State's interest in preserving "'the basic conception of a political community.'" *Ibid.,* quoting *Dunn* v. *Blumstein,* 405 U. S. 330, 344 (1972); see 413 U. S., at 647–648. *Sugarman* may thus be viewed as defining the circumstances under which laws excluding aliens from state jobs would further a compelling state interest, rather than as defining the circumstances under which lesser scrutiny is applicable. Regardless of which approach is followed, however, the question in this case remains the same: Is the job of state trooper a position involving direct participation "in the formulation, execution, or review of broad public policy"?

execute the public policy that fires should be extinguished, and sanitation workers execute the public policy that streets should be kept clean, state troopers execute the public policy that persons believed to have committed crimes should be arrested. But this fact simply demonstrates that the *Sugarman* exception, if read without regard to its context, "would swallow the rule." *Nyquist, supra,* at 11. Although every state employee is charged with the "execution" of public policy, *Sugarman* unambiguously holds that a blanket exclusion of aliens from state jobs is unconstitutional.

Thus the phrase "execution of broad public policy" in *Sugarman* cannot be read to mean simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature. The head of an executive agency, for example, charged with promulgating complex regulations under a statute, executes broad public policy in a sense that file clerks in the agency clearly do not. In short, as *Sugarman* indicates, those "elective or important nonelective" positions that involve broad policymaking responsibilities are the only state jobs from which aliens as a group may constitutionally be excluded. 413 U. S., at 647. In my view, the job of state trooper is not one of those positions.

There is a vast difference between the formulation and execution of broad public policy and the application of that policy to specific factual settings. While the Court is correct that "the exercise of police authority calls for a very high degree of judgment and discretion," *ante,* at 298, the judgments required are factual in nature; the policy judgments that govern an officer's conduct are contained in the Federal and State Constitutions, statutes, and regulations.[2] The officer

[2] If the state exclusion here were limited to the job of Superintendent of the State Police, a different case would be presented to the extent that

responding to a particular situation is only applying the basic policy choices—which he has no role in shaping—to the facts as he perceives them.[3] We have previously recognized this distinction between the broad policy responsibilities exercised by high executive officials and the more limited responsibilities of police officers and found it relevant in defining the scope of immunity afforded under 42 U. S. C. § 1983:

> "When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.' In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Scheuer* v. *Rhodes,* 416 U. S. 232, 245–247 (1974) (citation omitted).

The Court places great reliance on the fact that policemen make arrests and perform searches, often "without prior judicial authority." *Ante,* at 298. I certainly agree that "[an] arrest is a serious matter," *ibid.,* and that we should be

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this official executes broad public policy in deciding how to deploy officers and in formulating rules governing police conduct.

[3] This view of the differences between those who apply policy and those with policymaking responsibilities was rejected by MR. JUSTICE REHNQUIST in his lone dissenting opinion in *Sugarman.* His position was that " 'low level' civil servants . . . who apply facts to individual cases are as much 'governors' as those who write the laws or regulations the 'low-level' administrator must 'apply.' " 413 U. S., at 661. The eight-Justice *Sugarman* majority, in holding as it did, necessarily took the opposite position: that those "who apply facts to individual cases" do not have responsibility for broad policy execution that is in any way comparable to the responsibility exercised by "those who write the laws or regulations."

concerned about all "intru[sions] on the privacy of the individual." *Ibid.* But these concerns do not in any way make it "anomalous" for citizens to be arrested and searched by "noncitizen police officers," *ante,* at 299, at least not in New York State. By statute, New York authorizes "any person" to arrest another who has actually committed a felony or who has committed any other offense in the arresting person's presence. N. Y. Crim. Proc. Law § 140.30 (McKinney 1971). Moreover, a person making an arrest pursuant to this statute is authorized to make a search incident to the arrest.[4] While law enforcement is primarily the responsibility of state troopers, it is nevertheless difficult to understand how the Court can imply that the troopers' arrest and search authority justifies excluding aliens from the police force when the State has given all private persons, including aliens, such authority.

In *Griffiths* we held that the State could not limit the practice of law to citizens, "despite a recognition of the vital public and political role of attorneys," *Nyquist* v. *Mauclet,* 432 U. S., at 11. It is similarly not a denigration of the important public role of the state trooper—who, as the Court notes, *ante,* at 297, operates "in the most sensitive areas of daily life"—to find that his law enforcement responsibilities do not "make him a formulator of government policy." *In re Griffiths,* 413 U. S., at 729. Since no other rational reason, let alone a compelling state interest, has been advanced in sup-

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[4] See *United States* v. *Rosse,* 418 F. 2d 38, 39–40 (CA2 1969); *United States* v. *Viale,* 312 F. 2d 595, 599, 600 (CA2 1963). Although many of the cases discussing the right of a private individual to make arrests and searches refer to a "citizen" taking the action, see *United States* v. *Swarovski,* 557 F. 2d 40 (CA2 1977), cert. denied, 434 U. S. 1045 (1978); *United States* v. *Rosse, supra,* at 39; *United States* v. *Viale, supra,* it is clear from the context and from the plain language of the statutory provision that the right to arrest is not limited to citizens but applies to "any person."

port of the statute here at issue,[5] I would hold that the statute's exclusion of aliens from state trooper positions violates the Equal Protection Clause of the Fourteenth Amendment.

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

A State should, of course, scrutinize closely the qualifications of those who perform professional services within its borders. Police officers, like lawyers, must be qualified in their field of expertise and must be trustworthy. Detailed review of each individual's application for employment is therefore appropriate. Conversely, a rule which disqualifies an entire class of persons from professional employment is doubly objectionable. It denies the State access to unique individual talent; it also denies opportunity to individuals on the basis of characteristics that the group is thought to possess.

The first objection poses a question of policy rather than

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[5] One other justification for the statute was proffered by the appellee, see App. D–30 (affidavit of Superintendent of State Police), and accepted by the court below:

"The state quite rightly observes that conflicts of allegiance would be most glaring with respect to the alien's duty as a state policeman to make arrests of violators of the federal immigration laws, to participate in the Governor's Detail which provides protection for the Governor and visiting foreign dignitaries, to conduct investigations into matters having to do with government security, and to provide security at events involving foreign visitors such as the 1980 Winter Olympics to be held in Lake Placid, New York." 419 F. Supp. 889, 898 (SDNY 1976).

Not surprisingly, the appellee does not rely on this argument in his brief here, and the Court does not mention it. The suggestion that alien troopers would refuse to enforce the law against other aliens is highly offensive. This rationale would justify the State's refusal to hire members of any group on the basis that the individuals could not be trusted to faithfully enforce the law against other members of their race, nationality, or sex. I would have thought that the day had long since passed when a court would accept such a justification for exclusion of a group from public employment.

constitutional law. The wisdom of a rule denying a law enforcement agency the services of Hercule Poirot or Sherlock Holmes is thus for New York, not this Court, to decide. But the second objection raises a question of a different kind and a satisfactory answer to this question is essential to the validity of the rule: What is the group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien?

No one suggests that aliens as a class lack the intelligence or the courage to serve the public as police officers. The disqualifying characteristic is apparently a foreign allegiance which raises a doubt concerning trustworthiness and loyalty so pervasive that a flat ban against the employment of any alien in any law enforcement position is thought to be justified. But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? Are untrustworthy or disloyal lawyers more tolerable than untrustworthy or disloyal policemen? Or is the legal profession better able to detect such characteristics on an individual basis than is the police department? Unless the Court repudiates its holding in *In re Griffiths,* 413 U. S. 717, it must reject any conclusive presumption that aliens, as a class, are disloyal or untrustworthy.[1]

A characteristic that all members of the class do possess may provide the historical explanation for their exclusion from some categories of public employment. Aliens do not vote. Aliens and their families were therefore unlikely to have been beneficiaries of the patronage system which controlled access to public employment during so much of our history. The widespread exclusion of aliens from such positions today may

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[1] It is worth reiterating that "one need not be a citizen in order to take in good conscience an oath to support the Constitution. See *In re Griffiths,* 413 U. S., at 726 n. 18." *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 111 n. 43.

well be nothing more than a vestige of the historical relationship between nonvoting aliens and a system of distributing the spoils of victory to the party faithful.[2] If that be true, it might explain, but cannot justify, the discrimination.

Even if patronage never influenced the selection of police officers in New York, reference to the law governing denial of public employment for political reasons is nevertheless instructive. In *Elrod* v. *Burns,* 427 U. S. 347, the Court held that most public employees are protected from discharge because of their political beliefs but recognized that an exception was required for policymaking officials.[3] The exception identified in *Burns* was essentially the same as the category of "officers who participate in the formulation, execution, or review of broad public policy" described in *Sugarman* v. *Dougall,* 413 U. S. 634, 647. In both cases the special nature of the policymaking position was recognized as justifying a form of discriminatory treatment that could not be applied to regular employees.

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[2] "In its historical context, the assumption that only citizens would be employed in the federal service is easily understood. The new system of merit appointment, based on competitive examination, was replacing a patronage system in which appointment had often been treated as a method of rewarding support at the polls; since such rewards were presumably reserved for voters (or members of their families) who would necessarily be citizens, citizenship must have characterized most, if not all, federal employees at that time. The assumption that such a requirement would survive the enactment of the new statute is by no means equivalent to a considered judgment that it should do so." *Id.,* at 107.

[3] "A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Elrod* v. *Burns,* 427 U. S., at 367.

The Court should draw the line between policymaking and nonpolicymaking positions in as consistent and intelligible a fashion as possible. As MR. JUSTICE MARSHALL points out, *ante,* at 305, in the context of immunity from liability under 42 U. S. C. § 1983, the Court placed the police officer in a different category from the Governor of Ohio. See *Scheuer* v. *Rhodes,* 416 U. S. 232, 245–247. And under *Elrod* v. *Burns, supra,* the Court would unquestionably condemn the dismissal of a citizen state trooper because his political affiliation differed from that of his superiors. Yet, inexplicably, every state trooper is transformed into a high ranking, policymaking official when the question presented is whether persons may be excluded from all positions in the police force simply because they are aliens.

Since the Court does not purport to disturb the teaching of *Sugarman,* this transformation must rest on the unarticulated premise that the police function is at "the heart of representative government" and therefore all persons employed by the institutions performing that function "participate directly in the formulation, execution, or review of broad public policy . . . ." *Sugarman* v. *Dougall, supra,* at 647. In my judgment, to state the premise is to refute it. Respect for the law enforcement profession and its essential function, like respect for the military, should not cause us to lose sight of the fact that in our representative democracy neither the constabulary nor the military is vested with broad policymaking responsibility. Instead, each implements the basic policies formulated directly or indirectly by the citizenry. Under the standards announced in *Sugarman,* therefore, a blanket exclusion of aliens from this particular governmental institution is especially inappropriate.

The Court's misapprehension of the role of the institutionalized police function in a democratic society obfuscates the true significance of the distinction between citizenship and alienage. The privilege of participating in the formulation

of broad public policy—a privilege largely denied to the institutions exercising the police function in our society—is the essence of individual citizenship. It is this privilege which gives dramatic meaning to the naturalization ceremony.[4] The transition from alienage to citizenship is a fundamental change in the status of a person. This change is qualitatively different from any incremental increase in economic benefits that may accrue to holders of citizenship papers. The new citizen's right to vote and to participate in the democratic decisionmaking process is the honorable prerogative which no alien has a constitutional right to enjoy.

In final analysis, therefore, our society is governed by its citizens. But it is a government of and for all persons subject to its jurisdiction, and the Constitution commands their equal treatment. Although a State may deny the alien the right to participate in the making of policy, it may not deny him equal access to employment opportunities without a good and relevant reason. *Sugarman* plainly teaches us that the burgeoning public employment market cannot be totally foreclosed to aliens. Since the police officer is not a policymaker in this country, the total exclusion of aliens from the police force must fall.

Even if the Court rejects this analysis, it should not uphold a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the

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[4] As the Court eloquently points out:

"The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. Cf. *Worcester* v. *Georgia,* 6 Pet. 515, 559 (1832). The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions.' *Dougall, supra,* at 648, as part of the sovereign's obligation 'to preserve the basic conception of a political community.' 413 U. S., at 647." *Ante,* at 295–296.

discrimination. If the unarticulated characteristic is concern about possible disloyalty, it must equally disqualify aliens from the practice of law; yet the Court does not question the continuing vitality of its decision in *Griffiths*. Or if that characteristic is the fact that aliens do not participate in our democratic decisionmaking process, it is irrelevant to eligibility for this category of public service. If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court.[5]

Because the Court's unique decision fails either to apply or to reject established rules of law, and for the reasons stated by MR. JUSTICE MARSHALL, I respectfully dissent.

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[5] The Court has squarely held that a State may not treat employment as a scarce resource to be reserved for its own citizens. *Sugarman* v. *Dougall*, 413 U. S. 634, 641–645. Nor may a State impose special burdens on aliens to provide them with an incentive to become naturalized citizens. *Nyquist* v. *Mauclet*, 432 U. S. 1, 9–11. For it is the Federal Government that exercises plenary control over naturalization and immigration. *Hampton* v. *Mow Sun Wong*, 426 U. S., at 100–101. The Court's understanding that "most States expressly confine the employment of police officers to citizens," *ante*, at 299, is not persuasive. Most of the statutes cited to support that understanding were enacted before the Court had decided *Sugarman*. Some of the cited statutes are patently invalid as a result of *Sugarman*, and there is no evidence that most of the States referred to by the Court have decided to continue enforcement of their citizenship requirement for police officers after deliberate consideration of *Sugarman*'s teaching that only policymaking officials would be unaffected by the holding.

UNITED STATES *v.* WHEELER

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

No. 76–1629. Argued January 11, 1978—Decided March 22, 1978

Respondent, a member of the Navajo Tribe, pleaded guilty in Tribal Court to a charge of contributing to the delinquency of a minor and was sentenced. Subsequently, he was indicted by a federal grand jury for statutory rape arising out of the same incident. He moved to dismiss the indictment on the ground that since the tribal offense of contributing to the delinquency of a minor was a lesser included offense of statutory rape, the Tribal Court proceeding barred the subsequent federal prosecution. The District Court granted the motion, and the Court of Appeals affirmed, holding that since tribal courts and federal district courts are not "arms of separate sovereigns," the Double Jeopardy Clause of the Fifth Amendment barred respondent's federal trial. *Held:* The Double Jeopardy Clause does not bar the federal prosecution. Pp. 316–332.

(a) The controlling question is the source of an Indian tribe's power to punish tribal offenders, *i. e.*, whether it is a part of inherent tribal sovereignty or an aspect of the sovereignty of the Federal Government that has been delegated to the tribes by Congress. Pp. 316–322.

(b) Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. Pp. 322–323.

(c) Here, it is evident from the treaties between the Navajo Tribe and the United States and from the various statutes establishing federal criminal jurisdiction over crimes involving Indians, that the Navajo Tribe has never given up its sovereign power to punish tribal offenders, nor has that power implicitly been lost by virtue of the Indians' dependent status; thus, tribal exercise of that power is presently the continued exercise of retained tribal sovereignty. Pp. 323–326.

(d) Moreover, such power is not attributable to any delegation of federal authority. Pp. 326–328.

(e) When an Indian tribe criminally punishes a tribe member for violating tribal law, the tribe acts as an independent sovereign, and not as an arm of the Federal Government, *Talton* v. *Mayes*, 163 U. S. 376, and since tribal and federal prosecutions are brought by separate sover-

eigns, they are not "for the same offence" and the Double Jeopardy Clause thus does not bar one when the other has occurred. Pp. 328–330.

(f) To limit the "dual sovereignty" concept to successive state and federal prosecutions, as respondent urges, would result, in a case such as this, in the "undesirable consequences" of having a tribal prosecution for a relatively minor offense bar a federal prosecution for a much graver one, thus depriving the Federal Government of the right to enforce its own laws; while Congress could solve this problem by depriving Indian tribes of criminal jurisdiction altogether, this abridgment of the tribes' sovereign powers might be equally undesirable. See *Abbate* v. *United States*, 359 U. S. 187. Pp. 330–332.

545 F. 2d 1255, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which all other Members joined except BRENNAN, J., who took no part in the consideration or decision of the case.

Stephen L. Urbanczyk argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti, Deputy Solicitor General Barnett, Jerome M. Feit,* and *Michael W. Farrell.*

Thomas W. O'Toole argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of an Indian in a federal district court under the Major Crimes Act, 18 U. S. C. § 1153, when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident.

I

On October 16, 1974, the respondent, a member of the Navajo Tribe, was arrested by a tribal police officer at the Bureau of Indian Affairs High School in Many Farms, Ariz., on the Navajo Indian Reservation.[1] He was taken to the

[1] The record does not make clear the details of the incident that led

tribal jail in Chinle, Ariz., and charged with disorderly conduct, in violation of Title 17, § 351, of the Navajo Tribal Code (1969). On October 18, two days after his arrest, the respondent pleaded guilty to disorderly conduct and a further charge of contributing to the delinquency of a minor, in violation of Title 17, § 321, of the Navajo Tribal Code (1969). He was sentenced to 15 days in jail or a fine of $30 on the first charge and to 60 days in jail (to be served concurrently with the other jail term) or a fine of $120 on the second.[2]

Over a year later, on November 19, 1975, an indictment charging the respondent with statutory rape was returned by a grand jury in the United States District Court for the District of Arizona.[3] The respondent moved to dismiss this

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to the respondent's arrest. After the bringing of the federal indictment an evidentiary hearing was held on the respondent's motion to suppress statements he had made to police officers. This hearing revealed only that the respondent had been intoxicated at the time of his arrest; that his clothing had been disheveled and he had had a bloodstain on his face; that the incident had involved a Navajo girl; and that the respondent claimed that he had been trying to help the girl, who had been attacked by several other boys.

[2] The record does not reveal how the sentence of the Navajo Tribal Court was carried out.

[3] The indictment charged that "[o]n or about the 16th day of October, 1974, in the District of Arizona, on and within the Navajo Indian Reservation, Indian Country, ANTHONY ROBERT WHEELER, an Indian male, did carnally know a female Indian . . . not his wife, who had not then attained the age of sixteen years but was fifteen years of age. In violation of Title 18, United States Code, Sections 1153 and 2032."

At the time of the indictment, 18 U. S. C. § 1153 provided in relevant part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, . . . within the Indian country, shall be subject to the same

indictment, claiming that since the tribal offense of contributing to the delinquency of a minor was a lesser included offense of statutory rape,[4] the proceedings that had taken place in the Tribal Court barred a subsequent federal prosecution. See *Brown* v. *Ohio*, 432 U. S. 161. The District Court, rejecting the prosecutor's argument that "there is not an identity of sovereignties between the Navajo Tribal Courts and the courts of the United States," dismissed the indictment.[5] The Court of Appeals for the Ninth Circuit affirmed the judgment of dismissal, concluding that since "Indian tribal courts and United States district courts are not arms of separate sovereigns," the Double Jeopardy Clause barred the respondent's trial. 545 F. 2d 1255, 1258. We granted certiorari to resolve an intercircuit conflict. 434 U. S. 816.[6]

II

In *Bartkus* v. *Illinois*, 359 U. S. 121, and *Abbate* v. *United States*, 359 U. S. 187, this Court reaffirmed the well-established

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laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

The Major Crimes Act has since been amended in respects not relevant here. Indian Crimes Act of 1976, § 2, 90 Stat. 585.

Title 18 U. S. C. § 2032 (1976 ed.), applicable within areas of exclusive federal jurisdiction, punishes carnal knowledge of any female under 16 years of age who is not the defendant's wife by imprisonment for up to 15 years.

[4] The holding of the District Court and the Court of Appeals that the tribal offense of contributing to the delinquency of a minor was included within the federal offense of statutory rape is not challenged here by the Government.

[5] The decision of the District Court is unreported.

[6] In a later case, the Court of Appeals for the Eighth Circuit held that the Double Jeopardy Clause does not bar successive tribal and federal prosecutions for the same offense, expressly rejecting the view of the Ninth Circuit in the present case. *United States* v. *Walking Crow*, 560 F. 2d 386. See also *United States* v. *Elk*, 561 F. 2d 133 (CA8); *United States* v. *Kills Plenty*, 466 F. 2d 240, 243 n. 3 (CA8).

principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one.[7] The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":

> "An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Moore* v. *Illinois,* 14 How. 13, 19–20.

It was noted in *Abbate, supra,* at 195, that the "undesirable consequences" that would result from the imposition of a double jeopardy bar in such circumstances further support the

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[7] Although the problems arising from concurrent federal and state criminal jurisdiction had been noted earlier, see *Houston* v. *Moore,* 5 Wheat. 1, the Court did not clearly address the issue until *Fox* v. *Ohio,* 5 How. 410, *United States* v. *Marigold,* 9 How. 560, and *Moore* v. *Illinois,* 14 How. 13, in the mid-19th century. Those cases upheld the power of States and the Federal Government to make the same act criminal; in each case the possibility of consecutive state and federal prosecutions was raised as an objection to concurrent jurisdiction, and was rejected by the Court on the ground that such multiple prosecutions, if they occurred, would not constitute double jeopardy. The first case in which actual multiple prosecutions were upheld was *United States* v. *Lanza,* 260 U. S. 377, involving a prosecution for violation of the Volstead Act, ch. 85, 41 Stat. 305, after a conviction for criminal violation of liquor laws of the State of Washington.

"dual sovereignty" concept. Prosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one, thus effectively depriving the latter of the right to enforce its own laws.[8] While, the Court said, conflict might be eliminated by making federal jurisdiction exclusive where it exists, such a "marked change in the distribution of powers to administer criminal justice" would not be desirable. *Ibid.*

The "dual sovereignty" concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities. *Grafton* v. *United States,* 206 U. S. 333, held that a soldier who had been acquitted of murder by a federal court-martial could not be retried for the same offense by a territorial court in the Philippines.[9] And *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 264–266, reiterated that successive prosecutions by federal and territorial courts are impermissible because such courts are "creations emanating from the same sovereignty." Similarly, in *Waller* v. *Florida,* 397 U. S. 387, we held that a city and the State of which it

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[8] In *Abbate* itself the petitioners had received prison terms of three months on their state convictions, but faced up to five years' imprisonment on the federal charge. 359 U. S., at 195. And in *Bartkus* the Court referred to *Screws* v. *United States,* 325 U. S. 91, in which the same facts could give rise to a federal prosecution under what are now 18 U. S. C. §§ 242 and 371 (1976 ed.) (which then carried maximum penalties of one and two years' imprisonment) and a state prosecution for murder, a capital offense. "Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus* v. *Illinois,* 359 U. S. 121, 137.

[9] The prohibition against double jeopardy had been made applicable to the Philippines by Act of Congress. Act of July 1, 1902, § 5, 32 Stat. 692. In a previous case, the Court had held it unnecessary to decide whether the Double Jeopardy Clause would have applied within the Philippines of its own force in the absence of this statute. *Kepner* v. *United States,* 195 U. S. 100, 124–125.

is a political subdivision could not bring successive prosecutions for unlawful conduct growing out of the same episode, despite the fact that state law treated the two as separate sovereignties.

The respondent contends, and the Court of Appeals held, that the "dual sovereignty" concept should not apply to successive prosecutions by an Indian tribe and the United States because the Indian tribes are not themselves sovereigns, but derive their power to punish crimes from the Federal Government. This argument relies on the undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government. *Winton* v. *Amos,* 255 U. S. 373, 391–392; *In re Heff,* 197 U. S. 488, 498–499; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553; *Talton* v. *Mayes,* 163 U. S. 376, 384. Because of this all-encompassing federal power, the respondent argues that the tribes are merely "arms of the federal government" [10] which, in the words of his brief, "owe their existence and vitality solely to the political department of the federal government."

We think that the respondent and the Court of Appeals, in relying on federal control over Indian tribes, have misconceived the distinction between those cases in which the "dual sovereignty" concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress,[11] and cities to the control of the State which created them.[12] But that fact was not relied upon as the basis for the decisions in *Grafton, Shell Co.,*[13] and *Waller.*

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[10] *Colliflower* v. *Garland,* 342 F. 2d 369, 379 (CA9).

[11] *Binns* v. *United States,* 194 U. S. 486, 491; *De Lima* v. *Bidwell,* 182 U. S. 1, 196–197; *Mormon Church* v. *United States,* 136 U. S. 1, 42; *Murphy* v. *Ramsey,* 114 U. S. 15, 44–45.

[12] *Trenton* v. *New Jersey,* 262 U. S. 182, 187; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178–179; *Williams* v. *Eggleston,* 170 U. S. 304, 310; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 529; see 2 E. McQuillin, Law of Municipal Corporations § 4.03 (3d ed. 1966).

[13] Indeed, in the *Shell Co.* case the Court noted that Congress had

What differentiated those cases from *Bartkus* and *Abbate* was not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken.

Bartkus and *Abbate* rest on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments "[derive] power from different sources," each from the organic law that established it. *United States* v. *Lanza,* 260 U. S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." *Ibid.* And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.[14]

By contrast, cities are not sovereign entities. "Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds* v. *Sims,* 377 U. S. 533, 575.[15] A city is nothing more than "an agency of

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given Puerto Rico "an autonomy similar to that of the states . . . ." 302 U. S., at 262.

[14] Cf. *United States* v. *Lanza,* 260 U. S., at 379–382, holding that a State's power to enact prohibition laws did not derive from the Eighteenth Amendment's provision that Congress and the States should have concurrent jurisdiction in that area, but rather from the State's inherent sovereignty.

[15] See also *Trenton* v. *New Jersey, supra,* at 185–186; *Hunter* v. *Pittsburgh, supra,* at 178; *Worcester* v. *Street R. Co.,* 196 U. S. 539, 548; *Barnes* v. *District of Columbia,* 91 U. S. 540, 544.

the State." *Williams* v. *Eggleston,* 170 U. S. 304, 310. Any power it has to define and punish crimes exists only because such power has been granted by the State; the power "derive[s] . . . from the source of [its] creation." *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 524. As we said in *Waller* v. *Florida, supra,* at 393, "the judicial power to try petitioner . . . in municipal court springs from the same organic law that created the state court of general jurisdiction."

Similarly, a territorial government is entirely the creation of Congress, "and its judicial tribunals exert all their powers by authority of the United States." *Grafton* v. *United States, supra,* at 354; see *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 317; *United States* v. *Kagama,* 118 U. S. 375, 380; *American Ins. Co.* v. *Canter,* 1 Pet. 511, 542.[16] When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as "an agency of the federal government." *Domenech* v. *National City Bank,* 294 U. S. 199, 204–205.

Thus, in a federal Territory and the Nation, as in a city and a State, "[t]here is but one system of government, or of laws operating within [its] limits." *Benner* v. *Porter,* 9 How. 235, 242. City and State, or Territory and Nation, are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone.[17] And the "dual sovereignty" concept of *Bartkus* and *Abbate* does not permit a single sovereign to impose multiple punishment for

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[16] Indeed, the relationship of a Territory to the Federal Government has been accurately compared to the relationship between a city and a State. *Dorr* v. *United States,* 195 U. S. 138, 147–148, quoting T. Cooley, General Principles of Constitutional Law 164–165 (1880); see *National Bank* v. *County of Yankton,* 101 U. S. 129, 133.

[17] Cf. *Gonzales* v. *Williams,* 192 U. S. 1, 13; *American Ins. Co.* v. *Canter,* 1 Pet. 511, 542.

a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes.

III

It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." *United States* v. *Kagama, supra,* at 381–382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16.[18] Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions. *United States* v. *Antelope,* 430 U. S. 641, 643 n. 2; *Talton* v. *Mayes,* 163 U. S., at 380; *Ex parte Crow Dog,* 109 U. S. 556, 571–572; see 18 U. S. C. § 1152 (1976 ed.), *infra,* n. 21. As discussed above in Part II, the controlling question in this case is the source of this power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?

A

The powers of Indian tribes are, in general, *"inherent powers of a limited sovereignty which has never been extinguished."* F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political

[18] Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases,* 203 U. S. 76; *Roff* v. *Burney,* 168 U. S. 218, 222–223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U. S. 382; cf. *United States* v. *Quiver,* 241 U. S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U. S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100.

communities. See *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 172. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States* v. *Kagama, supra,* at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.[19] By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.' " *United States* v. *Mazurie,* 419 U. S. 544, 557; see also *Turner* v. *United States,* 248 U. S. 354, 354–355; *Cherokee Nation* v. *Georgia, supra,* at 16–17. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. See *Oliphant* v. *Suquamish Indian Tribe, ante,* p. 191.

B

It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the con-

[19] See *infra,* at 326.

tinued exercise of retained tribal sovereignty. Although both of the treaties executed by the Tribe with the United States [20] provided for punishment by the United States of Navajos who commit crimes against non-Indians, nothing in either of them deprived the Tribe of its *own* jurisdiction to charge, try, and punish members of the Tribe for violations of tribal law. On the contrary, we have said that "[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams* v. *Lee*, 358 U. S. 217, 221–222; see also *Warren Trading Post* v. *Tax Comm'n*, 380 U. S. 685.

Similarly, statutes establishing federal criminal jurisdiction over crimes involving Indians have recognized an Indian tribe's jurisdiction over its members. The first Indian Trade and Intercourse Act, Act of July 22, 1790, § 5, 1 Stat. 138, provided only that the Federal Government would punish offenses committed *against* Indians by "any citizen or inhabitant of the United States"; it did not mention crimes committed *by* Indians. In 1817 federal criminal jurisdiction was extended to crimes committed within the Indian country by "any Indian, or other person or persons," but "any offence committed by one Indian against another, within any Indian boundary" was excluded. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. In the Indian Trade and Intercourse Act of 1834, § 25, 4 Stat. 733, Congress enacted the direct progenitor of the General Crimes Act, now 18 U. S. C. § 1152 (1976 ed.), which makes federal enclave criminal law generally applicable to crimes in "Indian country." [21] In this statute Congress car-

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[20] The first treaty was signed at Canyon de Chelly in 1849, and ratified by Congress in 1850. 9 Stat. 974. The second treaty was signed and ratified in 1868. 15 Stat. 667.

[21] Title 18 U. S. C. § 1152 (1976 ed.) now provides:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place

ried forward the intra-Indian offense exception because "the tribes have exclusive jurisdiction" of such offenses and "we can[not] with any justice or propriety extend our laws to" them. H. R. Rep. No. 474, 23d Cong., 1st Sess., 13 (1834). And in 1854 Congress expressly recognized the jurisdiction of tribal courts when it added another exception to the General Crimes Act, providing that federal courts would not try an Indian "who has been punished by the local law of the tribe." Act of Mar. 27, 1854, § 3, 10 Stat. 270.[22] Thus, far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it.[23]

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within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulation, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Despite the statute's broad language, it does not apply to crimes committed by non-Indians against non-Indians, which are subject to state jurisdiction. *United States* v. *McBratney,* 104 U. S. 621.

[22] This statute is not applicable to the present case. The Major Crimes Act, under which the instant prosecution was brought, was enacted in 1885. Act of Mar. 3, 1885, § 9, 23 Stat. 385. It does not contain any exception for Indians punished under tribal law. We need not decide whether this " 'carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land,' " *United States* v. *Antelope,* 430 U. S. 641, 643 n. 1, deprives a tribal court of jurisdiction over the enumerated offenses, since the crimes to which the respondent pleaded guilty in the Navajo Tribal Court are not among those enumerated in the Major Crimes Act. Cf. *Oliphant* v. *Suquamish Indian Tribe, ante,* at 203–204, n. 14.

[23] See S. Rep. No. 268, 41st Cong., 3d Sess., 10 (1870):

"Their right of self government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned; and . . . the Government has care-

Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation* v. *County of Oneida,* 414 U. S. 661, 667–668; *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester* v. *Georgia,* 6 Pet. 515, 559; *Cherokee Nation* v. *Georgia,* 5 Pet., at 17–18; *Fletcher* v. *Peck,* 6 Cranch 87, 147 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant* v. *Suquamish Indian Tribe, ante,* p. 191.

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection." *Worcester* v. *Georgia, supra,* at 560–561.

C

That the Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of its

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fully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country."

retained sovereignty is further supported by the absence of any federal grant of such power. If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe.[24]

It is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control. Thus, before the Navajo Tribal Council created the present Tribal Code and tribal courts,[25] the Bureau of Indian Affairs established a Code of Indian Tribal Offenses and a Court of Indian Offenses for the reservation. See 25 CFR Part 11 (1977); cf. 25 U. S. C. § 1311.[26] Pursuant to federal regulations, the present Tribal Code was approved by the Secretary of the Interior before becoming effective. See 25 CFR § 11.1 (e) (1977). Moreover, the Indian Reorganization Act of 1934, § 16, 48 Stat. 987, 25 U. S. C. § 476, and the Act of Apr. 19, 1950, § 6, 64 Stat. 46, 25 U. S. C. § 636, each authorized the Tribe to adopt a constitution for self-government. And the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U. S. C. § 1302,

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[24] This Court has referred to treaties made with the Indians as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States* v. *Winans,* 198 U. S. 371, 381.

[25] The tribal courts were established in 1958, and the law-and-order provisions of the Tribal Code in 1959, by resolution of the Navajo Tribal Council. See Titles 7 and 17 of the Navajo Tribal Code; *Oliver* v. *Udall,* 113 U. S. App. D. C. 212, 306 F. 2d 819.

[26] Such Courts of Indian Offenses, or "CFR Courts," still exist on approximately 30 reservations "in which traditional agencies for the enforcement of tribal law and custom have broken down [and] no adequate substitute has been provided." 25 CFR § 11.1 (b) (1977). We need not decide today whether such a court is an arm of the Federal Government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the tribe.

made most of the provisions of the Bill of Rights applicable to the Indian tribes and limited the punishment tribal courts could impose to imprisonment for six months, or a fine of $500, or both.

But none of these laws *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders. Indeed, the Wheeler-Howard Act and the Navajo-Hopi Rehabilitation Act both recognized that Indian tribes already had such power under "existing law." See *Powers of Indian Tribes,* 55 I. D. 14 (1934). That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power.

In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.[27] It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.[28]

D

The conclusion that an Indian tribe's power to punish tribal offenders is part of its own retained sovereignty is clearly

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[27] The Department of Interior, charged by statute with the responsibility for "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U. S. C. § 2, clearly is of the view that tribal self-government is a matter of retained sovereignty rather than congressional grant. Department of the Interior, Federal Indian Law 398 (1958); *Powers of Indian Tribes,* 55 I. D. 14, 56 (1934). See also 1 Final Report of the American Indian Policy Review Commission 99–100, 126 (1977).

[28] By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon.

reflected in a case decided by this Court more than 80 years ago, *Talton* v. *Mayes,* 163 U. S. 376. There a Cherokee Indian charged with murdering another Cherokee in the Indian Territory claimed that his indictment by the Tribe was defective under the Grand Jury Clause of the Fifth Amendment. In holding that the Fifth Amendment did not apply to tribal prosecutions, the Court stated:

> "The case . . . depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative. . . .
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> . . . . . .
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> "True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. . . . But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States." *Id.,* at 382–384.

The relevance of *Talton* v. *Mayes* to the present case is clear. The Court there held that when an Indian tribe criminally punishes a tribe member for violating tribal law, the tribe acts as an independent sovereign, and not as an arm of the Federal Government.[29] Since tribal and federal prosecutions are

[29] Cf. *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, holding that a

brought by separate sovereigns, they are not "for the same offence," and the Double Jeopardy Clause thus does not bar one when the other has occurred.

IV

The respondent contends that, despite the fact that successive tribal and federal prosecutions are not "for the same offence," the "dual sovereignty" concept should be limited to successive state and federal prosecutions. But we cannot accept so restrictive a view of that concept, a view which, as has been noted, would require disregard of the very words of the Double Jeopardy Clause. Moreover, the same sort of "undesirable consequences" identified in *Abbate* could occur if successive tribal and federal prosecutions were barred despite the fact that tribal and federal courts are arms of separate sovereigns. Tribal courts can impose no punishment in excess of six months' imprisonment or a $500 fine. 25 U. S. C. § 1302 (7). On the other hand, federal jurisdiction over crimes committed by Indians includes many major offenses. 18 U. S. C. § 1153 (1976 ed.).[30] Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity. Indeed, the respondent in the present case faced the possibility of a federal sentence of 15 years in prison, but received a tribal sentence of no more than 75 days and a small fine. In such a case, the prospect

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business enterprise operated off the reservation by a tribe was not a "federal instrumentality" free from state taxation.

[30] Federal jurisdiction also extends to crimes committed by an Indian against a non-Indian which have not been punished in tribal court, 18 U. S. C. § 1152 (1976 ed.); see n. 21, *supra*, and to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer, 18 U. S. C. § 111 (1976 ed.). *Stone* v. *United States*, 506 F. 2d 561 (CA8).

of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations [31] would be frustrated.[32]

This problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether. But such a fundamental abridgment of the powers of Indian tribes might be thought as undesirable as the federal pre-emption of state criminal jurisdiction that would have avoided conflict in *Bartkus* and *Abbate*. The Indian tribes are "distinct political communities" with their own mores and laws, *Worcester* v. *Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756,[33] which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal

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[31] See *Keeble* v. *United States*, 412 U. S. 205, 209–212, describing the reasons for enactment of the Major Crimes Act, 18 U. S. C. § 1153 (1976 ed.).

[32] Moreover, since federal criminal jurisdiction over Indians extends as well to offenses as to which there is an independent federal interest to be protected, see n. 30, *supra*, the Federal Government could be deprived of the power to protect those interests as well.

[33] " 'Navaho' is not their own word for themselves. In their own language, they are *diné*, 'The People.' . . . This term is a constant reminder that the Navahos still constitute a society in which each individual has a strong sense of belonging with the others who speak the same language and, by the same token, a strong sense of difference and isolation from the rest of humanity." C. Kluckhohn & D. Leighton, The Navaho 23 (Rev. ed. 1974).

custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U. S., at 571.[34]

Thus, tribal courts are important mechanisms for protecting significant tribal interests.[35] Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. Thus, just as in *Bartkus* and *Abbate*, there are persuasive reasons to reject the respondent's argument that we should arbitrarily ignore the settled "dual sovereignty" concept as it applies to successive tribal and federal prosecutions.

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

It is so ordered.

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

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[34] Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment. See 1 Final Report of the American Indian Policy Review Commission 160–166 (1977); W. Hagan, Indian Police and Judges 11–17 (1966); Van Valkenburgh, Navajo Common Law, 9 Museum of Northern Arizona Notes 17 (1936); *id.*, at 51 (1937); 10 *id.*, at 37 (1938). See generally materials in M. Price, Law and the American Indian 133–150, 712–716 (1973).

[35] Tribal courts of all kinds, including Courts of Indian Offenses, see n. 26, *supra*, handled an estimated 70,000 cases in 1973. 1 Final Report of the American Indian Policy Review Commission 163–164 (1977).

LAKESIDE *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 76–6942. Argued January 18, 1978—Decided March 22, 1978

1. The giving by a state trial judge, over a criminal defendant's objection, of a cautionary instruction that the jury is not to draw any adverse inference from the defendant's decision not to testify in his behalf does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments. Pp. 336–341.

(a) Though in *Griffin* v. *California*, 380 U. S. 609, the Court stated that "comment on the refusal to testify" violates the constitutional privilege, the Court was there concerned only with *adverse* comment, whereas here the very purpose of the instruction is to remove from the jury's deliberations any influence of unspoken adverse inferences. Pp. 338–339.

(b) Petitioner's contention that such an instruction may encourage adverse inferences in a trial like his, where the defense was presented through several witnesses, would require indulgence, on which federal constitutional law cannot rest, in the dubious speculative assumptions (1) that the jurors have not noticed defendant's failure to testify and will not therefore draw adverse inferences on their own; and (2) that the jurors will totally disregard the trial judge's instruction. Pp. 339–340.

2. The challenged instruction does not deprive the objecting defendant of his right to counsel by interfering with his attorney's trial strategy. To hold otherwise would implicate the right to counsel in almost every permissible ruling of a trial judge if made over the objection of the defendant's lawyer. Pp. 341–342.

277 Ore. 569, 561 P. 2d 612, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined in part, *post*, p. 342. BRENNAN, J., took no part in the consideration or decision of the case.

Phillip M. Margolin, by appointment of the Court, 434 U. S. 918, argued the cause and filed a brief for petitioner.

Thomas H. Denney, Assistant Attorney General of Ore-

gon, argued the cause for respondent. With him on the brief were *James A. Redden,* Attorney General, and *Al J. Laue,* Solicitor General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner did not take the witness stand at his trial on a criminal charge in a state court. Over his objection the trial judge instructed the jury not to draw any adverse inference from the petitioner's decision not to testify. The question before us is whether the giving of such an instruction over the defendant's objection violated the Constitution.

I

The petitioner was brought to trial in an Oregon court on a charge of escape in the second degree.[1] The evidence showed that he had been an inmate of the Multnomah County Correctional Institution, a minimum-security facility in Multnomah County, Ore. On June 16, 1975, he received a special overnight pass requiring him to return by 10 o'clock the following evening. He did not return. The theory of the defense, supported by the testimony of a psychiatrist and three lay witnesses, was that the petitioner was not criminally responsible for his failure to return to the institution.[2]

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[1] Section 162.155 of Ore. Rev. Stat. (1977) provides, in pertinent part: "(1) A person commits the crime of escape in the second degree if:

. . . . .

"(c) He escapes from a correctional facility."

[2] Section 161.295 of Ore. Rev. Stat. (1977) provides:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) . . . [T]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

At the conclusion of the evidence, the trial judge informed counsel in chambers that he intended to include the following instruction in his charge to the jury:

> "Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence."

Defense counsel objected to the giving of that instruction, and, after it was given, the following colloquy took place in chambers:

> "[Defense Counsel]: . . . I have one exception.
>
> "I made this in Chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of the jury. . . .
>
> "THE COURT: The defendant did orally request the Court just prior to instructing that the Court not give the usual instruction to the effect that there are no inferences to be drawn against the defendant for failing to take the stand in his own behalf.
>
> "The Court felt that it was necessary to give that instruction in order to properly protect the defendant, and therefore, the defendant may have his exception."

The Oregon Court of Appeals reversed the petitioner's conviction and ordered a new trial on the ground that "the better rule is to not give instructions ostensibly designed for defendant's benefit over the knowledgeable objection of competent defense counsel." 25 Ore. App. 539, 542, 549 P. 2d 1287, 1288. The Oregon Supreme Court reinstated the conviction, holding that the giving of the instruction over the objection of counsel

did not violate the constitutional rights of the defendant. 277 Ore. 569, 561 P. 2d 612.

The petitioner then sought review in this Court, claiming that the instruction infringed upon both his constitutional privilege not to be compelled to incriminate himself, and his constitutional right to the assistance of counsel. Because of conflicting decisions in several other courts,[3] we granted certiorari, 434 U. S. 889.

II

A

The Fifth Amendment commands that no person "shall be compelled in any criminal case to be a witness against himself." This guarantee was held to be applicable against the States through the Fourteenth Amendment in *Malloy* v. *Hogan,* 378 U. S. 1.[4] That case, decided in 1964, established that "the same standards" must attach to the privilege "in either a federal or state proceeding." *Id.,* at 11. Less than a year

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[3] The federal courts have generally held that giving the protective instruction over the defendant's objection is not a constitutional violation. See, *e. g., United States* v. *Williams,* 172 U. S. App. D. C. 290, 295, 521 F. 2d 950, 955; *United States* v. *McGann,* 431 F. 2d 1104, 1109 (CA5); *United States* v. *Rimanich,* 422 F. 2d 817, 818 (CA7); but cf. *Mengarelli* v. *United States Marshal ex rel. Dist. of Nevada,* 476 F. 2d 617 (CA9); *United States* v. *Smith,* 392 F. 2d 302 (CA4). By contrast, several state courts have held, although not always in constitutional terms, that the giving of such an instruction in these circumstances is prejudicial error. See, *e. g., Russell* v. *State,* 240 Ark. 97, 398 S. W. 2d 213 (reversible error); *People* v. *Molano,* 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (proscribed by *Griffin* v. *California,* 380 U. S. 609); *Gross* v. *State,* 261 Ind. 489, 306 N. E. 2d 371 (violates Fifth Amendment); *State* v. *Kimball,* 176 N. W. 2d 864 (Iowa) (may violate spirit of *Griffin*).

[4] The *Malloy* decision overruled the long-settled doctrine of *Twining* v. *New Jersey,* 211 U. S. 78, and *Adamson* v. *California,* 332 U. S. 46. See *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Cohen* v. *Hurley,* 366 U. S. 117, 127–129.

later the Court held in *Griffin* v. *California,* 380 U. S. 609, that it is a violation of this constitutional guarantee to tell a jury in a state criminal trial that a defendant's failure to testify supports an unfavorable inference against him.[5]

In *Griffin,* the prosecutor had encouraged the jury to draw adverse inferences from the defendant's failure to respond to the testimony against him. And the trial judge had instructed the jury that as to evidence which the defendant might be expected to explain, his failure to testify could be taken " 'into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.' " *Id.,* at 610. In setting aside the judgment of conviction, the Court held that the Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.,* at 615.[6]

The *Griffin* opinion expressly reserved decision "on whether an accused can require . . . that the jury be instructed that his silence must be disregarded." *Id.,* at 615 n. 6. It is settled in Oregon, however, that a defendant has an absolute right to require such an instruction. *State* v. *Patton,* 208 Ore.

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[5] The practice held unconstitutional in *Griffin* had previously been the subject of considerable academic and professional controversy. See, *e. g.,* Note, Comment on Defendant's Failure to Take the Stand, 57 Yale L. J. 145 (1947); Bruce, The Right to Comment on the Failure of the Defendant to Testify, 31 Mich. L. Rev. 226 (1932). Indeed, at one time the practice had enjoyed the approval of the American Law Institute and the American Bar Association. 9 ALI Proceedings 202, 203 (1931); 56 A. B. A. Rep. 137–159 (1931); 59 A. B. A. Rep. 130–141 (1934). And instructions similar to those at issue in *Griffin* had been sanctioned by the Model Code of Evidence and the Uniform Rules of Evidence. ALI Model Code of Evidence, Rule 201 (1942); Uniform Rules of Evidence, Rule 23 (4) (1953).

[6] In *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, it was held that the rule of *Griffin* v. *California* was not to be given retrospective application.

610, 303 P. 2d 513.[7] The petitioner in the present case does not question this rule, nor does he assert that the instruction actually given was in any respect an erroneous statement of the law. His argument is, quite simply, that this protective instruction becomes constitutionally impermissible when given over the defendant's objection.

In the *Griffin* case, the petitioner argues, the Court said that "comment on the refusal to testify" violates the constitutional privilege against compulsory self-incrimination, 380 U. S., at 614, and thus the "comment" made by the trial judge over the defendant's objection in the present case was a literal violation of the language of the *Griffin* opinion.[8] Quite apart from this semantic argument, the petitioner contends that it is an invasion of the privilege against compulsory self-incrimination, as that privilege was perceived in the *Griffin* case, for a trial judge to draw the jury's attention in any way to a defendant's failure to testify unless the defendant acquiesces. We cannot accept this argument, either in terms of the language of the *Griffin* opinion or in terms of the basic postulates of the Fifth and Fourteenth Amendments.

It is clear from even a cursory review of the facts and the square holding of the *Griffin* case that the Court was there concerned only with *adverse* comment, whether by the prosecutor or the trial judge—"comment by the prosecution on the accused's silence or instructions by the court that such silence

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[7] It has long been established that a defendant in a federal criminal trial has that right as a matter of statutory law. *Bruno* v. *United States*, 308 U. S. 287.

[8] The petitioner also relies upon a remark in the dissenting opinion in *United States* v. *Gainey*, 380 U. S. 63, 73: "or, if the defendant sees fit, he may choose to have no mention made of his silence by anyone." This reliance is misplaced. The *Gainey* case did not involve the Fifth Amendment; the statement in the dissenting opinion expressed the author's understanding of a federal statute, not the Constitution; and, perhaps most important, the statement was subscribed to by no other Member of the Court.

is evidence of guilt." *Id.*, at 615. The Court reasoned that such adverse comment amounted to "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.*, at 614.

By definition, "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa* v. *United States*, 385 U. S. 293, 304. The Court concluded in *Griffin* that unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand.[9] But a judge's instruction that the jury must draw *no* adverse inferences of any kind from the defendant's exercise of his privilege not to testify is "comment" of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in *Griffin*. On the contrary, its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.

The petitioner maintains, however, that whatever beneficent effect such an instruction may have in most cases, it may in some cases encourage the jury to draw adverse inferences from a defendant's silence, and, therefore, it cannot constitutionally be given in any case when a defendant objects to it. Specifically, the petitioner contends that in a trial such as this one, where the defense was presented through several witnesses, the defendant can reasonably hope that the jury will not notice that he himself did not testify. In such cir-

[9] Compulsion was also found to be present in *Brooks* v. *Tennessee*, 406 U. S. 605, where the State required a defendant who chose to testify to take the witness stand ahead of any other defense witnesses. Thus a defendant was compelled to make his decision—whether or not to testify—at a point in the trial when he could not know if his testimony would be necessary or even helpful to his case. *Id.*, at 610–611.

cumstances, the giving of the cautionary instruction, he says, is like "waving a red flag in front of the jury."

The petitioner's argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own;[10] second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all.[11] Federal constitutional law cannot rest on speculative assumptions so dubious as these.

Moreover, even if the petitioner's simile be accepted, it does not follow that the cautionary instruction in these circumstances violates the privilege against compulsory self-incrimination. The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different.

It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an

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[10] It has often been noted that such inferences may be inevitable. Jeremy Bentham wrote more than 150 years ago: "[B]etween delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable." 5 J. Bentham, Rationale of Judicial Evidence 209 (1827). And Wigmore, among many others, made the same point: "What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. Wigmore, Evidence § 2272, p. 426 (McNaughton rev. 1961).

[11] As this Court has remarked before: "[W]e have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court . . . ." *Bruno* v. *United States, supra,* at 294.

instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments.[12]

B

The petitioner's second argument is based upon his constitutional right to counsel. *Gideon* v. *Wainwright,* 372 U. S. 335; *Argersinger* v. *Hamlin,* 407 U. S. 25. That right was violated, he says, when the trial judge refused his lawyer's request not to give the instruction in question, thus interfering with counsel's trial strategy. That strategy assertedly was based upon studious avoidance of any mention of the fact that the defendant had not testified.

The argument is an ingenious one, but, as a matter of federal constitutional law, it falls of its own weight once the petitioner's primary argument has been rejected. In sum, if the instruction was itself constitutionally accurate, and if the giving of it over counsel's objection did not violate the Fifth and Fourteenth Amendments, then the petitioner's right to the assistance of counsel was not denied when the judge gave the instruction. To hold otherwise would mean that the constitutional right to counsel would be implicated in almost every wholly permissible ruling of a trial judge, if it is made over the objection of the defendant's lawyer.

In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel. But that right has never been understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and

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[12] More than 50 years ago, Judge Learned Hand dealt with this question in a single sentence: "It is no doubt better if a defendant requests no charge upon the subject, for the trial judge to say nothing about it; but to say that when he does, it is error, carries the doctrine of self-incrimination to an absurdity." *Becher* v. *United States,* 5 F. 2d 45, 49 (CA2).

lawful trial. "'[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States,* 289 U. S. 466, 469 (1933)." *Geders* v. *United States,* 425 U. S. 80, 86.

The trial judge in this case determined in the exercise of his duty to give the protective instruction in the defendant's interest. We have held that it was no violation of the defendant's constitutional privilege for him to do so, even over the objection of defense counsel. Yet the petitioner argues that his constitutional right to counsel means that this instruction could constitutionally be given only if his lawyer did not object to it. We cannot accept the proposition that the right to counsel, precious though it be, can operate to prevent a court from instructing a jury in the basic constitutional principles that govern the administration of criminal justice.

For the reasons discussed in this opinion, the judgment of the Supreme Court of Oregon is affirmed.

It is so ordered.

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

MR. JUSTICE STEVENS, dissenting.

Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified

by the paramount importance of protecting a small minority of accused persons—those who are actually innocent—from wrongful conviction.

The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials.[1] Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury—either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates. The Constitution therefore gives the defendant and his lawyer the absolute right to decide that the accused shall not become a witness against himself. Even if the judge is convinced that the defendant's testimony would exonerate him, and even if he is motivated only by a desire to protect the defendant from the risk of an erroneous convic-

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[1] "But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." *Wilson* v. *United States,* 149 U. S. 60, 66.

The Court was there referring to the statutory prohibition against comment on the failure of the accused to testify. But, as we stated in *Griffin* v. *California,* 380 U. S. 609, 613–614: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected."

tion, the judge has no power to override counsel's judgment about what is in his client's best interest.[2]

The Constitution wisely commits the critical decision of whether the defendant shall take the stand to the defendant and his lawyer, rather than the judge, for at least two reasons. First, they have greater access to information bearing on the decision than the judge can normally have. Second, they are motivated solely by concern for the defendant's interests; the judge inevitably is concerned with society's interest in convicting the guilty as well as protecting the innocent. The choice, therefore, to testify or not to testify is for the defendant and his lawyer, not the judge, to make. The Constitution commands that the decision be made free of any compulsion by the State.

In *Griffin* v. *California,* 380 U. S. 609, the Court held that fair and accurate comment by the trial judge on the defendant's failure to take the witness stand was a form of compulsion forbidden by the Constitution.[3] By making silence "costly," the Court ruled, the trial judge's comments had an effect similar in kind, though not in degree, to a contempt ruling or a thumbscrew. *Id.,* at 614. Of course, a defendant's silence at his own trial is "almost certain to prejudice the defense no matter what else happens in the courtroom"; [4] for the jury will probably draw an unfavorable inference despite instructions to the contrary. Although this "cost" can never be eliminated, *Griffin* stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute. Reasonable men may differ

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[2] Moreover, there are defendants who prefer to risk a finding of guilt rather than being required to incriminate others whom they either love or fear.

[3] *Griffin* was decided over the dissent of MR. JUSTICE STEWART and MR. JUSTICE WHITE. I cannot believe that any Member of the *Griffin* majority would join today's opinion.

[4] *United States* v. *Davis,* 437 F. 2d 928, 933 (CA7 1971).

about the wisdom of that holding.[5] But if it is still the law, this conviction should be overturned.

In some trials, the defendant's silence will be like "the sun . . . shining with full blaze on the open eye." *State* v. *Cleaves*, 59 Me. 298, 301 (1871). But in other trials—perhaps when the whole story has been told by other witnesses or when the prosecutor's case is especially weak—the jury may not focus on the defendant's failure to testify. For the judge or prosecutor to call it to the jury's attention has an undeniably adverse effect on the defendant. Even if jurors try faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted. When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear.

The Court thinks it "would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect." *Ante*, at 339. Unless the same words mean different things in different mouths, this holding also applies to statements made by the prosecutor in his closing argument. Yet I wonder if the Court would find petitioner's argument as strange if the pros-

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[5] The Court today cites the same scholarly materials, prepared in the 1930's and 1940's, that MR. JUSTICE STEWART cited in his dissent in *Griffin*. Compare *ante*, at 337 n. 5 with 380 U. S., at 622 nn. 6–8. The list could have been much longer. In fact, the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession. See, *e. g.*, Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71, 75–88 (1891); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 191, 207 (1930); Pound, Legal Interrogation of Persons Accused or Suspected of Crime, 24 J. Crim. L. C. & P. S. 1014 (1934); Friendly, The Fifth Amendment Tomorrow: The Case For Constitutional Change, 37 U. Cin. L. Rev. 671 (1968); W. Schaefer, The Suspect and Society 59–76 (1967); Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 677 (1966).

ecutor, or even the judge, had given the instruction three or four times, in slightly different form, just to make sure the jury knew that silence, like killing Caesar, is consistent with honor.[6]

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[6] Cf. W. Shakespeare, Julius Caesar, Act III, Sc. II:

"Here, under leave of Brutus and the rest
(For Brutus is an honourable man;
So are they all, all honourable men)
Come I to speak in Caesar's funeral.
He was my friend, faithful and just to me:
But Brutus says he was ambitious;
And Brutus is an honourable man.
He hath brought many captives home to Rome,
Whose ransoms did the general coffers fill:
Did this in Caesar seem ambitious?
When that the poor have cried, Caesar hath wept:
Ambition should be made of sterner stuff:
Yet Brutus says he was ambitious;
And Brutus is an honourable man.
You all did see that on the Lupercal
I thrice presented him a kingly crown,
Which he did thrice refuse: was this ambition?
Yet Brutus says he was ambitious;
And, sure, he is an honourable man."

For the sake of comparison, here is a charge actually given in one reported case:

" 'I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. I have told you why he did not. He has exercised a lawful right. You may not take the position during

It is unrealistic to assume that instructions on the right to silence always have a benign effect.[7] At times the instruction will make the defendant's silence costly indeed. So long as *Griffin* is good law, the State must have a strong reason for ignoring the defendant's request that the instruction not be given. Remarkably, the Court fails to identify any reason for overriding the defendant's choice.[8] Eliminating the instruction on request costs the State nothing, other than the advantage of calling attention to the defendant's silence. A defendant may waive his Fifth Amendment right to silence, and a judge who thinks his decision unwise may not overrule it. The defendant should also be able to waive, without leave of court, his lesser right to an instruction about his Fifth

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your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify.'" *State* v. *Caron,* 288 N. C. 467, 471–472, 219 S. E. 2d 68, 71 (1975), cert. denied, 425 U. S. 971.

[7] Deciding when the instruction will do more harm than good is not an easy task. But the same may be said of deciding whether to take the stand at all.

[8] How far the Court deviates from the course charted in *Griffin* may be seen by comparing its reasoning to the analysis in an earlier case that followed *Griffin* more faithfully. In *Brooks* v. *Tennessee,* 406 U. S. 605, state law required the defendant to be the first defense witness if he wanted to testify at all. Since defendants may not be sequestered like other witnesses, this rule was the only way to prevent opportunistic defendants from shading their testimony to match that of other defense witnesses. Despite the substantial state interest in avoiding perjury, this Court struck down the rule, relying on *Griffin.* 406 U. S., at 611. The *Brooks* court thought that a defendant who planned to take the stand only if his case was weak, but who could not judge its weakness in advance, might be unnecessarily compelled to testify under the Tennessee law. In *Brooks,* the State had a good reason for its action; here the State has none. In *Brooks,* the compulsive force of the rule was speculative at best; here it is direct and plain. If today we are true to *Griffin,* as the Court asserts, then *Brooks* was surely wrong.

Amendment right to silence.[9] Many state courts have accepted this conclusion by ruling that no self-incrimination instruction should be given over the defendant's objection.[10] An ungrudging application of *Griffin* requires that we do the same.

I respectfully dissent.

MR. JUSTICE MARSHALL joins this opinion, with the exception of the first paragraph and footnote 5.

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[9] It is true that Learned Hand thought it absurd to find a violation of the Fifth Amendment when an instruction of this sort was given over the defendant's objection. *Ante,* at 341 n. 12. See *Becher* v. *United States,* 5 F. 2d 45, 49 (CA2 1924). But Judge Hand did not foresee *Griffin,* just as he did not foresee developments that were nearer at hand. In *United States* v. *Bruno,* 105 F. 2d 921 (CA2 1939), for example, he joined an opinion affirming a conviction even though the trial judge had refused to instruct the jury not to penalize the defendants for remaining silent. This Court granted certiorari and reversed. 308 U. S. 287. Now that *Griffin* has been decided, the more significant portion of Judge Hand's statement is his belief that "[i]t is no doubt better if a defendant requests no charge upon the subject, for the trial judge to say nothing about it." 5 F. 2d, at 49.

[10] See *People* v. *Hampton,* 394 Mich. 437, 231 N. W. 2d 654 (1975); *Gross* v. *State,* 261 Ind. 489, 306 N. E. 2d 371 (1974); *State* v. *White,* 285 A. 2d 832 (Me. 1972); *Villines* v. *State,* 492 P. 2d 343 (Okla. Crim. App. 1971); *State* v. *Kimball,* 176 N. W. 2d 864 (Iowa 1970); *Russell* v. *State,* 240 Ark. 97, 398 S. W. 2d 213 (1966); *People* v. *Horrigan,* 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (1967); *People* v. *Molano,* 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967). See also *United States* v. *Smith,* 392 F. 2d 302 (CA4 1968).

Syllabus

STUMP ET AL. *v.* SPARKMAN ET VIR

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

No. 76–1750. Argued January 10, 1978—Decided March 28, 1978

A mother filed a petition in affidavit form in an Indiana Circuit Court, a court of general jurisdiction under an Indiana statute, for authority to have her "somewhat retarded" 15-year-old daughter (a respondent here) sterilized, and petitioner Circuit Judge approved the petition the same day in an *ex parte* proceeding without a hearing and without notice to the daughter or appointment of a guardian *ad litem*. The operation was performed shortly thereafter, the daughter having been told that she was to have her appendix removed. About two years later she was married, and her inability to become pregnant led her to discover that she had been sterilized. As a result she and her husband (also a respondent here) filed suit in Federal District Court pursuant to 42 U. S. C. § 1983 against her mother, the mother's attorney, the Circuit Judge, the doctors who performed or assisted in the sterilization, and the hospital where it was performed, seeking damages for the alleged violation of her constitutional rights. Holding that the constitutional claims required a showing of state action and that the only state action alleged was the Circuit Judge's approval of the sterilization petition, the District Court held that no federal action would lie against any of the defendants because the Circuit Judge, the only state agent, was absolutely immune from suit under the doctrine of judicial immunity. The Court of Appeals reversed, holding that the "crucial issue" was whether the Circuit Judge acted within his jurisdiction, that he had not, that accordingly he was not immune from damages liability, and that in any event he had forfeited his immunity "because of his failure to comply with elementary principles of procedural due process." *Held:* The Indiana law vested in the Circuit Judge the power to entertain and act upon the petition for sterilization, and he is, therefore, immune from damages liability even if his approval of the petition was in error. Pp. 355–364.

(a) A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction," *Bradley* v. *Fisher*, 13 Wall. 335, 351. Pp. 355–357.

(b) Here there was not "clear absence of all jurisdiction" in the Circuit Court to consider the sterilization petition. That court had jurisdiction under the Indiana statute granting it broad general jurisdiction, it appearing that neither by statute nor by case law had such jurisdiction been circumscribed to foreclose consideration of the petition. Pp. 357–358.

(c) Because the Circuit Court is a court of general jurisdiction, neither the procedual errors the Circuit Judge may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions. Pp. 358–360.

(d) The factors determining whether an act by a judge is "judicial" relate to the nature of the act itself (whether it is a function normally performed by a judge) and the expectation of the parties (whether they dealt with the judge in his judicial capacity), and here both of these elements indicate that the Circuit Judge's approval of the sterilization petition was a judicial act, even though he may have proceeded with informality. Pp. 360–363.

(e) Disagreement with the action taken by a judge does not justify depriving him of his immunity, and thus the fact that in this case tragic consequences ensued from the judge's action does not deprive him of his immunity; moreover, the fact that the issue before the judge is a controversial one, as here, is all the more reason that he should be able to act without fear of suit. Pp. 363–364.

552 F. 2d 172, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post*, p. 364. POWELL, J., filed a dissenting opinion, *post*, p. 369. BRENNAN, J., took no part in the consideration or decision of the case.

George E. Fruechtenicht argued the cause and filed briefs for petitioners.

Richard H. Finley argued the cause for respondents. With him on the brief was *Eugene Gressman*.*

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*Briefs of *amici curiae* urging affirmance were filed by *Robert L. Burgdorf, Jr.*, for the American Coalition of Citizens with Disabilities et al.; by *Bruce J. Ennis, Joel M. Gora, Paul Friedman*, and *Lawrence M.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case requires us to consider the scope of a judge's immunity from damages liability when sued under 42 U. S. C. § 1983.

I

The relevant facts underlying respondents' suit are not in dispute. On July 9, 1971, Ora Spitler McFarlin, the mother of respondent Linda Kay Spitler Sparkman, presented to Judge Harold D. Stump of the Circuit Court of DeKalb County, Ind., a document captioned "Petition To Have Tubal Ligation Performed On Minor and Indemnity Agreement." The document had been drafted by her attorney, a petitioner here. In this petition Mrs. McFarlin stated under oath that her daughter was 15 years of age and was "somewhat retarded," although she attended public school and had been promoted each year with her class. The petition further stated that Linda had been associating with "older youth or young men" and had stayed out overnight with them on several occasions. As a result of this behavior and Linda's mental capabilities, it was stated that it would be in the daughter's best interest if she underwent a tubal ligation in order "to prevent unfortunate circumstances . . . ." In the same document Mrs. McFarlin also undertook to indemnify and hold harmless Dr. John Hines, who was to perform the operation, and the DeKalb Memorial Hospital, where the operation was to take place, against all causes of action that might arise as a result of the performance of the tubal ligation.[1]

Reuben for the American Civil Liberties Union et al.; and by *Ronald M. Soskin* for the National Center for Law and the Handicapped, Inc.

[1] The full text of the petition presented to Judge Stump read as follows:

"STATE OF INDIANA }
COUNTY OF DEKALB } ss:

"PETITION TO HAVE TUBAL LIGATION PERFORMED ON MINOR AND INDEMNITY AGREEMENT

"Ora Spitler McFarlin, being duly sworn upon her oath states that she

The petition was approved by Judge Stump on the same day. He affixed his signature as "Judge, DeKalb Circuit Court," to the statement that he did "hereby approve the

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is the natural mother of and has custody of her daughter, Linda Spitler, age fifteen (15) being born January 24, 1956 and said daughter resides with her at 108 Iwo Street, Auburn, DeKalb County, Indiana.

"Affiant states that her daughter's mentality is such that she is considered to be somewhat retarded although she is attending or has attended the public schools in DeKalb Central School System and has been passed along with other children in her age level even though she does not have what is considered normal mental capabilities and intelligence. Further, that said affiant has had problems in the home of said child as a result of said daughter leaving the home on several occasions to associate with older youth or young men and as a matter of fact having stayed overnight with said youth or men and about which incidents said affiant did not become aware of until after such incidents occurred. As a result of this behavior and the mental capabilities of said daughter, affiant believes that it is to the best interest of said child that a Tubal Ligation be performed on said minor daughter to prevent unfortunate circumstances to occur and since it is impossible for the affiant as mother of said minor child to maintain and control a continuous observation of the activities of said daughter each and every day.

"Said affiant does hereby in consideration of the Court of the DeKalb Circuit Court approving the Tubal Ligation being performed upon her minor daughter does hereby [*sic*] covenant and agree to indemnify and keep indemnified and hold Dr. John Hines, Auburn, Indiana, who said affiant is requesting perform said operation and the DeKalb Memorial Hospital, Auburn, Indiana, whereas [*sic*] said operation will be performed, harmless from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.

"In witness whereof, said affiant, Ora Spitler McFarlin, has hereunto subscribed her name this 9th day of July, 1971.

"/s/ Ora Spitler McFarlin
Ora Spitler McFarlin
Petitioner

"Subscribed and sworn to before me this 9th day of July, 1971.

"/s/ Warren G. Sunday
Warren G. Sunday
Notary Public

[*Footnote 1 is continued on p. 353*]

above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom."

On July 15, 1971, Linda Spitler entered the DeKalb Memorial Hospital, having been told that she was to have her appendix removed. The following day a tubal ligation was performed upon her. She was released several days later, unaware of the true nature of her surgery.

Approximately two years after the operation, Linda Spitler was married to respondent Leo Sparkman. Her inability to become pregnant led her to discover that she had been sterilized during the 1971 operation. As a result of this revelation, the Sparkmans filed suit in the United States District Court for the Northern District of Indiana against Mrs. McFarlin, her attorney, Judge Stump, the doctors who had performed and assisted in the tubal ligation, and the DeKalb Memorial Hospital. Respondents sought damages for the alleged violation of Linda Sparkman's constitutional rights; [2] also asserted were pendent state claims for assault

"My commission expires January 4, 1975.

"I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

"/s/ HAROLD D. STUMP
Judge, DeKalb Circuit Court

"Dated July 9, 1971"

[2] The District Court gave the following summary of the constitutional claims asserted by the Sparkmans:

"Whether laid under section 1331 or 1343 (3) and whether asserted

and battery, medical malpractice, and loss of potential fatherhood.

Ruling upon the defendants' various motions to dismiss the complaint, the District Court concluded that each of the constitutional claims asserted by respondents required a showing of state action and that the only state action alleged in the complaint was the approval by Judge Stump, acting as Circuit Court Judge, of the petition presented to him by Mrs. McFarlin. The Sparkmans sought to hold the private defendants liable on a theory that they had conspired with Judge Stump to bring about the allegedly unconstitutional acts. The District Court, however, held that no federal action would lie against any of the defendants because Judge Stump, the only state agent, was absolutely immune from suit under the doctrine of judicial immunity. The court stated that "whether or not Judge Stump's 'approval' of the petition may in retrospect appear to have been premised on an erroneous

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directly or via section 1983 and 1985, plaintiffs' grounds for recovery are asserted to rest on the violation of constitutional rights. Plaintiffs urge that defendants violated the following constitutional guarantees:

"1. that the actions were arbitrary and thus in violation of the due process clause of the Fourteenth Amendment;

"2. that Linda was denied procedural safeguards required by the Fourteenth Amendment;

"3. that the sterilization was permitted without the promulgation of standards;

"4. that the sterilization was an invasion of privacy;

"5. that the sterilization violated Linda's right to procreate;

"6. that the sterilization was cruel and unusual punishment;

"7. that the use of sterilization as punishment for her alleged retardation or lack of self-discipline violated various constitutional guarantees;

"8. that the defendants failed to follow certain Indiana statutes, thus depriving Linda of due process of law; and

"9. that defendants violated the equal protection clause, because of the differential treatment accorded Linda on account of her sex, marital status, and allegedly low mental capacity." *Sparkman* v. *McFarlin,* Civ. No. F 75–129 (ND Ind., May 13, 1976).

view of the law, Judge Stump surely had jurisdiction to consider the petition and to act thereon." *Sparkman* v. *McFarlin,* Civ. No. F 75–129 (ND Ind., May 13, 1976). Accordingly, under *Bradley* v. *Fisher,* 13 Wall. 335, 351 (1872), Judge Stump was entitled to judicial immunity.[3]

On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court,[4] holding that the "crucial issue" was "whether Judge Stump acted within his jurisdiction" and concluding that he had not. 552 F. 2d, at 174. He was accordingly not immune from damages liability under the controlling authorities. The Court of Appeals also held that the judge had forfeited his immunity "because of his failure to comply with elementary principles of procedural due process." *Id.,* at 176.

We granted certiorari, 434 U. S. 815 (1977), to consider the correctness of this ruling. We reverse.

II

The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley* v. *Fisher, supra,* at 347.[5] For that reason the Court held that "judges

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[3] The District Court granted the defendants' motion to dismiss the federal claims for that reason and dismissed the remaining pendent state claims for lack of subject-matter jurisdiction.

[4] *Sparkman* v. *McFarlin,* 552 F. 2d 172 (CA7 1977).

[5] Even earlier, in *Randall* v. *Brigham,* 7 Wall. 523 (1869), the Court stated that judges are not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." *Id.,* at 537. In *Bradley* the Court reconsidered that earlier

of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." [6] 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson* v. *Ray*, 386 U. S. 547 (1967).

The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ," *Bradley, supra,* at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only

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statement and concluded that "the qualifying words used were not necessary to a correct statement of the law . . . ." 13 Wall., at 351.

[6] In holding that a judge was immune for his judicial acts, even when such acts were performed in excess of his jurisdiction, the Court in *Bradley* stated:

"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Id.*, at 351–352.

when he has acted in the "clear absence of all jurisdiction." [7] 13 Wall., at 351.

We cannot agree that there was a "clear absence of all jurisdiction" in the DeKalb County Circuit Court to consider the petition presented by Mrs. McFarlin. As an Indiana Circuit Court Judge, Judge Stump had "original exclusive jurisdiction in all cases at law and in equity whatsoever . . . ," jurisdiction over the settlement of estates and over guardianships, appellate jurisdiction as conferred by law, and jurisdiction over "all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer." Ind. Code § 33–4–4–3 (1975).[8] This is indeed a broad jurisdictional grant; yet the Court of Appeals concluded that Judge Stump did not have jurisdiction over the petition authorizing Linda Sparkman's sterilization.

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[7] In *Bradley,* the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.,* at 352.

[8] Indiana Code § 33–4–4–3 (1975) states as follows:

"Jurisdiction.—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

In so doing, the Court of Appeals noted that the Indiana statutes provided for the sterilization of institutionalized persons under certain circumstances, see Ind. Code §§ 16–13–13–1 through 16–13–13–4 (1973), but otherwise contained no express authority for judicial approval of tubal ligations. It is true that the statutory grant of general jurisdiction to the Indiana circuit courts does not itemize types of cases those courts may hear and hence does not expressly mention sterilization petitions presented by the parents of a minor. But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump. The statutory authority for the sterilization of institutionalized persons in the custody of the State does not warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents, particularly where the parents have authority under the Indiana statutes to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery." Ind. Code § 16–8–4–2 (1973). The District Court concluded that Judge Stump had jurisdiction under § 33–4–4–3 to entertain and act upon Mrs. McFarlin's petition. We agree with the District Court, it appearing that neither by statute nor by case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization.

The Court of Appeals also concluded that support for Judge Stump's actions could not be found in the common law of Indiana, relying in particular on the Indiana Court of Appeals' intervening decision in *A. L.* v. *G. R. H.*, 163 Ind. App. 636, 325 N. E. 2d 501 (1975). In that case the Indiana court held that a parent does not have a common-law right to have a minor child sterilized, even though the parent might "sincerely believe the child's adulthood would benefit therefrom." *Id.*, at 638, 325 N. E. 2d, at 502. The opinion, however,

speaks only of the rights of the parents to consent to the sterilization of their child and does not question the *jurisdiction* of a circuit judge who is presented with such a petition from a parent. Although under that case a circuit judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child, the opinion in *A. L.* v. *G. R. H.* does not indicate that a circuit judge is without jurisdiction to entertain the petition. Indeed, the clear implication of the opinion is that, when presented with such a petition, the circuit judge should deny it on its merits rather than dismiss it for lack of jurisdiction.

Perhaps realizing the broad scope of Judge Stump's jurisdiction, the Court of Appeals stated that, even if the action taken by him was not foreclosed under the Indiana statutory scheme, it would still be "an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process." 552 F. 2d, at 176. This misconceives the doctrine of judicial immunity. A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in *Bradley,* 13 Wall., at 357, where it stated: "[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever . . . ."

We conclude that the Court of Appeals, employing an unduly restrictive view of the scope of Judge Stump's jurisdiction, erred in holding that he was not entitled to judicial immunity. Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question ren-

dered him liable in damages for the consequences of his actions.

The respondents argue that even if Judge Stump had jurisdiction to consider the petition presented to him by Mrs. McFarlin, he is still not entitled to judicial immunity because his approval of the petition did not constitute a "judicial" act. It is only for acts performed in his "judicial" capacity that a judge is absolutely immune, they say. We do not disagree with this statement of the law, but we cannot characterize the approval of the petition as a nonjudicial act.

Respondents themselves stated in their pleadings before the District Court that Judge Stump was "clothed with the authority of the state" at the time that he approved the petition and that "he was acting as a county circuit court judge." Plaintiffs' Reply Brief to Memorandum Filed on Behalf of Harold D. Stump in Support of his Motion to Dismiss in Civ. No. F 75–129, p. 6. They nevertheless now argue that Judge Stump's approval of the petition was not a judicial act because the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem*.

This Court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act; but it has previously rejected the argument, somewhat similar to the one raised here, that the lack of formality involved in the Illinois Supreme Court's consideration of a petitioner's application for admission to the state bar prevented it from being a "judicial proceeding" and from presenting a case or controversy that could be reviewed by this Court. *In re Summers,* 325 U. S. 561 (1945). Of particular significance to the present case, the Court in *Summers* noted the following: "The record does not show that any process issued or that any appearance was made. . . . While no entry was placed by the Clerk in the file, on a docket, or in a judgment roll, the Court took cognizance of the petition and

passed an order which is validated by the signature of the presiding officer." *Id.*, at 567. Because the Illinois court took cognizance of the petition for admission and acted upon it, the Court held that a case or controversy was presented.

Similarly, the Court of Appeals for the Fifth Circuit has held that a state district judge was entitled to judicial immunity, even though "at the time of the altercation [giving rise to the suit] Judge Brown was not in his judge's robes, he was not in the courtroom itself, and he may well have violated state and/or federal procedural requirements regarding contempt citations." *McAlester* v. *Brown,* 469 F. 2d 1280, 1282 (1972).[9] Among the factors relied upon by the Court of Appeals in deciding that the judge was acting within his judicial capacity was the fact that "the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *Ibid.*[10]

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[9] In *McAlester* the plaintiffs alleged that they had gone to the courthouse where their son was to be tried by the defendant in order to give the son a fresh set of clothes. When they went into the defendant judge's office, he allegedly ordered them out and had a deputy arrest one of them and place him in jail for the rest of the day. Several months later, the judge issued an order holding the plaintiff in contempt of court, *nunc pro tunc.*

[10] Other Courts of Appeals, presented with different fact situations, have concluded that the challenged actions of defendant judges were not performed as part of the judicial function and that the judges were thus not entitled to rely upon the doctrine of judicial immunity. The Court of Appeals for the Ninth Circuit, for example, has held that a justice of the peace who was accused of forcibly removing a man from his courtroom and physically assaulting him was not absolutely immune. *Gregory* v. *Thompson,* 500 F. 2d 59 (1974). While the court recognized that a judge has the duty to maintain order in his courtroom, it concluded that the actual eviction of someone from the courtroom by use of physical force, a task normally performed by a sheriff or bailiff, was "simply not an act of a judicial nature." *Id.*, at 64. And the Court of Appeals for the Sixth Circuit held in *Lynch* v. *Johnson,* 420 F. 2d 818 (1970), that the county judge sued in that case was not entitled to judicial immunity because his service on a board with only legislative and administrative powers did not constitute a judicial act.

The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i. e.*, whether they dealt with the judge in his judicial capacity. Here, both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act.[11] State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim. Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." See *supra,* at 360. We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no

[11] Mr. Justice Stewart, in dissent, complains that this statement is inaccurate because it nowhere appears that judges are normally asked to approve parents' decisions either with respect to surgical treatment in general or with respect to sterilizations in particular. Of course, the opinion makes neither assertion. Rather, it is said that Judge Stump was performing a "function" normally performed by judges and that he was taking "the type of action" judges normally perform. The dissent makes no effort to demonstrate that Judge Stump was without jurisdiction to entertain and act upon the specific petition presented to him. Nor does it dispute that judges normally entertain petitions with respect to the affairs of minors. Even if it is assumed that in a lifetime of judging, a judge has acted on only one petition of a particular kind, this would not indicate that his function in entertaining and acting on it is not the kind of function that a judge normally performs. If this is the case, it is also untenable to claim that in entertaining the petition and exercising the jurisdiction with which the statutes invested him, Judge Stump was nevertheless not performing a judicial act or was engaging in the kind of conduct not expected of a judge under the Indiana statutes governing the jurisdiction of its courts.

merit to respondents' argument that the informality with which he proceeded rendered his action nonjudicial and deprived him of his absolute immunity.[12]

Both the Court of Appeals and the respondents seem to suggest that, because of the tragic consequences of Judge Stump's actions, he should not be immune. For example, the Court of Appeals noted that "[t]here are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take," 552 F. 2d, at 176, and respondents argue that Judge Stump's action was "so unfair" and "so totally devoid of judicial concern for the interests and well-being of the young girl involved" as to disqualify it as a judicial act. Brief for Respondents 18. Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley* v. *Fisher,* 13

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[12] Mr. Justice Stewart's dissent, *post,* at 369, suggests that Judge Stump's approval of Mrs. McFarlin's petition was not a judicial act because of the absence of what it considers the "normal attributes of a judicial proceeding." These attributes are said to include a "case," with litigants and the opportunity to appeal, in which there is "principled decisionmaking." But under Indiana law, Judge Stump had jurisdiction to act as he did; the proceeding instituted by the petition placed before him was sufficiently a "case" under Indiana law to warrant the exercise of his jurisdiction, whether or not he then proceeded to act erroneously. That there were not two contending litigants did not make Judge Stump's act any less judicial. Courts and judges often act *ex parte.* They issue search warrants in this manner, for example, often without any "case" having been instituted, without any "case" ever being instituted, and without the issuance of the warrant being subject to appeal. Yet it would not destroy a judge's immunity if it is alleged and offer of proof is made that in issuing a warrant he acted erroneously and without principle.

Wall., at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit. As the Court pointed out in *Bradley:*

> "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility." *Id.,* at 348.

The Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization. He is, therefore, under the controlling cases, immune from damages liability even if his approval of the petition was in error. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[13]

It is so ordered.

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

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

It is established federal law that judges of general jurisdiction are absolutely immune from monetary liability "for their

[13] The issue is not presented and we do not decide whether the District Court correctly concluded that the federal claims against the other defendants were required to be dismissed if Judge Stump, the only state agent, was found to be absolutely immune. Compare *Kermit Constr. Corp.* v. *Banco Credito y Ahorro Ponceno,* 547 F. 2d 1 (CA1 1976), with *Guedry* v. *Ford,* 431 F. 2d 660 (CA5 1970).

judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley* v. *Fisher,* 13 Wall. 335, 351. It is also established that this immunity is in no way diminished in a proceeding under 42 U. S. C. § 1983. *Pierson* v. *Ray,* 386 U. S. 547. But the scope of judicial immunity is limited to liability for "judicial acts," and I think that what Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act.

Neither in *Bradley* v. *Fisher* nor in *Pierson* v. *Ray* was there any claim that the conduct in question was not a judicial act, and the Court thus had no occasion in either case to discuss the meaning of that term.[1] Yet the proposition that judicial immunity extends only to liability for "judicial acts" was emphasized no less than seven times in Mr. Justice Field's opinion for the Court in the *Bradley* case.[2] Cf. *Imbler* v. *Pachtman,* 424 U. S. 409, 430. And if the limitations inherent in that concept have any realistic meaning at all, then I cannot believe that the action of Judge Stump in approving Mrs. McFarlin's petition is protected by judicial immunity.

The Court finds two reasons for holding that Judge Stump's approval of the sterilization petition was a judicial act. First, the Court says, it was "a function normally performed by a judge." Second, the Court says, the act was performed in Judge Stump's "judicial capacity." With all respect, I think that the first of these grounds is factually untrue and that the second is legally unsound.

When the Court says that what Judge Stump did was an act "normally performed by a judge," it is not clear to me whether the Court means that a judge "normally" is asked to approve a mother's decision to have her child given surgical

[1] In the *Bradley* case the plaintiff was a lawyer who had been disbarred; in the *Pierson* case the plaintiffs had been found guilty after a criminal trial.

[2] See 13 Wall., at 347, 348, 349, 351, 354, 357.

treatment generally, or that a judge "normally" is asked to approve a mother's wish to have her daughter sterilized. But whichever way the Court's statement is to be taken, it is factually inaccurate. In Indiana, as elsewhere in our country, a parent is authorized to arrange for and consent to medical and surgical treatment of his minor child. Ind. Code § 16–8–4–2 (1973). And when a parent decides to call a physician to care for his sick child or arranges to have a surgeon remove his child's tonsils, he does not, "normally" or otherwise, need to seek the approval of a judge.[3] On the other hand, Indiana did in 1971 have statutory procedures for the sterilization of certain people who were *institutionalized.* But these statutes provided for *administrative proceedings* before a board established by the superintendent of each public hospital. Only if, after notice and an evidentiary hearing, an order of sterilization was entered in these proceedings could there be review in a circuit court. See Ind. Code §§ 16–13–13–1 through 16–13–13–4 (1974).[4]

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[3] This general authority of a parent was held by an Indiana Court of Appeals in 1975 not to include the power to authorize the sterilization of his minor child. *A. L.* v. *G. R. H.*, 163 Ind. App. 636, 325 N. E. 2d 501.

Contrary to the Court's conclusion, *ante*, at 359, that case does not in the least demonstrate that an Indiana judge is or ever was empowered to act on the merits of a petition like Mrs. McFarlin's. The parent in that case did not petition for judicial approval of her decision, but rather "filed a complaint for declaratory judgment seeking declaration of her right under the common-law attributes of the parent-child relationship to have her son . . . sterilized." 163 Ind. App., at 636–637, 325 N. E. 2d, at 501. The Indiana Court of Appeals' decision simply established a limitation on the parent's common-law rights. It neither sanctioned nor contemplated any procedure for judicial "approval" of the parent's decision.

Indeed, the procedure followed in that case offers an instructive contrast to the judicial conduct at issue here:

"At the outset, we thank counsel for their excellent efforts in representing a seriously concerned parent and in providing the guardian ad litem defense of the child's interest. *Id.*, at 638, 325 N. E. 2d, at 502.

[4] These statutes were repealed in 1974.

In sum, what Judge Stump did on July 9, 1971, was in no way an act "normally performed by a judge." Indeed, there is no reason to believe that such an act has ever been performed by *any* other Indiana judge, either before or since.

When the Court says that Judge Stump was acting in "his judicial capacity" in approving Mrs. McFarlin's petition, it is not clear to me whether the Court means that Mrs. McFarlin submitted the petition to him only because he was a judge, or that, in approving it, he *said* that he was acting as a judge. But however the Court's test is to be understood, it is, I think, demonstrably unsound.

It can safely be assumed that the Court is correct in concluding that Mrs. McFarlin came to Judge Stump with her petition because he was a County Circuit Court Judge. But false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act. In short, a judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity.

If, on the other hand, the Court's test depends upon the fact that Judge Stump *said* he was acting in his judicial capacity, it is equally invalid. It is true that Judge Stump affixed his signature to the approval of the petition as "Judge, De Kalb Circuit Court." But the conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.[5]

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[5] Believing that the conduct of Judge Stump on July 9, 1971, was not a judicial act, I do not need to inquire whether he was acting in "the clear absence of all jurisdiction over the subject matter." *Bradley* v. *Fisher,* 13 Wall., at 351. "Jurisdiction" is a coat of many colors. I note only that the Court's finding that Judge Stump had jurisdiction to entertain Mrs. McFarlin's petition seems to me to be based upon dangerously broad

If the standard adopted by the Court is invalid, then what is the proper measure of a judicial act? Contrary to implications in the Court's opinion, my conclusion that what Judge Stump did was not a judicial act is not based upon the fact that he acted with informality, or that he may not have been "in his judge's robes," or "in the courtroom itself." *Ante,* at 361. And I do not reach this conclusion simply "because the petition was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem.*" *Ante,* at 360.

It seems to me, rather, that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act. Those factors were accurately summarized by the Court in *Pierson* v. *Ray,* 386 U. S., at 554:

> "[I]t 'is . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

Not one of the considerations thus summarized in the *Pierson* opinion was present here. There was no "case," con-

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criteria. Those criteria are simply that an Indiana statute conferred "jurisdiction of all . . . causes, matters and proceedings," and that there was not in 1971 any Indiana law specifically prohibiting what Judge Stump did.

troversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decisionmaking. The total absence of *any* of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act.

The petitioners' brief speaks of "an aura of deism which surrounds the bench . . . essential to the maintenance of respect for the judicial institution." Though the rhetoric may be overblown, I do not quarrel with it. But if aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that would surely be in the public interest.[6]

MR. JUSTICE POWELL, dissenting.

While I join the opinion of MR. JUSTICE STEWART, I wish to emphasize what I take to be the central feature of this case—Judge Stump's preclusion of any possibility for the vindication of respondents' rights elsewhere in the judicial system.

Bradley v. *Fisher*, 13 Wall. 335 (1872), which established the absolute judicial immunity at issue in this case, recognized that the immunity was designed to further the public interest in an independent judiciary, sometimes at the expense of legitimate individual grievances. *Id.*, at 349; accord, *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). The *Bradley* Court accepted those costs to aggrieved individuals because the judicial system itself provided other means for protecting individual rights:

> "Against the consequences of [judges'] erroneous or irregular action, from whatever motives proceeding, the law

[6] The only question before us in this case is the scope of judicial immunity. How the absence of a "judicial act" might affect the issue of whether Judge Stump was acting "under color of" state law within the meaning of 42 U. S. C. § 1983, or the issue of whether his act was that of the State within the meaning of the Fourteenth Amendment that need not, therefore, be pursued here.

> has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort." 13 Wall., at 354.

Underlying the *Bradley* immunity, then, is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights.[1]

But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is inoperative. See *Pierson* v. *Ray, supra,* at 554.[2] In this case, as MR. JUSTICE STEWART points out, *ante,* at 369, Judge Stump's unjudicial conduct insured that "[t]here was and could be no appeal." The complete absence of normal judicial process foreclosed resort to any of the "numerous remedies" that "the law has provided for private parties." *Bradley, supra,* at 354.

In sum, I agree with MR. JUSTICE STEWART that petitioner judge's actions were not "judicial," and that he is entitled to no judicial immunity from suit under 42 U. S. C. § 1983.

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[1] See Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 53–55 (1960); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 233–235 (1963); Note, Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of *Barr* v. *Mateo,* 77 Colum. L. Rev. 625, 647 (1977).

[2] In both *Bradley* and *Pierson* any errors committed by the judges involved were open to correction on appeal.

UNITED STATES *v.* CULBERT

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

No. 77–142. Argued January 11, 1978—Decided March 28, 1978

Respondent was convicted under the Hobbs Act, 18 U. S. C. § 1951 (1976 ed.), of attempting to obtain money from a federally insured bank by means of threats of violence to its president. The Court of Appeals reversed, holding that the Government had failed to prove that respondent's conduct constituted "racketeering," which in its view was a necessary element of a Hobbs Act offense. *Held:* The plain language and legislative history of the statute make clear that Congress did not intend to limit the statute's scope by reference to an undefined category of conduct termed "racketeering," but rather that Congress intended to reach all conduct within the express terms of the statute. Pp. 373–380.

548 F. 2d 1355, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case.

Sara Sun Beale argued the cause for the United States. With her on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti,* and *Deputy Solicitor General Frey.*

James F. Hewitt argued the cause for respondent. With him on the brief was *Frank O. Bell, Jr.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent was convicted of violating the Hobbs Act, 18 U. S. C. § 1951 (1976 ed.), which provides in relevant part:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical

> violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." § 1951 (a).

The question in this case is whether the Government not only had to establish that respondent violated the express terms of the Act, but also had to prove that his conduct constituted "racketeering."

The evidence at respondent's jury trial showed that he and an accomplice attempted to obtain $100,000 from a federally insured bank by means of threats of physical violence made to the bank's president. The United States Court of Appeals for the Ninth Circuit, with one judge dissenting, reversed the Hobbs Act conviction,[1] holding that, " 'although an activity may be within the literal language of the Hobbs Act, it must constitute "racketeering" to be within the perimeters of the Act.' " 548 F. 2d 1355, 1357, quoting *United States* v. *Yokley*, 542 F. 2d 300, 304 (CA6 1976). We granted certiorari, 434 U. S. 816 (1977),[2] and we now reverse.

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[1] Respondent was also convicted of attempted bank robbery, a violation of 18 U. S. C. § 2113 (a) (1976 ed.). In the Court of Appeals, however, the Government confessed error on the ground that § 2113 (a) is not violated unless the taking of the bank's money is "from the person or presence of another." Since respondent's plan involved the delivery of the money by the bank president to a parking lot and did not contemplate any entry by respondent into the bank or any taking from the person or presence of the president, the Government conceded that the bank robbery conviction should be vacated. 548 F. 2d 1355, 1356–1357.

In its brief in this Court, the Government notes that "the United States Attorney's concession was not approved by the Solicitor General and does not represent the position of the Department of Justice on this question." Brief for United States 33 n. 19. We express no view on the validity of the United States Attorney's interpretation of § 2113 (a).

[2] There is a conflict in the Circuits on this issue. Compare *United States* v. *Culbert*, 548 F. 2d 1355 (CA9 1977) (case below), and *United States* v. *Yokley*, 542 F. 2d 300 (CA6 1976), with *United States* v. *Frazier*, 560 F. 2d 884, 886 (CA8 1977), cert. pending, No. 77–847; *United States* v.

I

Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons who have engaged in "racketeering." To the contrary, the statutory language sweeps within it all persons who have "in any way or degree . . . affect[ed] commerce . . . by robbery or extortion." 18 U. S. C. § 1951 (a) (1976 ed.). These words do not lend themselves to restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," *Stirone* v. *United States,* 361 U. S. 212, 215 (1960). The statute, moreover, carefully defines its key terms, such as "robbery," "extortion," and "commerce." [3] Hence the absence of any reference to "racketeering"—much less any definition of the word—is strong evidence that Congress did not intend to make "racketeering" an element of a Hobbs Act violation.

Warledo, 557 F. 2d 721, 730 (CA10 1977); and *United States* v. *Brecht,* 540 F. 2d 45, 52 (CA2 1976).

[3] Title 18 U. S. C. § 1951 (b) (1976 ed.) provides:

"As used in this section—

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Respondent nevertheless argues that we should read a racketeering requirement into the statute. To do so, however, might create serious constitutional problems, in view of the absence of any definition of racketeering in the statute. Neither respondent nor either of the two Courts of Appeals that have read this requirement into the statute has even attempted to provide a definition. Without such a definition, the statute might well violate "the first essential of due process of law": It would forbid "the doing of an act in terms so vague that [persons] of common intelligence [would] necessarily [have to] guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); see, *e. g.*, *Hynes* v. *Mayor of Oradell*, 425 U. S. 610, 620 (1976). But we need not concern ourselves with these potential constitutional difficulties because a construction that avoids them is virtually compelled by the language and structure of the statute.

II

A

Nothing in the legislative history supports the interpretation of the statute adopted by the Court of Appeals.[4] The predecessor to the Hobbs Act, the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, was enacted, as its name implies, at a time when Congress was very concerned about racketeering activities. Despite these concerns, however, the Act, which was written in broad language similar to the language of the

[4] Although we find the statutory language to be clear, we have often stated that, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940) (footnotes omitted). See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U. S. 1, 10 (1976); *Cass* v. *United States*, 417 U. S. 72, 77–79 (1974).

Hobbs Act, nowhere mentioned racketeering.[5] This absence of the term is not surprising, since the principal congressional committee working on the Act, known as the Copeland Committee, found that the term and the associated word "racket" had "for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent, or even disliked, whether criminal or not." S. Rep. No. 1189, 75th Cong., 1st Sess., 2 (1937).[6]

The Copeland Committee proceeded to develop its own "working definition" of racketeering, but it did not incor-

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[5] The Anti-Racketeering Act provided in pertinent part:

"SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

"SEC. 3. (a) As used in this Act the term 'wrongful' means in violation of the criminal laws of the United States or of any State or Territory.

"(b) The terms 'property', 'money', or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee."

[6] Although the cited report was issued in 1937, it was intended to provide "a complete picture" of the earlier work of the Copeland Committee. S. Rep. No. 1189, 75th Cong., 1st Sess., 1 (1937).

porate this definition into the Act. *Ibid.* Critical to the definition was the existence of "an organized conspiracy to commit the crimes of extortion or coercion." *Id.*, at 3. Yet the Act itself did not require a conspiracy to engage in unlawful conduct, and the Senate Judiciary Committee Report expressly stated that a violation of the Act would be established "'whether the restraints [of commerce] are in form of conspiracies or not,'" S. Rep. No. 532, 73d Cong., 2d Sess., 2 (1934), quoting Justice Department memorandum; see H. R. Rep. No. 1833, 73d Cong., 2d Sess., 2 (1934). Moreover, the Act included a separate prohibition on conspiracies, § 2 (d), 48 Stat. 980; see n. 5, *supra,* that would have been superfluous if proof of racketeering—as defined by the Copeland Committee to require conspiracy—were an integral element of the substantive offenses.[7] There is nothing in the legislative history to dispel the conclusion compelled by these observations. Congress simply did not intend to make racketeering a separate, unstated element of an Anti-Racketeering Act violation.

B

Given the absence of this intent in the Hobbs Act's predecessor, any requirement that racketeering be proved must be derived from the Hobbs Act itself or its legislative history. While the Hobbs Act was enacted to correct a perceived deficiency in the Anti-Racketeering Act, that deficiency had nothing to do with the element of racketeering. See *United States* v. *Enmons,* 410 U. S. 396, 401–404 (1973). Rather, it involved the latter Act's requirement that the proscribed "force, violence or coercion" lead to exaction of "valuable consideration" and its exclusion of wage payments from the definition of consideration. See n. 5, *supra.* In construing the wage-payments exclusion, this Court had held that the Act

[7] The Hobbs Act also separately proscribes conspiracies. 18 U. S. C. § 1951 (a) (1976 ed.), quoted, *supra,* at 371–372.

did not cover the actions of union truckdrivers who exacted money by threats or violence from out-of-town drivers in return for undesired and often unutilized services. *United States* v. *Teamsters,* 315 U. S. 521 (1942). Shortly thereafter, several bills were introduced in Congress to alter this result. *United States* v. *Enmons, supra,* at 402, and n. 8.

The bill that eventually became the Hobbs Act deleted the exception on which the Court had relied in *Teamsters* and substituted specific prohibitions against robbery and extortion for the Anti-Racketeering Act's language relating to the use of force or threats of force. The primary focus in the Hobbs Act debates was on whether the bill was designed as an attack on organized labor. Opponents of the bill argued that it would be used to prosecute strikers and interfere with labor unions. See, *e. g.,* 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); *ibid.* (remarks of Rep. Powell); *id.,* at 11902 (remarks of Rep. Celler). The proponents of the bill steadfastly maintained that the purpose of the bill was to prohibit robbery and extortion perpetrated by anyone. See, *e. g., id.,* at 11900 (remarks of Rep. Hancock); *id.,* at 11904 (remarks of Rep. Gwynne); *id.,* at 11912 (remarks of Rep. Hobbs); *id.,* at 11914 (remarks of Rep. Russell). Although there were many references in the debates to "racketeers" and "racketeering," see, *e. g., id.,* at 11906 (remarks of Rep. Robsion); *id.,* at 11908 (remarks of Rep. Vursell); *id.,* at 11910 (remarks of Rep. Andersen), none of the comments supports the conclusion that Congress did not intend to make punishable all conduct falling within the reach of the statutory language. To the contrary, the debates are fully consistent with the statement in the Report of the House Committee on the Judiciary that the purpose of the bill was "to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion *as defined in the bill.*" H. R. Rep. No. 238, 79th Cong., 1st Sess., 9 (1945) (emphasis

added); see also S. Rep. No. 1516, 79th Cong., 2d Sess., 1 (1946).[8]

Indeed, many Congressmen praised the bill because it set out with more precision the conduct that was being made criminal. As Representative Hobbs noted, the words robbery and extortion "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945). See also *id.*, at 11906 (remarks of Rep. Robsion); *id.*, at 11910 (remarks of Rep. Springer); *id.*, at 11914 (remarks of Rep. Russell). In the wake of the Court's decision in *Teamsters,* moreover, a paramount congressional concern was to be clear about what conduct was prohibited:

> "We are explicit. That language is too general, and we thought it better to make this bill explicit, and leave nothing to the imagination of the court." 91 Cong. Rec. 11904 (1945) (remarks of Rep. Hancock).

See *id.*, at 11912 (remarks of Rep. Hobbs).

It is inconceivable that, at the same time Congress was so concerned about clearly defining the acts prohibited under the bill, it intended to make proof of racketeering—a term not mentioned in the statute—a separate prerequisite to criminal liability under the Hobbs Act.[9]

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[8] There are other indications that Congress did not intend to make criminal liability under the Hobbs Act turn on proof of some additional element of "racketeering." One Congressman, in enumerating for his colleagues exactly what the Government would have to prove to establish an individual's liability under the bill, made no reference to "racketeering." 91 Cong. Rec. 11903 (1945) (remarks of Rep. Gwynne). Another emphasized that, with respect to a predecessor bill—one that "was substantially carried forward into the [Hobbs] Act," *United States* v. *Enmons,* 410 U. S. 396, 404–405, n. 14 (1973)—Congress was "trying to make a legal definition of racketeering" by proscribing specific conduct in the statute. 89 Cong. Rec. 3227 (1943) (remarks of Rep. Vorys).

[9] We note that when Congress wanted to make racketeering an element of an offense, it knew how to do so. In the Organized Crime Control Act

III

We therefore conclude that respondent's position has no support in either the statute or its legislative history. Respondent also invokes, as did the court below, two maxims of statutory construction, but neither is applicable here. It is true that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States,* 401 U. S. 808, 812 (1971), and that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," *United States* v. *Bass,* 404 U. S. 336, 349 (1971). But here Congress has conveyed its purpose clearly, and we decline to manufacture ambiguity where none exists. The two maxims only apply "when we are uncertain about the statute's meaning"; they are "not to be used 'in complete disregard of the purpose of the legislature.'" *Scarborough* v. *United States,* 431 U. S. 563, 577 (1977), quoting *United States* v. *Bramblett,* 348 U. S. 503, 510 (1955).

With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes. See, *e. g.,* 91 Cong. Rec. 11848 (1945) (remarks of Rep. Powell); *id.,* at 11900 (remarks of Rep. Hancock); *id.,* at 11904 (remarks of Rep. Gwynne). Those who opposed the Act argued that it was a grave interference with the rights of the States. See, *e. g., id.,* at 11903 (remarks

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of 1970, Pub. L. 91–452, 84 Stat. 922, Congress not only made "racketeering activity" an element of a statutory offense, but it specifically defined the term for purposes of the statute. 18 U. S. C. § 1961 (1) (1976 ed.). Moreover, the statute defines as "racketeering activity" any act which violates certain state laws as well as "any act which is indictable under . . . title 18, United States Code . . . section 1951"—the Hobbs Act. § 1961 (1) (B).

of Rep. Welch); *id.*, at 11913 (remarks of Rep. Resa). Congress apparently believed, however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so. See, *e. g.*, *id.*, at 11911 (remarks of Rep. Jennings); *id.*, at 11904, 11920 (remarks of Rep. Gwynne).

Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language. We therefore decline the invitation to limit the statute's scope by reference to an undefined category of conduct termed "racketeering." The judgment of the Court of Appeals is, accordingly,

Reversed.

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

Syllabus

BANKERS TRUST CO. *v.* MALLIS ET AL.

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

No. 76–1359. Argued November 30, 1977—Decided March 28, 1978

In dismissing respondents' action against petitioner under § 10 (b) of the Securities Exchange Act of 1934, the District Court failed to set forth the judgment in a separate document as required by Fed. Rule Civ. Proc. 58. Despite the absence of a separate judgment but without objection by petitioner, the Court of Appeals assumed appellate jurisdiction under 28 U. S. C. § 1291 giving courts of appeals jurisdiction of appeals from all "final decisions" of the district courts, and reversed on the merits. *Held:*

1. Under the circumstances the parties should be deemed to have waived Rule 58's separate-judgment requirement, and hence the Court of Appeals properly assumed appellate jurisdiction under § 1291.

2. Where, however, the case's posture changed between the time of the Court of Appeals' decision and the presentation of the case to this Court, respondents' counsel having urged here that the Court of Appeals' judgment be affirmed on a theory different from that court's reasoning in reversing the District Court, the writ of certiorari is dismissed as having been improvidently granted.

Certiorari dismissed. Reported below: 568 F. 2d 824.

Jack H. Weiner argued the cause for petitioner. With him on the briefs was *Charles Leeds.*

Noel W. Hauser argued the cause and filed a brief for respondents.

John L. Warden argued the cause and filed a brief for the New York Clearing House Assn. as *amicus curiae* urging reversal.

Harvey L. Pitt argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Paul Gonson, Jacob H. Stillman,* and *James E. Bowers.*

PER CURIAM.

Respondents sued petitioner Bankers Trust Co. under § 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j (b) (1976 ed.), for allegedly fraudulent statements. The District Court for the Southern District of New York dismissed the action on the ground that the fraud alleged had not occurred "in connection with the purchase or sale" of a security, as required by § 10 (b). *Mallis* v. *Federal Deposit Ins. Corp.*, 407 F. Supp. 7 (1975). The Court of Appeals for the Second Circuit reversed, holding that respondents were "purchasers [of securities] by virtue of their acceptance of [a] pledge" of stock and that petitioner was "a seller by virtue of its release of [a] pledge." *Mallis* v. *Federal Deposit Ins. Corp.*, 568 F. 2d 824, 830 (1977). We granted certiorari to consider the correctness of these rulings of the Court of Appeals. 431 U. S. 928 (1977).

We find ourselves initially confronted, however, by a difficult question of federal appellate jurisdiction. As the Court of Appeals noted in its opinion, a search of the District Court record fails to uncover "any document that looks like a judgment." 568 F. 2d, at 827 n. 4. Because both the parties and the District Court "proceeded on the assumption that there was an adjudication of dismissal," *ibid.*,[1] the Court of Appeals felt free to consider the merits of the appeal. The Court of Appeals action, however, conflicts with the decisions of other Courts of Appeals concluding that a judgment set forth on a "separate document" is a prerequisite to appel-

[1] Respondents appealed from a combined opinion and order of the District Court dated September 30, 1975. In the relatively lengthy opinon, the District Court granted petitioner's motion to dismiss the claim for failure to state a federal claim upon which relief could be granted and then concluded: "Complaint dismissed in its entirety. So ORDERED." On the same day, an entry was made on the District Court docket reading, "Complaint dismissed in its entirety. So Ordered. Pollack, J. (mn)."

late jurisdiction.[2] We conclude that the Court of Appeals for the Second Circuit was correct in deciding that it had jurisdiction in this case despite the absence of a separate judgment.

Appellate jurisdiction was invoked under 28 U. S. C. § 1291, which provides that the "courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The issue posed is whether a decision of a district court can be a "final decision" for purposes of § 1291 if not set forth on a document separate from the opinion. The issue arises because of Fed. Rule Civ. Proc. 58, which reads in part:

> "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79 (a)." [3]

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[2] See, *e. g., Lyons* v. *Davoren,* 402 F. 2d 890 (CA1 1968); *Sassoon* v. *United States,* 549 F. 2d 983 (CA5 1977); *Richland Trust Co.* v. *Federal Ins. Co.,* 480 F. 2d 1212 (CA6 1973); *Home Fed. Sav. & Loan* v. *Republic Ins. Co.,* 405 F. 2d 18 (CA7 1968); *Baity* v. *Ciccone,* 507 F. 2d 717 (CA8 1974); *Baker* v. *Southern Pac. Transp.,* 542 F. 2d 1123 (CA9 1976). But see *W. G. Cosby Transfer & Storage Corp.* v. *Froehlke,* 480 F. 2d 498, 501 n. 4 (CA4 1973).

[3] Rule 58 reads in its entirety:

"Subject to the provisions of Rule 54 (b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79 (a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

We assume, without deciding, that the requirements for an effective judgment set forth in the Federal Rules of Civil Procedure must generally be satisfied before § 1291 jurisdiction may be invoked.[4] We nonetheless conclude that it could not have been intended that the separate-document requirement of Rule 58 be such a categorical imperative that the parties are not free to waive it.

The sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U. S. C. § 2107 begins to run.[5] According to the Advisory Committee that drafted the 1963 amendment:

> "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e. g., 'the plaintiff's motion [for summary judgment] is granted,' see United States v. F. & M. Schaefer Brewing Co., 356 U. S. 227, 229 . . . (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a

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[4] A "judgment" for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a "final decision" as that term is used in 28 U. S. C. § 1291. Federal Rule Civ. Proc. 54 (a), for example, provides that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." See also *Ex parte Tiffany*, 252 U. S. 32, 36 (1920); 6A J. Moore, Federal Practice ¶ 58.02, pp. 51–52 (1972). Because Rule 58 provides that a "judgment is effective only . . . when entered as provided in Rule 79 (a)," it is arguable that a decision must be entered on the civil docket before it may constitute a "final decision" for purposes of § 1291. Unlike the separate-document requirement, however, the keeping of a civil docket pursuant to Rule 79 fulfills a public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it. A judgment of dismissal was entered in this case below. See n. 1, *supra*.

[5] Section 2107 provides that "[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." See also Fed. Rule App. Proc. 4 (a).

> sufficient basis for entering judgment in the civil docket as provided by Rule 79 (a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of a judgment was effective, starting the time running for post verdict motions and for the purpose of appeal. . . .
>
> "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." 28 U. S. C. App., p. 7824.

The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. See *United States* v. *Indrelunas*, 411 U. S. 216, 220–222 (1973). Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.[6]

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[6] Nor would strict compliance with the separate-judgment requirement aid in the court of appeals' determination of whether the decision of the District Court was "final" for purposes of § 1291. Even if a separate judgment is filed, the courts of appeals must still determine whether the

In *United States* v. *Indrelunas,* we recognized that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. *Id.,* at 221–222.[7] Technical application of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought. Cf. *United States* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227 (1958). The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered. As Professor Moore notes, if the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, "there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment." 9 J. Moore, Federal Practice ¶ 110.08 [2], p. 120 n. 7 (1970). "[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Id.,* at 119–120.

The Federal Rules of Civil Procedure are to be "construed

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district court intended the judgment to represent the final decision in the case. Cf. *United States* v. *Hark,* 320 U. S. 531 (1944).

[7] While our decision in *Indrelunas* is consistent with the result we reach today, the beginning paragraph of *Indrelunas* could be read as holding that a separate judgment must be filed in compliance with Rule 58 before a decision is "final" for purposes of § 1291. In *Indrelunas,* we noted that since both parties conceded "that the jurisdiction of the Court of Appeals was based on the provisions of 28 U. S. C. § 1291, making final decisions of the district courts appealable, the correctness of the Court of Appeals' decision depends on whether the District Court's judgment of February 25, 1971, was a final decision. That question, in turn, depends on whether actions taken in the District Court previous to the February date amounted to the 'entry of judgment' as that term is used in Fed. Rule Civ. Proc. 58." 411 U. S., at 216. To the extent the above passage is inconsistent with our decision today, we disavow it.

to secure the just, speedy, and inexpensive determination of every action." In *Foman* v. *Davis,* 371 U. S. 178 (1962), this Court was asked to apply Rule 73 which, as then written, provided that an appeal was to be taken "by filing with the District Court a notice of appeal," which notice "shall designate the judgment or part thereof appealed from." Under Rule 73 it was clear that the filing of a notice of appeal was "jurisdictional," and the contents of the notice of appeal were prescribed in the Rule. This Court nonetheless held in *Foman* that a notice of appeal from a denial of motions to vacate a judgment and to amend the complaint was, in view of an earlier and premature notice of appeal, a notice of appeal from the original judgment.

> "The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first) the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." 371 U. S., at 181.

The same principles of common-sense interpretation that led the Court in *Foman* to conclude that the technical requirements for a notice of appeal were not mandatory where the notice "did not mislead or prejudice" the appellee demonstrate that parties to an appeal may waive the separate-judgment requirement of Rule 58. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 371 U. S., at 181.

Here, the District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a

separate judgment. Under these circumstances, the parties should be deemed to have waived the separate-judgment requirement of Rule 58, and the Court of Appeals properly assumed appellate jurisdiction under § 1291.

Although we conclude that the Court of Appeals did have appellate jurisdiction to pass on the merits of this case, we do not reach them. At oral argument, counsel for respondents took the position that "the mere release of a pledge is [not] a sale." Tr. of Oral Arg. 32. Counsel urged that the judgment of the Court of Appeals be affirmed on a theory which differed from the reasoning of the Court of Appeals in reversing the District Court. Because of the change in the posture of the case between the time of the decision of the Court of Appeals and its presentation to us for decision, we dismiss the writ of certiorari as having been improvidently granted.

Dismissed.

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

Syllabus

CITY OF LAFAYETTE, LOUISIANA, ET AL. *v.* LOUISIANA POWER & LIGHT CO.

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

No. 76–864. Argued October 4, 1977—Decided March 29, 1978

Petitioner cities, which own and operate electric utility systems both within and beyond their respective city limits as authorized by Louisiana law, brought an action in District Court against respondent investor-owned electric utility with which petitioners compete, alleging that it committed various federal antitrust offenses that injured petitioners in the operation of their electric utility systems. Respondent counterclaimed, alleging that petitioners had committed various antitrust offenses that injured respondent in its business and property. Petitioners moved to dismiss the counterclaim on the ground that, as cities and subdivisions of the State, the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341, rendered federal antitrust laws inapplicable to them. The District Court granted the motion, but the Court of Appeals reversed and remanded. *Held:* Apart from whether petitioners are exempt from the antitrust laws as agents of the State under the *Parker* doctrine there are insufficient grounds for inferring that Congress did not intend to subject cities to antitrust liability. Pp. 394–408.

(a) The definition of "person" or "persons" covered by the antitrust laws clearly includes cities, whether as municipal utility operators suing as plaintiffs seeking damages for antitrust violations or as such operators being sued as defendants. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390; *Georgia* v. *Evans*, 316 U. S. 159. Pp. 394–397.

(b) Petitioners have failed to show the existence of any overriding public policy inconsistent with a construction of coverage of the antitrust laws. The presumption against implied exclusion from such laws cannot be negated either on the ground that it would be anomalous to subject municipalities to antitrust liability or on the ground that the antitrust laws are intended to protect the public only from abuses of private power and not from action of municipalities that exist to serve the public weal. Pp. 400–408.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded:

1. *Parker* v. *Brown* does not automatically exempt from the antitrust

laws all governmental entities, whether state agencies or subdivisions of a State, simply by reason of their status as such, but exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. Pp. 408–413.

2. The Court of Appeals did not err in holding that further inquiry should be made to determine whether petitioners' actions were directed by the State, since when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Pp. 413–417.

THE CHIEF JUSTICE, while agreeing with the directions for remand in Part III because they represent at a minimum what is required to establish an exemption, would insist that the State compel the alleged anticompetitive activity and that the cities demonstrate that the exemption is essential to the state regulatory scheme. Pp. 425–426, and n. 6.

532 F. 2d 431, affirmed.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part I, in which BURGER, C. J., and MARSHALL, POWELL, and STEVENS, JJ., joined; and an opinion with respect to Parts II and III, in which MARSHALL, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a concurring opinion, *post,* p. 417. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 418. STEWART, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, and in all but Part II–B of which BLACKMUN, J., joined, *post,* p. 426. BLACKMUN, J., filed a dissenting opinion, *post,* p. 441.

Jerome A. Hochberg argued the cause for petitioners. With him on the briefs were *James F. Fairman, Jr.,* and *Ivor C. Armistead III.*

Andrew P. Carter argued the cause for respondent. With him on the brief was *William T. Tete.*

William T. Crisp argued the cause for the National Rural Electric Cooperative Assn. et al. as *amici curiae* urging

affirmance. With him on the brief were *Robert D. Tisinger, James H. Eddleman, J. J. Davidson, Jr., C. Pinckney Roberts,* and *B. D. St. Clair.**

MR. JUSTICE BRENNAN delivered the opinion of the Court (Part I), together with an opinion (Parts II and III), in which MR. JUSTICE MARSHALL, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined.

Parker v. *Brown,* 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Co. (LP&L), an investor-owned electric service utility with which petitioners compete

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**Solicitor General McCree, Acting Assistant Attorney General Shenefield,* and *Barry Grossman* filed a brief for the United States as *amicus curiae* urging affirmance.

Frederick T. Searls and *Michael P. Graney* filed a brief for the Columbus and Southern Ohio Electric Co. et al. as *amici curiae.*

[1] See La. Const., Art. 6, §§ 2, 7 (A) (effective Jan. 1, 1975); La. Const., Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); see generally La. Rev. Stat. Ann. §§ 33:621, 33:361, 33:506 (West 1951).

[2] La. Rev. Stat. Ann. § 33:1326 (West 1951); §§ 33:4162, 33:4163 (West 1966).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Co., Inc., and Gulf States Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission, and sale of electric power at wholesale and retail in Louisiana.

in the areas beyond their city limits,[4] committed various antitrust offenses which injured petitioners in the operation of their electric utility systems.[5] LP&L counterclaimed, seeking damages and injunctive relief for various antitrust offenses which petitioners had allegedly committed and which injured it in its business and property.[6]

Petitioners moved to dismiss the counterclaim on the ground that, as cities and subdivisions of the State of Louisiana, the "state action" doctrine of *Parker* v. *Brown,* rendered federal antitrust laws inapplicable to them. The District Court granted the motion, holding that the decision of the Court of Appeals for the Fifth Circuit in *Saenz* v. *University Interscholastic League,* 487 F. 2d 1026 (1973), required dismissal, notwithstanding that "[t]hese plaintiff cities are engaging in what is clearly a business activity . . . in which a profit is realized," and "for this reason . . . this court is reluctant to

[4] LP&L does not allege that it directly competes with the city of Lafayette, but does allege that the city of Plaquemine imposed tying arrangements which injured it. See Respondent's Second Amended Counterclaim, App. 33–34; Affidavit of J. M. Wyatt, Senior Vice President of LP&L, *id.,* at 37.

[5] Petitioners' complaint charged that the defendants conspired to restrain trade and attempted to monopolize and have monopolized the generation, transmission, and distribution of electric power by preventing the construction and operation of competing utility systems, by improperly refusing to wheel power, by foreclosing supplies from markets served by defendants, by engaging in boycotts against petitioners, and by utilizing sham litigation and other improper means to prevent the financing of construction of electric generation facilities beneficial to petitioners.

[6] The counterclaim, as amended, alleged that the petitioners, together with a nonparty electric cooperative, had conspired to engage in sham litigation against LP&L to prevent the financing with the purpose and effect of delaying or preventing the construction of a nuclear electric-generating plant, to eliminate competition within the municipal boundaries by use of covenants in their respective debentures, to exclude competition in certain markets by using long-term supply agreements, and to displace LP&L in certain areas by requiring customers of LP&L to purchase electricity from petitioners as a condition of continued water and gas service.

hold that the antitrust laws do not apply to *any* state activity." [7] App. 47 (emphasis in original). The District Court in this case read *Saenz* to interpret the "state action" exemption [8] as requiring the "holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States," App. 48, thereby making petitioners' status as cities determinative against maintenance of antitrust suits against them. The Court of Appeals for the Fifth Circuit reversed and remanded for further proceedings.[9] 532 F. 2d 431 (1976). The Court of Appeals noted that the District Court had acted before this Court's decision in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975), and held that "taken together" *Parker* v. *Brown* and *Goldfarb* "require the following analysis":

> "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an

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[7] *Saenz* was a treble-damages action by a slide-rule manufacturer who alleged a conspiracy between a state agency, the University Interscholastic League (UIL), its director, and a private competitor of Saenz to effect the rejection of Saenz products for use in interscholastic competition among Texas public schools. In *Saenz* the Court of Appeals affirmed the District Court's dismissal of the action against the UIL and its director on the ground that as a state agency and a state official, they were not answerable under the Sherman Act.

[8] The word "exemption" is commonly used by courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case.

[9] In entering its order dismissing the counterclaim, the District Court made an express determination that there was no just reason for delay and expressly directed the entry of judgment for plaintiffs pursuant to Fed. Rule Civ. Proc. 54 (b). This action designated the dismissal as a final appealable order. See *Liberty Mutual Ins. Co.* v. *Wetzel,* 424 U. S. 737, 742–743 (1976).

express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb,* the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." 532 F. 2d, at 434–435 (footnotes omitted).

We granted certiorari, 430 U. S. 944 (1977). We affirm.

I

Petitioners' principal argument is that "since a city is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker*'s findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Brief for Petitioners 5. Before addressing this question, however, we shall address the contention implicit in petitioners' arguments in their brief that, apart from the question of their exemption as agents of the State under the *Parker* doctrine, Congress never intended to subject local governments to the antitrust laws.

A

The antitrust laws impose liability on and create a cause of action for damages for a "person" or "persons" as defined in

the Acts.[10] Since the Court has held that the definition of "person" or "persons" embraces both cities and States, it is understandable that the cities do not argue that they are not "persons" within the meaning of the antitrust laws.

Section 8 of the Sherman Act, ch. 647, 26 Stat. 210, 15 U. S. C. § 7 (1976 ed.), and § 1 of the Clayton Act, 38 Stat. 730, 15 U. S. C. § 12 (1976 ed.), are general definitional sections which define "person" or "persons," "wherever used in this [Act] . . . to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." [11] Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15 (1976 ed.), provides,

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[10] The word "person" or "persons" is used repeatedly in the antitrust statutes. For examples, see 15 U. S. C. § 1 (1976 ed.) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . ."); 15 U. S. C. § 2 (1976 ed.) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."); 15 U. S. C. § 3 (1976 ed.) ("Every person [making a contract or engaging in a combination or conspiracy in restraint of trade in any Territory or the District of Columbia] shall be deemed guilty of a felony . . ."); 15 U. S. C. § 7 (1976 ed.) (defining the word "person" or "persons"); 15 U. S. C. § 8 (1976 ed.) (declaring illegal every contract, combination, or conspiracy in restraint of trade by persons or corporations engaged in importing articles into the United States, and providing that any person so engaged shall be guilty of a misdemeanor).

[11] Section 8 of the Sherman Act provides in full:

"That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 8 has remained unchanged since its enactment in 1890.

Section 1 of the Clayton Act defines the word "person" or "persons" in language identical to that of § 8 of the Sherman Act, and it also has remained unchanged since its enactment in 1914.

in pertinent part, that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . , and shall recover threefold the damages by him sustained . . . ." [12]

Chattanooga Foundry & Pipe Works v. *Atlanta,* 203 U. S. 390 (1906), held that a municipality is a "person" within the meaning of § 8 of the Sherman Act, the general definitional section, and that the city of Atlanta therefore could maintain a treble-damages action under § 7, the predecessor of § 4 of the Clayton Act,[13] against a supplier from whom the city purchased water pipe which it used to furnish water as a municipal utility service. Some 36 years later, *Georgia* v. *Evans,* 316 U. S. 159 (1942), held that the words "any person" in § 7 of the Sherman Act included States. Under that decision, the State of Georgia was permitted to bring an action in its own name charging injury from a combination to fix prices and suppress competition in the market for asphalt which the

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[12] Section 4 is quoted in full in n. 13, *infra.*

[13] Section 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890) (repealed in 1955), provided in full:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act provides in full:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4 has remained unchanged since its enactment in 1914. It is made applicable to all of the antitrust statutes by § 1 of the Clayton Act, 15 U. S. C. § 12 (1976 ed.).

State purchased annually for use in the construction of public roads. The Court reasoned that "[n]othing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State." 316 U. S., at 162.

Although both *Chattanooga Foundry* and *Georgia* v. *Evans* involved the public bodies as plaintiffs, whereas petitioners in the instant case are defendants to a counterclaim, the basis of those decisions plainly precludes a reading of "person" or "persons" to include municipal utility operators that sue as plaintiffs but not to include such municipal operators when sued as defendants. Thus, the conclusion that the antitrust laws are not to be construed as meant by Congress to subject cities to liability under the antitrust laws must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of "person" or "persons" as not including them.[14]

B

Petitioners suggest several reasons why, in addition to their arguments for exemption as agents of the State under the *Parker* doctrine, a congressional purpose not to subject cities

[14] When Congress wished to exempt municipal service operations from the coverage of the antitrust laws, it has done so without ambiguity. The Act of May 26, 1938, ch. 283, 52 Stat. 446, 15 U. S. C. § 13c (1976 ed.), grants a limited exemption to certain not-for-profit institutions for "purchases of their supplies for their own use" from the provisions of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §§ 13 to 13b and 21a (1976 ed.), which otherwise make it unlawful for a supplier to grant, or for an institution to induce, a discriminatory discount with respect to such supplies. Congress expressly included public libraries in this exemption. (Public libraries are, by definition, operated by local government. See 1 U. S. Office of Education, Biennial Surveys of Education in the United States, ch. 8 (Library Service 1938–1940), p. 27 (1947); 2 U. S. Office of Education, ch. 2 (Statistical Summary of Education, 1941–1942), p. 38; 32 Am. Library Assn. Bull. 272 (1938)).

to the antitrust laws should be inferred. Those arguments, like the *Parker* exemption itself, necessarily must be considered in light of the presumption against implied exclusions from coverage under the antitrust laws.

(1)

The purposes and intended scope of the Sherman Act have been developed in prior cases and require only brief mention here. Commenting upon the language of the Act in rejecting a claim that the insurance business was excluded from coverage, the Court stated: "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 553 (1944). That and subsequent cases reviewing the legislative history of the Sherman Act have concluded that Congress, exercising the full extent of its constitutional power,[15] sought to establish a regime of competition as the fundamental principle governing commerce in this country.[16]

For this reason, our cases have held that even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. *E. g., United States* v.

[15] See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229–235 (1948).

[16] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates*, 405 U. S. 596, 610 (1972).

Philadelphia Nat. Bank, 374 U. S. 321, 350–351, and n. 28 (1963) (collecting cases). The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions. See *Goldfarb,* 421 U. S., at 786–788.

Two policies have been held sufficiently weighty to override the presumption against implied exclusions from coverage of the antitrust laws. In *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws. Although there is nothing in the language of the statute or its history which would indicate that Congress considered such an exclusion, the impact of two correlative principles was held to require the conclusion that the presumption should not support a finding of coverage. The first is that a contrary construction would impede the open communication between the polity and its lawmakers which is vital to the functioning of a representative democracy. Second, "and of at least equal significance," is the threat to the constitutionally protected right of petition which a contrary construction would entail. *Id.,* at 137–138.[17]

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[17] See also *Mine Workers* v. *Pennington,* 381 U. S. 657, 669–672 (1965). *Pennington* held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying before the Secretary of Labor in favor of legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying before TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to *Pennington* have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented. See

Parker v. *Brown* [18] identified a second overriding policy, namely that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351.

Common to the two implied exclusions was potential conflict with policies of signal importance in our national traditions and governmental structure of federalism. Even then, however, the recognized exclusions have been unavailing to prevent antitrust enforcement which, though implicating those fundamental policies, was not thought severely to impinge upon them. See, *e. g., Goldfarb, supra; California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972).

Petitioners' arguments therefore cannot prevail unless they demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption. We now turn to a consideration of whether, apart from the question of their exemption as agents of the State under the *Parker* doctrine, petitioners have made that showing.

(2)

Petitioners argue that their exclusion must be inferred because it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws. The short answer is that it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon "persons." See *Union Pacific R.*

Continental Ore Co. v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 707–708 (1962); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 516 (1972) (STEWART, J., concurring in judgment).

[18] See also *Olsen* v. *Smith,* 195 U. S. 332, 344–345 (1904).

Co. v. *United States,* 313 U. S. 450 (1941).[19] See generally *Ohio* v. *Helvering,* 292 U. S. 360, 370 (1934);[20] *California* v. *United States,* 320 U. S. 577 (1944).[21] But those cases do not

[19] *Union Pacific* considered the applicability to a city of § 1 of the Elkins Act, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41 (1). That statute, in definitional language similar to that used in § 8 of the Sherman Act, makes it unlawful for *"any person, persons, or corporation* to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any [covered] common carrier . . . ." (Emphasis added.) Kansas City, Kan. (hereinafter Kansas), decided to develop its Public Levee as a metropolitan rail food terminal with wholesale and retail produce markets. Kansas constructed, operated, and owned the market, financing the development with municipal revenue bonds.

Another city, Kansas City, Mo. (hereinafter Missouri), also operated a rail food terminal within the same metropolitan area. Because Kansas believed that there was insufficient business in the metropolitan area to support both markets, it developed a plan to induce Missouri produce dealers to lease its facilities by offering cash payments and temporary reduction or abatement of rent. These payments exceeded the amounts needed to compensate the merchants for the costs of moving, settlement of existing leases, and disruption to business. Kansas adopted the payment plan by resolution, and its legality under Kansas law was sustained by the Kansas Supreme Court in a *quo warranto* proceeding. *State ex rel. Parker* v. *Kansas City,* 151 Kan. 1, 97 P. 2d 104, 98 P. 2d 101 (1939).

The Missouri terminal was served by a number of railroads, but the Kansas terminal was served virtually exclusively by the Union Pacific Railroad. As merchants moved from Missouri to Kansas, the Union Pacific's traffic necessarily increased while that of the other railroads shrank. The United States charged that the effect of Kansas' concessions to merchants was to permit them to ship produce over the Union Pacific more cheaply than on the competing railroads serving the Missouri terminal and, in effect, amounted to a rebate from Union Pacific's tariffs. The District Court permanently enjoined Kansas from giving cash or rental credits to Missouri dealers to move or for moving to Kansas.

On appeal to this Court, Kansas argued that because the concessions were lawful under state law, it could not be enjoined from making them, and the United States argued that the municipality was a "person" within the meaning of the statute and therefore subject to the Act on the same terms

[*Footnotes 20 and 21 are on p. 402*]

necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case.[22]

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as a private corporation. See Brief for Appellants, O. T. 1940, No. 594, pp. 233–235, 244–256; Brief for United States, O. T. 1940, No. 594, p. 72. See generally *id.*, at 59–68, 69–75.

The Court held that the municipality was a "person" subject to the Act, and, with a modification not important here, upheld the permanent injunction against it. Mr. Justice Roberts, in dissent, made the argument made by the cities here, that the statutory phrase "every person" was not sufficiently specific to justify the conclusion that Congress wished to subject municipal corporations and their officers to the criminal penalties for which the Act provided. It is significant that the cities' argument was rejected in the context of the antirebate provisions of the Elkins Act, a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act. Accord, Slater, Antitrust and Government Action: A Formula For Narrowing *Parker* v. *Brown,* 69 Nw. U. L. Rev. 71, 89 n. 100 (1974).

[20] *Ohio* v. *Helvering* sustained a federal tax liability imposed upon the State of Ohio in its business as a distributor of alcoholic beverages. The statute, Rev. Stat. § 3244 (1878), imposed a tax upon "[e]very person who sells or offers for sale [alcoholic beverages]." The applicable definitional section, Rev. Stat. § 3140 (1878), provided: "[W]here not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person." *Helvering* stated that "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found," 292 U. S., at 370, and held that "the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension." *Id.*, at 371.

[21] *California* held that a city and State are subject to §§ 16 and 17 of the Shipping Act, 1916, 39 Stat. 734, as amended, 46 U. S. C. §§ 815, 816, making unlawful certain practices of "person[s]," defined by § 1, 46 U. S. C. § 801, as including "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State . . . ."

[22] The question of remedy can arise only if the District Court, on the

Petitioners next argue that the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal.

Petitioners' contention that their goal is not private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. The allegations of the counterclaim, which for present purposes we accept as true,[23] aptly illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors.[24]

LP&L alleged that the city of Plaquemine contracted to provide LP&L's electric customers outside its city limits gas and water service only on condition that the customers pur-

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Court of Appeals remand, determines that petitioners' activities are prohibited by the antitrust laws.

[23] Cf. *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U. S. 738, 740 (1976). We use the allegations of the counterclaim only as a ready and convenient example of the kinds of activities in which a municipality may engage in the operation of its utility business which would have an anticompetitive effect transcending its municipal borders.

[24] See generally *Duke & Co.* v. *Foerster,* 521 F. 2d 1277 (CA3 1975); *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363 (CA9 1974); *Hecht* v. *Pro-Football, Inc.,* 144 U. S. App. D. C. 56, 444 F. 2d 931 (1971).

chase electricity from the city and not from LP&L.[25] The effect of such a tie-in is twofold. First, the tying contract might injure former LP&L customers in two ways. The net effect of the tying contract might be to increase the cost of electric service to these customers. Moreover, a municipality conceivably might charge discriminatorily higher rates to such captive customers outside its jurisdiction without a cost-justified basis. Both of these practices would provide maximum benefits for its constituents, while disserving the interests of the affected customers. Second, the practice would necessarily have an impact on the regulated public utility whose service is displaced.[26] The elimination of customers in an established service area would likely reduce revenues, and possibly require abandonment or loss of existing equipment the effect of which would be to reduce its rate base and possibly affect its capital structure. The surviving customers and the investor-owners would bear the brunt of these consequences. The decision to displace existing service, rather than being made on the basis of efficiency in the distribution of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extra-territorial impact and regional efficiency.[27]

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[25] See Respondent's Second Amended Counterclaim, App. 33.

[26] As one commentator has noted, our cases indicate that the protection against injury to the buyer is only one purpose of the rule against tying arrangements. Equally important is the need to protect competing sellers from competition unrelated to the merits of the product involved, and, concomitantly, to protect the market from distortion. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 60 (1958).

[27] While the investor-owned utilities in Louisiana are subject to regulation by the Louisiana Public Utilities Commission, municipally owned utilities are not subject to the jurisdiction of the PUC and hence apparently need not conform their expansion policies to whatever plans the PUC might deem advisable for coordinating service. See n. 44, *infra*.

The second allegation of LP&L's counterclaim,[28] is that petitioners conspired with others to engage in sham and frivolous litigation against LP&L before various federal agencies [29] and federal courts for the purpose, and with the effect, of delaying approval and construction of LP&L's proposed nuclear electric generating plant. It is alleged that this course of conduct was designed to deprive LP&L of needed financing and to impose delay costs, amounting to $180 million, which would effectively block construction of the proposed project. Such activity may benefit the citizens of Plaquemine and Lafayette by eliminating a competitive threat to expansion of the municipal utilities in still undeveloped areas beyond the cities' territorial limits. But that kind of activity, if truly anticompetitive,[30] may impose enormous unnecessary costs on the potential customers of the nuclear generating facility both within and beyond the cities' proposed area of expansion. In addition, it may cause significant injury to LP&L, interfering with its ability to provide expanded service.

Another aspect of the public-service argument [31] is that

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[28] See Respondent's Answer & Counterclaim, App. 18–20.

[29] The counterclaim alleged that petitioners engaged in sham litigation before the Securities and Exchange Commission, the Federal Power Commission, the Atomic Energy Commission, and the United States Department of Justice.

[30] See generally *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972).

[31] Petitioners have urged that the antimonopoly principles of the antitrust laws are inconsistent with the very nature of government operating as a monopoly in the public interest. They suggest that to apply antitrust principles to local governments will necessarily interfere with the execution of governmental programs. We do not agree. Acting as agents at the direction of the State, local governments are free to implement state policies without being subject to the antitrust laws to the same extent as would the State itself. See *infra,* at 413–417. On the other hand, it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the State.

because government is subject to political control, the welfare of its citizens is assured through the political process and that federal antitrust regulation is therefore unnecessary. The argument that consumers dissatisfied with the service provided by the municipal utilities may seek redress through the political process is without merit. While petitioners recognize, as they must, that those consumers living outside the municipality who are forced to take municipal service have no political recourse at the municipal level, they argue nevertheless that the customers may take their complaints to the state legislature. It fairly may be questioned whether the consumers in question or the Florida corporation of which LP&L is a subsidiary have a meaningful chance of influencing the state legislature to outlaw on an ad hoc basis whatever anticompetitive practices petitioners may direct against them from time to time. More fundamentally, however, that argument cuts far too broadly; the same argument may be made regarding anticompetitive activity in which any corporation engages. Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts,[32] which

[32] "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated,[*] the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed. . . ."

"[*] See Debates, 21 Cong. Rec. 2460, 3148; 2 Hoar, Autobiography of Seventy Years 364; Senator Edmunds, *The Interstate Trust and Commerce Act of 1890,* 194 No. Am. Rev. 801, 813, 'after most careful and earnest consideration by the Judiciary Committee of the Senate it was

would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," *United States* v. *Topco Associates,* 405 U. S. 596, 610 (1972), without regard to the amount of influence it might have with local or state legislatures.[33]

In 1972, there were 62,437 different units of local government in this country.[34] Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services,[35] while the remaining 38,552 repre-

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agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words "trade" and "commerce" or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration.'

"See also Senator Hoar who with Senator Edmunds probably drafted the bill (see A. H. Walker, History of the Sherman Law (1910), p. 27–28) in 36 Cong. Rec. 522, Jan. 6, 1903: 'We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. . . .' "

Apex Hosiery Co. v. *Leader,* 310 U S. 469, 489, and n. 10 (1940).

[33] The political-redress argument could also be made in the context of anticompetitive actions engaged in by the State itself. Our rejection of the argument here is not, however, inconsistent with the *Parker* doctrine. *Parker* did not reason that political redress is an adequate substitute for direct enforcement of the antitrust laws. Rather, *Parker* held that, in the absence of congressional intent to the contrary, a purpose that the antitrust laws be used to strike down the State's regulatory program imposed as an act of government would not be inferred. To the extent that the actions of a State's subdivisions are the actions of the State, the *Parker* exemption applies. See *infra,* at 413–417.

[34] 1 U. S. Bureau of the Census, 1972 Census of Governments, Governmental Organization 1 (1973). This figure (62,437) represents the total of county, municipal, township, and special district governments, but does not include the 15,781 independent school districts in the United States which, of course, have a much more narrowly defined range of functions and powers than those of local governmental units generally. See *id.,* at 1–5.

[35] See *id.,* at 4–5.

sented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State.[36] These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.[37] If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.[38]

We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. We therefore turn to petitioners' principal argument, that "*Parker*'s findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Brief for Petitioners 5.

II

Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.

Parker v. *Brown* involved the California Agricultural Pro-

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[36] See *id.*, at 1–3.

[37] See, *e. g.*, *Apex Hosiery Co.* v. *Leader*, *supra*, at 493–495, n. 15 (reviewing legislative history).

[38] See *United States* v. *Topco Associates*, 405 U. S., at 610; *Apex Hosiery Co.* v. *Leader*, *supra*, at 492–495, and n. 15; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229–235 (1948).

rate Act enacted by the California Legislature as a program to be enforced "through action of state officials . . . to restrict competition among the growers [of raisins] and maintain prices in the distribution of their commodities to packers." 317 U. S., at 346. The Court held that the program was not prohibited by the federal antitrust laws since "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.*, at 350–351, and "[t]he state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*, at 352.

Goldfarb v. *Virginia State Bar*, 421 U. S. 773 (1975), underscored the significance of *Parker*'s holding that the determinant of the exemption was whether the challenged action was "an act of government" by the State as "sovereign." *Parker* repeatedly emphasized that the anticompetitive effects of California's prorate program derived from "the state['s] command"; the State adopted, organized, and enforced the program "in the execution of a governmental policy." [39] 317 U. S., at 352. *Goldfarb*, on the other hand, presented the question "whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar," 421 U. S., at 775, violated the Sherman Act. Exemption was claimed on the ground that the Virginia State Bar was "a state agency by law." *Id.*, at 790. The Virginia Legislature had empowered the Supreme Court of Virginia to regulate the practice of law and had assigned the State Bar a role in that regulation as an administrative agency of the Virginia Supreme Court. But no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to mini-

[39] The state regulatory program involved in *Parker* furthered an important state interest which was consistent with federal policy. See *Parker*, 317 U. S., at 352–359.

mum-fee schedules. *Goldfarb* therefore held that it could not be said that the anticompetitive effects of minimum-fee schedules were directed by the State acting as sovereign. *Id.*, at 791. The State Bar, though acting within its broad powers, had "voluntarily joined in what is essentially a private anticompetitive activity," *id.*, at 792, and was not executing the mandate of the State. Thus, the actions of the State Bar had failed to meet "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe. . . ." *Id.*, at 790. *Goldfarb* therefore made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.

Bates v. *State Bar of Arizona*, 433 U. S. 350 (1977), involved the actions of a state agency to which the *Parker* exemption applied. *Bates* considered the applicability of the antitrust laws to a ban on attorney advertising directly imposed by the Arizona Supreme Court. In holding the antitrust laws inapplicable, *Bates* noted that "[t]hat court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.' " *Id.*, at 360, quoting *Goldfarb, supra*, at 791. We emphasized, moreover, the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker.[40]

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[40] The plurality opinion in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), also analyzed a "state action" exemption claim in terms of whether the challenged anticompetitive action was taken pursuant to state command. Detroit Edison, an electric utility regulated by Michigan, was charged by an independent seller of light bulbs with antitrust violations in the operation of a program which provided light bulbs without extra cost

These decisions require rejection of petitioners' proposition that their status as such automatically affords governmental entities the "state action" exemption.[41] *Parker*'s limitation

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to electricity customers. Detroit Edison, relying on *Parker,* defended on the ground that the light-bulb program was included in its rate filed with and approved by the State Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. *Cantor* rejected the claim, holding that since no Michigan statutes regulated the light-bulb industry, and since neither the Michigan Legislature nor the Public Service Commission had passed upon the desirability of such a light-bulb program, the Commission's approval of Detroit Edison's program did not "implement any statewide policy relating to light bulbs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." 428 U. S., at 585. THE CHIEF JUSTICE, while not joining all of the plurality opinion, agreed with this analysis. *Id.,* at 604–605.

Cantor's analysis is not, however, necessarily applicable here. *Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State.

[41] Petitioners argue that *Goldfarb,* like *Cantor* v. *Detroit Edison Co., supra,* expresses a limitation upon the circumstances under which *private* parties may be immunized from suit under the antitrust laws. They seek to avoid our holding in *Goldfarb* by suggesting that the State Bar, although a state agency by law acting in its official capacity, was somehow not a state agency because its official actions in issuing ethical opinions, see 421 U. S., at 791 n. 21, benefited its member-lawyers by discouraging price competition. We think it obvious that the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization. In addition to the decision in this case, every other Court of Appeals which has considered the immunity of state instrumentalities after *Goldfarb* has regarded it as having held that anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws. *Fairfax* v. *Fairfax Hospital Assn.,* 562 F. 2d 280, 284–285 (CA4 1977); *id.,* at 288 (concurring opinion); *Kurek* v. *Pleasure Drive-*

of the exemption, as applied by *Goldfarb* and *Bates*, to "official action directed by [the] state," arises from the basis for the "state action" doctrine—that given our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," 317 U. S., at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651, 667 n. 12 (1974); *Lincoln County* v. *Luning*, 133 U. S. 529 (1890) (political subdivisions not protected by Eleventh Amendment from immunity from suit in federal court). *Parker*'s limitation of the exemption to "official action directed by a state," 317 U. S., at 351, is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves.[42] In light of the serious economic dislocation which

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way & Park Dist., 557 F. 2d 580, 588–591 (CA7 1977), cert. pending, No. 77–440; *Duke & Co.* v. *Foerster*, 521 F. 2d, at 1280.

The acknowledgment of our Brother STEWART's dissent, *post*, at 433, that, as noted in *Indian Towing Co.* v. *United States*, 350 U. S. 61, 67–68 (1955), "'Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it'" (citation omitted), discloses the fallacy of his effort to distinguish *Goldfarb* on the ground that, although the State Bar was "'a state agency for some limited purposes,' . . . the price fixing it fostered was for the private benefit of its members and its actions were essentially those of a private professional group." *Post*, at 431.

[42] Without explication, our Brother STEWART's dissent states that our "reliance . . . on the basically irrelevant body of law under the Eleventh Amendment" is unfounded. *Ibid.* Rather, it is the statement that is unfounded. For the longstanding principle, of which Congress in 1890 was well aware, see *Lincoln County* v. *Luning*, 133 U. S. 529 (1890), is that political subdivisions are not as such sovereign. Certainly, nothing

could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, see *supra,* at 403–408, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

On the other hand, the fact that municipalities, simply by their status as such, are not within the *Parker* doctrine, does not necessarily mean that all of their anticompetitive activities are subject to antitrust restraints. Since "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits." *Louisiana ex rel. Folsom* v. *Mayor of New Orleans,* 109 U. S. 285, 287 (1883), the actions of municipalities may reflect state policy. We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. There remains the question whether the Court of Appeals erred in holding that further inquiry should be made to determine whether petitioners' actions were directed by the State.

III

The petitioners and our Brother STEWART's dissent focus their arguments upon the fact that municipalities may exercise the sovereign power of the State, concluding from this that any actions which municipalities take necessarily reflect state policy and must therefore fall within the *Parker* doctrine.

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in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), even remotely suggested the contrary; we search in vain for anything in that case that establishes a constructional principle of presumptive congressional deference in behalf of cities. Indeed our emphasis today in our conclusion, that municipalities are "exempt" from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself, makes it difficult to see how *National League of Cities* is even tangentially implicated.

But, the fact that the governmental bodies sued are cities, with substantially less than statewide jurisdiction, has significance. When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State.[43] Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed. 317 U. S., at 352. The most [44] that could be said is that state policy may be neutral.

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[43] "While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level." *Avery* v. *Midland County*, 390 U. S. 474, 481 (1968).

Although *Avery* concluded that the actions of local government are the actions of the State for purposes of the Fourteenth Amendment, state action required under *Parker* has different attributes. Cf. *Edelman* v. *Jordan*, 415 U. S. 651, 667 n. 12 (1974).

[44] Indeed, state policy may be contrary to that adopted by a political subdivision, yet, for a variety of reasons, might not render the local policy unlawful under state law. For example, a state public utilities commission might adopt, though we are not aware that the Louisiana PUC has done so, a policy prohibiting the specific anticompetitive practices in which the municipality engages, yet be unable to enforce that policy with respect to municipalities because it lacks jurisdiction over them. (The Louisiana PUC, in litigation unrelated to this case, has been held to lack jurisdiction over municipal utility systems whether operating within or without the municipality. *City of Monroe* v. *Louisiana Public Serv. Comm'n*, No. 177,757—Div. "I" (19th Jud. Dist. Ct., Sept. 14, 1976).) If that were the case, and assuming that there were no other evidence to the contrary, it would be difficult to say that state policy fosters, much less compels, the anticompetitive practices.

Louisiana Rev. Stat. Ann. § 33:1334 (G) (West Supp. 1977) provides

To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, see *supra,* at 403–408, without furthering the policy underlying the *Parker* "exemption." This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [45] 532 F. 2d, at 434.

The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the

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another illustration of the fact that a particular activity in which a subdivision technically has power to engage does not necessarily conform to, and may conflict with, state policy. Louisiana has authorized municipalities to create intergovernmental commissions as municipal instrumentalities jointly to construct and operate public services including utilities. §§ 33:1324, 33:1331–33:1334 (West Supp. 1977). Such commissions are, by definition, political subdivisions of the State. § 33:1334 (D) (West Supp. 1977). Section 1334 (G) nevertheless provides that "[n]othing in this Chapter shall be construed to grant an immunity to or on behalf of any [such] public instrumentality . . . from any antitrust laws of the state or of the United States."

[45] We reject petitioners' fallback position that an antitrust claim will not lie for anticompetitive municipal action which, though not state directed, is lawful under state law. See *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951); *Northern Securities Co.* v. *United States,* 193 U. S. 197, 344–351 (1904); cf. *Union Pacific R. Co.* v. *United States,* 313 U. S. 450 (1941) (discussed in n. 19, *supra*). See also n. 44, *supra.*

same time permitting purely parochial interests to disrupt the Nation's free-market goals.

Our Brother STEWART's dissent argues that the result we reach will "greatly . . . impair the ability of a State to delegate governmental power broadly to its municipalities." *Post,* at 438 (footnote omitted). That, with respect, is simply hyperbole. Our decision will render a State no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. The dissent notwithstanding, it is far too late to argue that a State's desire to insulate anticompetitive practices not imposed by it as an act of government falls within the *Parker* doctrine. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951). Moreover, by characterizing the *Parker* exemption as fully applicable to local governmental units simply by virtue of their status as such, the approach taken by the dissent would hold anticompetitive municipal action free from federal antitrust enforcement even when state statutes specifically provide that municipalities shall be subject to the antitrust laws of the United States. See generally La. Rev. Stat. Ann. § 33:1334 (G) (West Supp. 1977), quoted in n. 44, *supra.* That result would be a perversion of federalism.[46]

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal gov-

[46] Restating a theme made and rejected before, see *Cantor* v. *Detroit Edison Co.,* 428 U. S., at 640 (STEWART, J., dissenting), our Brother STEWART's dissent, *post,* at 438–440, likens judicial enforcement of the antitrust laws to a regime of substantive due process used by federal judges to strike down state and municipal economic regulation thought by them unfair. That analogy, of course, ignores the congressional judgment mandating broad scope in enforcement of the antitrust laws and simply reflects the dissent's view that such enforcement with respect to cities is unwise.

ernment from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may, as States did in *Parker* and *Bates,* direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. Compare *Bates* with *Goldfarb.* True, even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization. Cf. *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 377–382 (1973).[47] But assuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action [48] will not hobble the execution of legitimate governmental programs.

Affirmed.

MR. JUSTICE MARSHALL, concurring.

I agree with THE CHIEF JUSTICE, *post,* at 425–426, that any implied "state action" exemption from the antitrust laws should be no broader than is necessary to serve the State's legitimate purposes. I join the plurality opinion, however, because the test there established, relating to whether it is "state policy to displace competition," *ante,* at 413, incorporates within it the core of THE CHIEF JUSTICE'S concern. As the plurality opinion makes clear, it is not enough that the State

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[47] While the majority and dissent disagreed in *Otter Tail* over whether the specific practices of which plaintiffs complained could be regarded as unlawful anticompetitive restraints in light of the existence of federal regulation, there was agreement that a lawful monopolist could violate the antitrust laws. Compare 410 U. S., at 377–382 with *id.,* at 390–391, n. 7 (STEWART, J., concurring in part and dissenting in part).

[48] It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government. See generally Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 705 (1974).

"desire[s] to insulate anticompetitive practices." *Ante,* at 416. For there to be an antitrust exemption, the State must "impose" the practices "as an act of government." *Ibid.* State action involving more anticompetitive restraint than necessary to effectuate governmental purposes must be viewed as inconsistent with the plurality's approach.

MR. CHIEF JUSTICE BURGER, concurring in the Court's opinion in Part I and in the judgment.

This case turns, or ought to, on the District Court's explicit conclusion,[1] unchallenged here, that "[t]hese plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized." There is nothing in *Parker* v. *Brown,* 317 U. S. 341 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality. *Parker* was a case involving a suit against state officials who were administering a state program which had the conceded purpose of replacing competition in a segment of the agricultural market with a regime of governmental regulation. The instant lawsuit is entirely different. It arises because respondent took the perfectly natural step of answering a federal antitrust complaint—

[1] The District Court did not, of course, make a formal finding of fact to this effect since the counterclaim was disposed of on the basis of pleadings. Nonetheless, the District Court could reasonably conclude, as a matter of law, that these Cities are engaging in business activities which have as their aim the production of revenues in excess of costs. It certainly is the case that the Cities are attempting to provide a public service, but it is likewise undeniable that they seek to do so in the most profitable way. The Cities allege in their complaint, for example, that they have "been prevented from profitably expanding their businesses." App. 14. While it is correct that the Cities are ordinarily constrained from applying their net earnings as a private corporation would, this does not detract from their competitive posture and resulting incentive to engage in anticompetitive practices.

filed by competitors—with a counterclaim alleging serious violations of the Sherman Act.

There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market. It is true that petitioners are municipalities, but we should not ignore the reality that this is the only difference between the Cities and any other entrepreneur in the economic community. Indeed, the injuries alleged in petitioners' complaint read as a litany of economic woes suffered by a business which has been unfairly treated by a competitor:

> "As a direct and proximate result of the unlawful conduct hereinabove alleged, plaintiffs have: (1) been prevented from and continue to be prevented from *profitably expanding their businesses;* (2) *lost and continue to lose the profits* which would have resulted from the operation of an expanded, *more efficient and lower cost business;* (3) been deprived of and continue to be deprived of economies in the financing and operation of their systems; (4) *sustained and continue to sustain losses in the value of their businesses and properties;* and (5) incurred and continue to incur excessive costs and expenses they otherwise would not have incurred." App. 14. (Emphasis added.)

It strikes me as somewhat remarkable to suggest that the same Congress which "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade," *Atlantic Cleaner & Dyers, Inc.* v. *United States,* 286 U. S. 427, 435 (1932), would have allowed these petitioners to complain of such economic damage while baldly asserting that any similar harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law. To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a "fundamental national economic pol-

icy," *Carnation Co.* v. *Pacific Conference,* 383 U. S. 213, 218 (1966), which strongly disfavors immunity from its scope. See *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 350–351 (1963); *California* v. *FPC,* 369 U. S. 482, 485 (1962).

As I indicated, concurring in *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, 604 (1976), "in interpreting *Parker,* the Court has heretofore focused on the challenged *activity,* not upon the identity of the *parties* to the suit." Such an approach is surely logical in light of the fact that the Congress which passed the Sherman Act very likely never considered the kinds of problems generated by *Parker* and the cases which have arisen in its wake. *E. g., Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977); *Cantor, supra; Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975); see Slater, Antitrust and Government Action: A Formula for Narrowing *Parker* v. *Brown,* 69 Nw. U. L. Rev. 71, 84 (1974). It is even more dubious to assume that the Congress specifically focused its attention on the possible liability of a utility operated by a subdivision of a State. Not only were the States generally considered free to regulate commerce within their own borders, see, *e. g., United States* v. *E. C. Knight Co.,* 156 U. S. 1 (1895); *Kidd* v. *Pearson,* 128 U. S. 1 (1888), but manufacturing enterprises, in and of themselves, were not taken to be interstate commerce. *Id.,* at 20.

By the time *Parker* was decided, however, this narrow view of "interstate commerce" had broadened via the "affection doctrine" to include intrastate events which had a sufficient effect on interstate commerce. See *NLRB* v. *Fainblatt,* 306 U. S. 601, 605, and n. 1 (1939); cf. *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U. S. 738, 743 (1976). Given this development, and the Court's interpretation of "person" or "persons" in the Sherman Act to include States and municipalities, *ante,* at 394–397, along with the trend of allowing the reach of the Sherman Act to expand with broadening conceptions of congressional power under the Commerce Clause, see

Rex Hospital Trustees, supra, at 743 n. 2, one might reasonably wonder how the Court reached its result in *Parker.*

The holding in *Parker* is perfectly understandable, though, in light of the historical period in which the case was decided. The Court had then but recently emerged from the era of substantive due process, and was undoubtedly not eager to commence a new round of invalidating state regulatory laws on federal principles. See Verkuil, State Action, Due Process and Antitrust: Reflections on *Parker* v. *Brown,* 75 Colum. L. Rev. 328, 331–334 (1975). Responding to this concern, the *Parker* Court's interpretation of legislative intent reflects a "polic[y] of signal importance in our national traditions and governmental structure of federalism." *Ante,* at 400.

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker,* 317 U. S., at 351.

The *Parker* decision was thus firmly grounded on principles of federalism, the ambit of its inquiry into congressional purpose being defined by the Court's view of the requirements of "a dual system of government." [2]

This mode of analysis is as sound today as it was then, and I am surprised that neither the plurality opinion nor the dissents focus their attention on this aspect of *Parker.* Indeed,

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[2] Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to "state action" analysis under *Parker.* That is, we should not treat the *result* in the *Parker* case as cast in bronze; rather, the scope of the Sherman Act's power should parallel the developing concepts of American federalism.

it is even more puzzling that so much judicial energy is expended here on deciding a question not presented by the parties or by the facts of this case: that is, to what extent the Sherman Act impinges generally upon the monopoly powers of state and local governments. As I suggested at the outset, the issue here is whether the Sherman Act reaches the proprietary enterprises of municipalities.[3]

The answer to the question presented ought not to be so difficult. When *Parker* was decided there was certainly no question that a State's operation of a common carrier, even without profit and as a "public function," would be subject to federal regulation under the Commerce Clause. *United States* v. *California,* 297 U. S. 175, 183–186 (1936) ("[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity." *Id.,* at 183); see *Parden* v. *Terminal R. Co.,* 377 U. S. 184, 189–193 (1964); *California* v. *Taylor,* 353 U. S. 553, 568 (1957). Likewise, it had been held in *Ohio* v. *Helvering,* 292 U. S. 360 (1934), that a State, upon engaging in business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although States were not specifically mentioned in the statute. In short, the Court had already recognized, for purposes of federalism, the difference between a State's entrepreneurial personality and a sovereign's decision—as in *Parker*—to replace competition with regulation.[4]

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[3] I use the term "proprietary" only to focus attention on the fact that all of the parties are in a competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws. It is highly unlikely that Congress would have meant to impose liability only on some of these parties, when each possesses the means to thwart federal antitrust policy.

[4] MR. JUSTICE STEWART's dissent, *post,* at 433–434, attempts to blunt this analysis by noting that the "nongovernmental-governmental" distinction was criticized in *Indian Towing Co.* v. *United States,* 350 U. S. 61 (1955). I suggest no more, however, than what is obvious from our past cases: Petitioners' business activities are not entitled to *per se* exemption from the

I see nothing in the last 35 years to question this conclusion. In fact, the Court's recent decision in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), which rekindled a commitment to tempering the Commerce Clause power with the limits imposed by our structure of government, employs language strikingly similar to the words of Mr. Chief Justice Stone in *Parker:*

> "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U. S., at 845.

The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" alluded to above on a determination as to whether the State's interest involved " 'functions essential to separate and independent existence.' " *Ibid.,*

Sherman Act. This much ought to be quite clear from *United States* v. *California,* 297 U. S. 175 (1936), where the State operated a railroad, albeit without profit, and as a "public function." I cannot comprehend why the Cities here should be treated in a different manner. The only authority which MR. JUSTICE STEWART cites to the contrary, *Lowenstein* v. *Evans,* 69 F. 908 (CC SC 1895), was a case in which a State's complete monopolization of the liquor industry was challenged as violating the Sherman Act. But in that circumstance the State clearly *directed* the creation of a monopoly, thus bringing the matter within the *Parker* rationale. Compare *Ohio* v. *Helvering,* 292 U. S. 360 (1934).

quoting *Coyle* v. *Oklahoma,* 221 U. S. 559, 580 (1911). It should be evident, I would think, that the running of a business enterprise is not an integral operation in the area of traditional government functions. See *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U. S. 682, 695–696 (1976); *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat. 904, 907 (1824). Indeed, the reaffirmance of the holding in *United States* v. *California, supra,* by *National League of Cities, supra,* at 854 n. 18, strongly supports this understanding. Even if this proposition were not generally true, the particular undertaking at issue here—the supplying of electric service—has not traditionally been the prerogative of the State. *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345, 352–353 (1974).[5]

Following the path outlined above should lead us to a logical destination: Petitioners should be treated, for purposes of applying the federal antitrust laws, in essentially the same manner as respondent. This is not to say, of course, that the conduct in which petitioners allegedly engaged is automatically subject to condemnation under the Sherman Act. As the Court recognized in *Cantor* v. *Detroit Edison Co.,* 428 U. S., at 592–598, state-regulated utilities pose special analytical problems under *Parker.* It may very well be, for example, that a State, acting as sovereign, has imposed a system of governmental control in order "to avoid the consequences of unre-

[5] Such an ascertainment dovetails precisely with the law of Louisiana. There it is recognized that the powers of a municipal corporation are both public and private: As to the former, the city represents the State, discharging duties incumbent upon the State; as to the latter, it represents pecuniary and proprietary interests of individuals, and is held to the same responsibility as a private person. *Hall* v. *Shreveport,* 157 La. 589, 594, 102 So. 680, 681 (1925). A long line of Louisiana cases dealing explicitly with the subject of municipally owned electrical utilities holds that cities are to be governed by the same rules applicable to private corporations and individuals. See *Hicks* v. *City of Monroe Utilities Comm'n,* 237 La. 848, 112 So. 2d 635 (1959); *Elias* v. *Mayor of New Iberia,* 137 La. 691, 69 So. 141 (1915); *Hart* v. *Lake Providence,* 5 La. App. 294 (1926); *Bannister* v. *City of Monroe,* 4 La. App. 182 (1926).

strained competition." *Cantor, supra,* at 595. This is precisely what occurred in *Parker,* and there is no question that a utility's action taken pursuant to the command of such an "act of government," *Parker,* 317 U. S., at 352, would not be prohibited by the Sherman Act.

I agree with the plurality, then, that "[t]he *threshold inquiry* in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the *activity* is required by the State acting as sovereign." *Goldfarb,* 421 U. S., at 790. (Emphasis added.) But this is only the first, not the final step of the inquiry, for *Cantor* recognized that "all economic regulation does not necessarily suppress competition." 428 U. S., at 595. "There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.,* at 596.

I would therefore remand, directing the District Court to take an additional step beyond merely determining—as the plurality would—that any area of conflict between the State's regulatory policies and the federal antitrust laws was the result of a "state policy to displace competition with regulation or monopoly public service." [6] *Ante,* at 413. This supple-

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[6] While I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation, I would require a strong showing on the part of the defendant that the State so intended. Thus, I would not be satisfied, as the plurality and Court of Appeals apparently are, that the highest policymaking body in the State of Louisiana merely "contemplated" the activities being undertaken by the cities. See *ante,* at 415. I would insist, as the Court did in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 791 (1975), that the State *compel* the anticompetitive activity. Moreover, I would have the Cities demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was *essential* to the State's plan. Consequently,

mental inquiry would consist of determining whether the implied exemption from federal law "was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " 428 U. S., at 597.[7]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN,* and MR. JUSTICE REHNQUIST join, dissenting.

In *Parker* v. *Brown,* 317 U. S. 341, a California statute restricted competition among raisin growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." *Id.,* at 352. *Parker* v. *Brown* thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 136.

The principle of *Parker* v. *Brown* controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which *Parker* v. *Brown* held are not subject to the Sherman Act. But instead of applying the *Parker* doctrine, the Court today imposes new

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I do not disagree with the terms of the plurality's remand *as such;* I would simply ask for a stronger showing on the part of the Cities. I join the judgment, however, and the directions of the remand, because they represent at a minimum what I believe we should demand of petitioners.

[7] In *Cantor* this mode of analysis effectively answered Detroit Edison's claim that it was required by state law to engage in the allegedly anticompetitive activities. We "infer[red] that the State's policy [was] *neutral* on the question whether a utility should, or should not, have such a program," 428 U. S., at 585 (opinion of STEVENS, J.) (emphasis added), 604–605 (opinion of BURGER, C. J.), and consequently it could not be said that an exemption "was necessary in order to make the regulatory Act work."

*MR. JUSTICE BLACKMUN joins all but Part II–B of this opinion.

and unjustifiable limits upon it. According to the plurality, governmental action will henceforth be immune from the antitrust laws[1] only when "authorized or directed" by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Ante,* at 414, 413. Such a "direction" from the State apparently will exist only when it can be shown " 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Ante,* at 415. By this exclusive focus on a legislative mandate the plurality has effectively limited the governmental action immunity of the *Parker* case to the acts of a state legislature. This is a sharp and I think unjustifiable departure from our prior cases.

THE CHIEF JUSTICE adopts a different approach, at once broader and narrower than the plurality's. In his view, municipalities are subject to antitrust liability when they engage in "proprietary enterprises," *ante,* at 422, but apparently retain their antitrust immunity for other types of activity. But a city engaged in proprietary activity is to be treated as if it were a private corporation: that is, it is immune from the antitrust laws only if it shows not merely that its action was " 'required by the State acting as sovereign' " but also that such immunity is " 'necessary in order to make the [State's] regulatory Act work.' " *Ante,* at 425, 426. THE CHIEF JUSTICE's approach seems to me just as mistaken as the plurality's.

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[1] As the plurality acknowledges, *ante,* at 393 n. 8, *Parker* v. *Brown* did not create any exemption from the antitrust laws, but simply recognized that it was the intent of Congress that the Sherman Act should not apply to governmental action. It is thus hard to understand why the plurality invokes the doctrine that exemptions from the antitrust laws will not be lightly implied by subsequent enactment of a regulatory statute. This rule, which effects the accommodation of two federal statutes and rests on the principle that implied repeals are not favored, has no relevance to the *Parker* doctrine, which is based on an interpretation of the Sherman Act itself.

I

The fundamental error in the opinions of the plurality and THE CHIEF JUSTICE is their failure to recognize the difference between private activities authorized or regulated by government on the one hand, and the actions of government itself on the other.

A

In determining whether the actions of a political subdivision of a State as well as those of a state legislature are immune from the Sherman Act, we must interpret the provisions of the Act "in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 489. Those "particular evils" did not include acts of governmental bodies. Rather, Congress was concerned with attacking concentrations of private economic power unresponsive to public needs, such as "these great trusts, these great corporations, these large moneyed institutions." 21 Cong. Rec. 2562 (1890).[2]

Recognizing this congressional intent, the Court in *Parker* v. *Brown* held that the antitrust laws apply to private and not governmental action. The program there at issue was in

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[2] See also, *e. g.,* 20 Cong. Rec. 1458 (1889) ("the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell"); 21 Cong. Rec. 2728 (1890) ("transaction[s] the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community"); *id.,* at 3147 (remarks of Sen. George).

That the Sherman Act was enacted to deal with combinations of individuals and corporations for private business advantage has long been recognized by this Court. *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 135–136; *Apex Hosiery Co.* v. *Leader,* 310 U. S., at 492–493, and n. 15; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50, 58.

fact established by California's legislature, and not by one of its political subdivisions. But the Court nowhere held that the actions of municipal governments should not equally be immune from the antitrust laws. On the contrary, it expressly equated "the state or its municipality." 317 U. S., at 351. The *Parker* opinion repeatedly and carefully [3] emphasized that California's program was not the action of "private persons, individual or corporate." *Id.*, at 350.[4] The distinction established in *Parker* v. *Brown* was not one between actions of a state legislature and those of other governmental units. Rather, the Court drew the line between private action and governmental action.

There can be no doubt on which side of this line the petitioners' actions fall. "Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits." *Louisiana ex rel. Folsom* v. *Mayor of New Orleans,* 109 U. S. 285, 287; cf. *Reynolds* v. *Sims,* 377 U. S. 533, 575.[5] They have only such powers as are delegated them by the State of which they are a subdivision, and when they act they exercise the State's sovereign power. *Avery* v. *Midland County,* 390 U. S. 474, 480; *Breard* v.

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[3] See *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, 591, and n. 24.

[4] The Court assumed that California's program would violate the Sherman Act "if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," but noted that the program "was never intended to operate by force of individual agreement or combination." 317 U. S., at 350. The Court found nothing in the Sherman Act or its legislative history to suggest that "it was intended to restrain state action or official action directed by a state"; rather, the Act was intended "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations." *Id.,* at 351. It was "a prohibition of individual and not state action." *Id.,* at 352.

[5] See also, *e. g., Trenton* v. *New Jersey,* 262 U. S. 182, 185–186; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178; *The Mayor* v. *Ray,* 19 Wall. 468, 475; *Bradford* v. *Shreveport,* 305 So. 2d 487 (La.).

Alexandria, 341 U. S. 622, 640. City governments are not unaccountable to the public but are subject to direct popular control through their own electorates and through the state legislature.[6] They are thus a far cry from the private accumulations of wealth that the Sherman Act was intended to regulate.

B

The plurality today advances two reasons for holding nonetheless that the *Parker* doctrine is inapplicable to municipal governments. First, the plurality notes that municipalities cannot claim the State's sovereign immunity under the Eleventh Amendment. *Ante,* at 412. But this is hardly relevant to the question of whether they are within the reach of the Sherman Act. That question must be answered by reference to congressional intent, and not constitutional principles that apply in entirely different situations.[7] And if constitutional analogies are to be looked to, a decision much more directly related to this case than those under the Eleventh Amendment is *National League of Cities* v. *Usery,* 426 U. S. 833. That case, like this one, involved an exercise of Congress' power under the Commerce Clause, and held that States and their political subdivisions must be given equal deference. *Id.,* at 855–856, n. 20. The plurality does not advance any basis for its disregard of *National League of Cities* and its

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[6] Cf. *Barnes* v. *District of Columbia,* 91 U. S. 540, 544–545; *The Mayor* v. *Ray, supra,* at 475; *East Hartford* v. *Hartford Bridge Co.,* 10 How. 511. Under Louisiana law the petitioners' powers are subject to complete legislative control. See *Bradford* v. *Shreveport, supra.*

[7] That the particular factual and legal context is all important is shown by the fact that under other provisions of the Constitution a municipality is equated with a State. *E. g., Waller* v. *Florida,* 397 U. S. 387 (Double Jeopardy Clause); *Avery* v. *Midland County,* 390 U. S. 474, 480 (Fourteenth Amendment); *Trenton* v. *New Jersey, supra* (Impairment of Contract Clause). See also *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922, 927 n. 2 (28 U. S. C. § 1254 (2)).

reliance instead on the basically irrelevant body of law under the Eleventh Amendment.

Secondly, the plurality relies on *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773. The *Goldfarb* case, however, did not overrule *Parker* v. *Brown* but rather applied it. *Goldfarb* concerned a scheme regulating economic competition among private parties, namely, lawyers. The Court held that this "private anticompetitive activity," 421 U. S., at 792, could not be sheltered under the umbrella of the *Parker* doctrine unless it was compelled by the State. Since the bar association and State Bar could show no more than that their minimum-fee schedule "complemented" actions of the State, *id.,* at 791, the scheme was not immune from the antitrust laws. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384.

Unlike *Goldfarb,* this case does not involve any anticompetitive activity by private persons. As noted in *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 361, actions of governmental bodies themselves present "an entirely different case" falling squarely within the rule of *Parker* v. *Brown.* Although the State Bar in *Goldfarb* was "a state agency for some limited purposes," 421 U. S., at 791, the price fixing it fostered was for the private benefit of its members and its actions were essentially those of a private professional group. Cf. *Asheville Tobacco Board of Trade, Inc.* v. *FTC,* 263 F. 2d 502, 508–510 (CA4). Unlike a city, the Virginia State Bar surely is not "a political subdivision of the State." [8]

By requiring that a city show a legislative mandate for its activity, the plurality today blurs, if indeed it does not erase, this logical distinction between private and governmental action. In *Goldfarb* and in *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, the Court held that *private* action must be *compelled* by the state legislature in order to escape the reach of the Sherman Act. State compulsion is an appropriate require-

[8] *Worcester* v. *Street R. Co.,* 196 U. S. 539, 548.

ment when private persons claim that their anticompetitive actions are not their own but the State's, since a State cannot immunize private anticompetitive conduct merely by permitting it.[9] But it is senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions. See *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363, 369–370 (CA9).

C

The separate opinion of THE CHIEF JUSTICE does not rely on any distinctions between States and their political subdivisions. It purports to find a simpler reason for subjecting the petitioners to antitrust liability despite the fact that they are governmental bodies, namely, that *Parker* v. *Brown* does not protect "a State's entrepreneurial personality." *Ante*, at 422.[10] But this distinction is no more substantial a basis for disregarding the governmental action immunity in this case than the reasons advanced by the plurality.

A State may choose to regulate private persons providing certain goods or services, or it may provide the goods and services itself. The State's regulatory body in the former case, or a state-owned utility in the latter, will necessarily make economic decisions. These decisions may be responsive to similar concerns, and they may have similar anticompetitive effects.[11] Yet, according to THE CHIEF JUSTICE, the former

[9] See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 346.

[10] However, the District Court's "conclusion," *ante*, at 418, that the petitioners' electric utility service was a business activity engaged in for profit was not supported by any evidence (since the case was decided on a motion to dismiss) and is indeed challenged here by the petitioners in their reply brief.

[11] Of course, the fact—heavily relied upon both by the plurality and THE CHIEF JUSTICE—that the actions of cities may have anticompetitive effects misses the point. The whole issue before the Court today is whether conduct that would concededly subject a private individual to liability

type of governmental decision is immune from antitrust liability while the latter is not.

There is no basis for this distinction either in the Sherman Act itself or in our prior cases interpreting it. To the contrary, *Parker* v. *Brown* established that governmental actions are not regulated by the Sherman Act. See *supra,* at 428–430. And, as this Court has previously said:

> " 'Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.' *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383–384. On the other hand, it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." *Indian Towing Co.* v. *United States,* 350 U. S. 61, 67–68.

Nonetheless THE CHIEF JUSTICE would treat some governmental actions as governmental for purposes of the antitrust laws, and some as if they were not governmental at all.

Moreover, the scope of the immunity envisioned by THE CHIEF JUSTICE is virtually impossible to determine. The distinction between "proprietary" and "governmental" activities has aptly been described as a "quagmire." *Id.,* at 65. The "distinctions [are] so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.,* at 65–68. The separate opinion of THE CHIEF JUSTICE does nothing to make these distinctions any more substantial or understandable.[12] Indeed, even a mo-

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because of its anticompetitive nature is proscribed by the antitrust laws when undertaken by a city.

[12] In various places, the separate opinion of THE CHIEF JUSTICE refers to " 'business activit[ies] . . . in which a profit is realized,' " to "pro-

ment's consideration of the range of services provided today by governments shows how difficult it is to determine whether or not they are "proprietary." For example, if a city or State decides to provide water service to its citizens at cost on a monopoly basis, is its action to be characterized as "proprietary"? Whether it is "proprietary" or not, it is surely an act of government, as are the petitioners' actions in this case. Cf. *Lowenstein* v. *Evans*, 69 F. 908 (CC S. C.).[13] But THE CHIEF JUSTICE, like the plurality, ignores what seems to me the controlling distinction in this case, that between private and governmental action.

II

The Court's decision in this case marks an extraordinary intrusion into the operation of state and local government in this country. Its impact can hardly be overstated.

A

Under our federal system, a State is generally free to allocate its governmental power to its political subdivisions as it wishes.[14] A State may decide to permit its municipalities to exercise its police power without having to obtain approval of each law from the legislature.[15] Such local self-government

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prietary enterprises," to activities which have "the inherent capacity for economically disruptive anticompetitive effects," to those which are not "integral operation[s] in the area of traditional government functions," and to those not "the prerogative of the State."

[13] This case, involving a state liquor monopoly, was cited with approval in *Parker* v. *Brown*, 317 U. S., at 352.

[14] See, *e. g.*, *Lockport* v. *Citizens for Community Action*, 430 U. S. 259, 269; *Avery* v. *Midland County*, 390 U. S., at 481–482.

[15] Local self-government is broadest in "home rule" municipalities, which can be almost entirely free from legislative control in local matters. See Vanlandingham, Municipal Home Rule in the United States, 10 Wm. & Mary L. Rev. 269 (1968). Although the petitioners are not home rule cities, Louisiana's Constitution has a home rule provision, La. Const. of 1974, Art. 6, §§ 5, 6; La. Const. of 1921, Art. XIV, §§ 22, 40 (c), as

serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems. But today's decision, by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies.

This will follow from the plurality's emphasis on state legislative action, and the vagueness of the criteria it announces.[16] First, it is not clear from the plurality opinion whether a municipal government's actions will be immune from the Sherman Act if they are merely "authorized" by a state legislature or whether they must be legislatively "directed" in order to enjoy immunity. While the plurality uses these terms interchangeably, they can have very different meanings. See *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 592–593. A municipality that is merely "authorized" by a state statute to provide a monopoly service thus cannot be certain it will not be subject to antitrust liability if it does so.

Second, the plurality gives no indication of how specifically the legislature's "direction" must relate to the "action complained of." Reference to the facts of this case will show how elusive the plurality's test is. Stripped to its essentials, the counterclaim alleged that the petitioners engaged in sham litigation, maintained their monopolies by debenture covenants, foreclosed competition by long-term supply contracts,

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do the constitutions or statutes of at least 33 other States. Note, Antitrust Law and Municipal Corporations, 65 Geo. L. J. 1547, 1559 n. 77 (1977).

[16] While THE CHIEF JUSTICE has not joined those portions of the plurality opinion that discuss what is necessary to show that a challenged activity was required by the State, he would apparently require a still stronger, and hence less justifiable, showing of state legislative compulsion. *Ante,* at 425–426, n. 6.

and tied the sale of gas and water to the sale of electricity. Broadly speaking, these actions could be characterized as bringing lawsuits, issuing bonds, and providing electric and gas service, all of which are activities authorized by state statutes.[17] But in affirming the judgment of the Court of Appeals the Court makes evident that it does not consider these statutes alone a sufficient "mandate" to the cities.

On the other hand, the plurality states that a city need not "point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." *Ante,* at 415. Thus, it seems that the petitioners need not identify a statute compelling each lawsuit, each contract, and each debenture covenant.[18] But what intermediate showing

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[17] La. Rev. Stat. Ann. § 33:621 (West 1951):

"The inhabitants of the city shall continue a body politic and corporate by its present name and, as such, . . . may sue and be sued; . . . may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities; . . . [and] may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt . . . ."

See also La. Rev. Stat. Ann. §§ 33:1326 (West 1951), 33:4162, 33:4163 (West 1966).

[18] The plurality's suggestion that the Louisiana Legislature has expressed a state policy that the activities of cities should be subject to the antitrust laws, *ante,* at 414–415, n. 44, and 416, is both erroneous and irrelevant. Louisiana Rev. Stat. Ann. § 33:1334 (G) (West Supp. 1977) applies not to municipalities but only to utility commissions created jointly by several cities or counties; there is no comparable statute applicable to the petitioners. Moreover, the applicability of the federal antitrust laws is a matter of federal, not state, law; conversely, a State's restrictions on municipal action are a matter of state, not federal, law. A State can no more bring a person's conduct within the coverage of federal law when Congress has not done so than it can exempt a person's conduct from the operation of federal law if Congress has provided otherwise. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384.

of legislative authorization, approval, or command will meet the plurality's test I am unable to fathom.[19]

Finally, state statutes often are enacted with little recorded legislative history,[20] and the bare words of a statute will often be unilluminating in interpreting legislative intent. For example, do the Louisiana statutes permitting the petitioners to operate public utilities [21] "contemplate" that the petitioners might tie the sale of gas to the sale of electricity? Do those statutes, indeed, "contemplate" that electric service will be provided to city residents on a monopoly basis? Without legislative history or relevant statutory language, any answer to these questions would be purely a creation of judicial imagination.[22]

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[19] The Court imposes yet another unwarranted limitation upon governmental immunity from the antitrust laws. Apparently, a municipality can claim immunity only if the state legislature has mandated its action "pursuant to state policy to displace competition with regulation or monopoly public service." *Ante,* at 413 (plurality opinion); see *ante,* at 425 (opinion of BURGER, C. J.). Even had the Louisiana State Legislature passed a law specifically compelling the petitioners to litigate in an effort to prevent respondent from constructing its nuclear generating facility, compelling them to insert restrictive covenants in their debentures, and compelling the tying arrangements complained of, could such a law fairly be described as "displac[ing] competition with regulation or monopoly public service"? Would the Court thus deny the cities immunity for their actions even if they were compelled by the State which controlled them?

[20] See M. Price & H. Bitner, Effective Legal Research 73, 103 (3d ed. 1969).

[21] See n. 17, *supra.*

[22] This problem of statutory interpretation is exacerbated by the fact that today's decision will have "retroactive" application in two senses. First, antitrust liability can be premised on actions that have occurred in the past. Second, many of the statutes governing contemporary and future municipal activities were enacted years ago. Thus, municipalities will be faced with the difficult problem of establishing their antitrust immunity based on statutes that were enacted without any foreknowledge of the criteria announced by the Court today.

As a practical result of the uncertainties in today's opinions,[23] and of the plurality's emphasis on state legislative action, a prudent municipality will probably believe itself compelled to seek passage of a state statute requiring it to engage in any activity which might be considered anticompetitive. Each time a city grants an exclusive franchise, or chooses to provide a service itself on a monopoly basis, or refuses to grant a zoning variance to a business,[24] or even—as alleged in this case—brings litigation on behalf of its citizens, state legislative action will be necessary to ensure that a federal court will not subsequently decide that the activity was not "contemplated" by the legislature. Thus, the effect of today's decision is greatly to impair the ability of a State to delegate governmental power broadly to its municipalities.[25] Such extensive interference with the fundamentals of state government is not a proper function of the federal judiciary.[26]

B

Today's decision will cause excessive judicial interference not only with the procedures by which a State makes its governmental decisions, but with their substance as well.

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[23] The vagueness of the test proposed in the separate opinion of THE CHIEF JUSTICE, see *supra*, at 433–434, will only add to the confusion of a city trying to protect itself from antitrust liability.

[24] See *Whitworth* v. *Perkins*, 559 F. 2d 378 (CA5).

[25] By imposing antitrust liability on "proprietary" governmental activities, the test adopted in the opinion of THE CHIEF JUSTICE would further deter States from choosing to provide services themselves rather than regulating others.

[26] See *Sailors* v. *Board of Education*, 387 U. S. 105; *Williams* v. *Eggleston*, 170 U. S. 304, 310; see also *Baker* v. *Carr*, 369 U. S. 186, 289–290, and n. 23, and cases cited (Frankfurter, J., dissenting).

The plurality's emphasis on legislative action also leaves in doubt the status of state delegations of power to administrative agencies, unless they, too, can show that the legislature "directed" their actions. This, of course, defeats the whole purpose of establishing such agencies.

States should be "accorded wide latitude in the regulation of their local economies," *New Orleans* v. *Dukes,* 427 U. S. 297, 303, and in "the manner in which they will structure delivery of those governmental services which their citizens require." *National League of Cities* v. *Usery,* 426 U. S., at 847. The antitrust liability the Court today imposes on municipal governments will sharply limit that latitude.

First, the very vagueness and uncertainty of the new test for antitrust immunity is bound to discourage state agencies and subdivisions in their experimentation with innovative social and economic programs.[27] In the exercise of their powers local governmental entities often take actions that might violate the antitrust laws if taken by private persons, such as granting exclusive franchises, enacting restrictive zoning ordinances, and providing public services on a monopoly basis. But a city contemplating such action in the interest of its citizens will be able to do so after today only at the risk of discovering too late that a federal court believes that insufficient statutory "direction" existed, or that the activity is "proprietary" in nature.

Second, the imposition of antitrust liability on the activities of municipal governments will allow the sort of wide-ranging inquiry into the reasonableness of state regulations that this Court has forsworn.[28] For example, in *New Orleans* v. *Dukes, supra,* a city ordinance which, to preserve the character of a historic area, prohibited the sale of food from pushcarts unless the vendor had been in business for at least eight years, was challenged under the Equal Protection Clause of the Fourteenth Amendment. The Court upheld the constitutional validity of the ordinance. But it now appears that if Dukes had proceeded under the antitrust laws and claimed that the ordinance was an unreasonably anticompetitive limit

[27] See *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (Brandeis, J., dissenting).

[28] *Ferguson* v. *Skrupa,* 372 U. S. 726.

on the number of pushcart vendors, he might well have prevailed unless New Orleans could establish that the Louisiana Legislature "contemplated" the exclusion of all but a few pushcart vendors from the historic area. The "wide latitude" of the States "in the regulation of their local economies," exercised in *Dukes* by the city to which this power to regulate had been delegated, could thus be wholly stifled by the application of the antitrust laws.

C

Finally, today's decision will impose staggering costs on the thousands of municipal governments in our country. In this case, a not atypical antitrust action, the respondent claimed that it had suffered damages of $180 million as a result of only one of the antitrust violations it alleged. Trebled, this amounts to $540 million on this claim alone, to be recovered from cities with a combined population (in 1970) of about 75,000.[29] A judgment of this magnitude would assure bankruptcy for almost any municipality against which it might be rendered.[30] Even if the petitioners ultimately prevail, their citizens will have to bear the rapidly mounting

[29] U. S. Department of Commerce, Bureau of the Census, 1970 Census of Population, Number of Inhabitants, United States Summary, Table 31 (1971).

[30] The Court indicates that the remedy of treble damages might not be "appropriate" in antitrust actions against a municipality. *Ante,* at 401–402, and n. 22. But the language of § 4 of the Clayton Act, 15 U. S. C. § 15 (1976 ed.), is mandatory on its face: It requires that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages by him sustained" (emphasis supplied). Cf., *e. g.,* 35 U. S. C. § 284. And the legislative history cited by MR. JUSTICE BLACKMUN, *post,* at 443 n. 2, demonstrates that Congress has understood the treble-damages provision to be mandatory and has refused to change it. The Court does not say on what basis a district court could possibly disregard this clear statutory command. Cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134.

costs of antitrust litigation through increased taxes or decreased services.[31] The prospect of a city closing its schools, discharging its policemen, and curtailing its fire department in order to defend an antitrust suit would surely dismay the Congress that enacted the Sherman Act.[32]

For all of the reasons discussed in this opinion, I respectfully dissent.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE STEWART's dissent with the exception of Part II–B, but wish to note that I do not take his opinion as reaching the question whether petitioners should be immune under the Sherman Act even if found to have been acting in concert with private parties. To grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded officials of the States themselves. See *Parker* v. *Brown,* 317 U. S. 341, 351–352 (1943) ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States,* 313 U. S. 450"). The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all. If the view that municipalities are not subject to the full reach

[31] Legal fees to defend one current antitrust suit have been estimated as at least one-half million dollars a month. N. Y. Times, June 27, 1977, p. 41, col. 6; *id.,* Sept. 4, 1977, section 3, p. 5, col. 1.

[32] Treble-damages liability can, of course, be ruinous to a private corporation as well. But a private corporation, organized for the purpose of seeking private profit, is surely very different from a city providing essential governmental functions, and shareholders do not stand in the same relation to their corporation as do residents or taxpayers to the city in which they live. An investment in a corporation is essentially a business decision; a shareholder takes the risks of corporate losses in the hope of corporate profits. A citizen's relationship to his city government is obviously far different.

of Sherman Act liability had commanded a majority, a remand for consideration of this more limited exception would be in order.

In light of the fact that the plurality and THE CHIEF JUSTICE have concluded that municipalities should be subject to broad Sherman Act liability, I must question the nonchalance with which the Court puts aside the question of remedy. *Ante,* at 402, and n. 22. It is a grave act to make governmental units potentially liable for massive treble damages when, however "proprietary" some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection. The several occasions in the past when the Court has found that Congress intended to subject municipalities and States to liability as "persons" or "corporations" do not provide the support for today's holding that the plurality opinion would pretend. *Ante,* at 400–402, and nn. 19–21. The Court cites previous constructions of the Elkins Act; the federal tax on sellers of alcoholic beverages; and the Shipping Act, 1916. But the financial penalties available under those Acts do not even approach the magnitude of the treble-damages remedy provided by the antitrust laws.[1] Nor has

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[1] Respondent seeks treble damages in excess of $540 million in this case. If divided among Plaquemine and Lafayette residents, that penalty would exceed $28,000 for each family of four.

Under the federal tax on sellers of alcoholic beverages, 26 U. S. C. §§ 11 and 205 (1926 ed.), construed in *Ohio* v. *Helvering,* 292 U. S. 360, 370–371 (1934), the potential liability of the State of Ohio was $25 for each retail, and $100 for each wholesale, outlet. Under §§ 16 and 17 of the Shipping Act, 1916, 46 U. S. C. §§ 815, 816 (1940 ed.), construed in *California* v. *United States,* 320 U. S. 577, 585–586 (1944), a violation was a misdemeanor punishable by a $5,000 fine. The Court's only arguable support lies in § 1 of the Elkins Act, 49 U. S. C. § 41, construed in *Union Pacific R. Co.* v. *United States,* 313 U. S. 450 (1941). Even there, the potential liability of a municipality not acting as a common carrier is a $20,000 fine, and, were illegal transportation rebates to be received by the municipality, three times the amount of the rebate. Even if a municipality were held

the Court come to grips with the plainly mandatory language of § 4 of the Clayton Act, 15 U. S. C. § 15 (1976 ed.): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages by him sustained" (emphasis supplied), and the repeated occasions on which Congress has rejected proposals to make the treble-damages remedy discretionary.[2] It is one thing to leave open the question of remedy if there is a conceivable defense to damages whose theory is consistent with the mandatory language of the Clayton Act (*e. g.*, in the case of private utilities subject to state tariffs, that their conduct was required by state law and hence was involuntary). See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 614–615, n. 6 (1976) (opinion concurring in judgment). It is quite another to delay the question of remedy in the absence of any suggested basis for a defense, especially where the prospect of insolvency for petitioner cities would so threaten the welfare of their inhabitants. The sensible course, it seems to me, is to consider the range of liability in light of the range of defendants for whom Sherman Act penalties would be appropriate.

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to be operating a common carrier under that Act, potential financial liability is limited to the fine and the actual damages caused by the prohibited conduct. 49 U. S. C. § 8.

[2] *E. g.*, H. R. 4597, 83d Cong., 1st Sess. (1953); H. R. 6875, 84th Cong., 1st Sess. (1955); H. R. 978, 85th Cong., 1st Sess. (1957); H. R. 1184, 86th Cong., 1st Sess. (1959); H. R. 190, 87th Cong., 1st Sess. (1961). See also Hearings on H. R. 4597 before Subcommittee No. 3 of the House Committee on the Judiciary, 83d Cong., 1st Sess. (1953); Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., 189, 509–522, 2246–2249 (1955).

MASSACHUSETTS *v.* UNITED STATES

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

No. 76–1500. Argued December 6, 1977—Decided March 29, 1978

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem, Congress enacted the Airport and Airway Revenue Act of 1970, which imposes an annual "flat fee" registration tax on all civil aircraft, including those owned by the States and by the Federal Government, that fly in the navigable airspace of the United States. The Act also imposes a 7-cent-per-gallon tax on aircraft fuel, which, together with a 5-cent-per-pound aircraft tire and 10-cent-per-pound tube tax and the registration tax, was intended to reflect the cost of benefits from the programs to noncommercial general aircraft, but States were exempted from the fuel, tire, and tube taxes. After the registration tax was collected under protest from it with respect to a helicopter it used exclusively for police functions, the Commonwealth of Massachusetts instituted this refund action, contending that the United States may not constitutionally impose a tax that directly affects the essential and traditional state function of operating a police force. The District Court dismissed the complaint on the ground, *inter alia*, that the registration tax was a user fee which did not implicate the constitutional doctrine of implied immunity of state government from federal taxation. The Court of Appeals affirmed. *Held:* The registration tax does not violate the implied immunity of a state government from federal taxation. Pp. 453–470.

(a) A State enjoys no constitutional immunity from a nondiscriminatory federal revenue measure which operates only to ensure that each member of a class of special beneficiaries of a federal program pays a reasonable approximation of its fair share of the cost of the program to the Federal Government. Pp. 454–463.

(b) Even if it were feasible for the Federal Government to recover all costs of a program through charges for measurable amounts of use of its facilities, rather than by imposing a flat fee, so long as the federal taxes imposed do not discriminate against state functions, are based on a fair approximation of the State's use of the facilities, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits supplied, there can be no substantial basis for a claim that the Federal Government may be using its

taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services. Pp. 463–467.

(c) Here, the registration tax (1) is nondiscriminatory, since it applies not only to private users of the airways, but also to civil aircraft operated by the United States; (2) is, together with the 7-cent-per-gallon fuel tax and the 5-cent-per-pound tire and 10-cent-per-pound tube tax, a fair approximation of the cost of the benefits civil aircraft receive from the federal programs, since, even though the taxes do not give weight to every factor affecting appropriate compensation for airport and airway use, the fuel tax and tire and tube tax are geared directly to use whereas the registration tax is designed to give weight to factors affecting the level of use of the navigational facilities; and (3) is not excessive in relation to the cost of the Government benefits supplied, since not only have the user fees proved to be insufficient to cover the annual civil aviation outlays but the States, being exempt from the fuel tax, pay far less than private noncommercial users of the airways. Pp. 467–470.

548 F. 2d 33, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I, II–C, and III of which STEWART and POWELL, JJ., joined. STEWART and POWELL, JJ., filed an opinion concurring in part and concurring in the judgment, *post*, p. 470. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 471. BLACKMUN, J., took no part in the decision or consideration of the case.

Terence P. O'Malley, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Francis X. Bellotti,* Attorney General, and *S. Stephen Rosenfeld* and *Margot Botsford,* Assistant Attorneys General.

Allan A. Ryan, Jr., argued the cause for the United States. On the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith,* and *Ann Belanger Durney.**

**W. Bernard Richland* and *Samuel J. Warms* filed a brief for the city of New York as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.*

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem, Congress in 1970 imposed an annual registration tax on all civil aircraft that fly in the navigable airspace of the United States. 26 U. S. C. § 4491.[1] The constitutional question presented in this case is whether this tax, as applied to an aircraft owned by a State and used by it exclusively for police functions, violates the implied immunity of a state government from federal taxation. We hold that it does not.

I

Since the passage of the Air Commerce Act of 1926, 44 Stat. 568, the Federal Government has expended significant amounts of federal funds to develop and strengthen an integrated national airsystem and to make civil air transportation safe and practical. It has established, developed, and improved a wide array of air navigational facilities and services that benefit all aircraft flying in the Nation's navigable

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*MR. JUSTICE STEWART and MR. JUSTICE POWELL join only Parts I, II-C, and III of this opinion. MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join the entire opinion.

[1] In pertinent part, § 4491 provides:

"(a) Imposition of Tax.

"A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

"(1) $25, plus

"(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight."

Title 26 U. S. C. § 4492 (c)(2) defines "use" as flying an aircraft "in the navigable airspace of the United States." "[T]axable civil aircraft" includes aircraft owned and operated by a State. § 4492 (a); see n. 6, *infra*.

airspace,[2] and it has also made substantial grants to state and local governments to assist in planning and developing airports.

In 1970, after an extended study of the national airsystem, Congress concluded that the level of annual federal outlays on aviation, while significant, had not been sufficient to permit the national airsystem to develop the capacity to cope satisfactorily with the current and projected growth in air transportation. To remedy this situation, Congress enacted two laws, the Airport and Airway Development Act of 1970 (Development Act), 84 Stat. 219, and the Airport and Airway Revenue Act of 1970 (Revenue Act), 84 Stat. 236, which together constitute a comprehensive program substantially to expand and improve the national airport and airway system over the decade beginning July 1, 1970. In the Development Act, Congress provided for vastly increased federal expenditures both for airport planning and development and for the further expansion of federal navigational services. More importantly for present purposes, the Revenue Act adopted several measures to ensure that federal outlays that benefited the civil users of the airways would, to a substantial extent, be financed by taxing measures imposed on those civil users.[3]

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[2] These include: assisting and controlling aircraft operations during takeoffs and landings at our Nation's larger airports; air traffic control to Instrument Flight Rule (IFR) users and navigation assistance to all categories of aircraft after takeoff operations are concluded and prior to landing; and miscellaneous services for both Visual Flight Rule (VFR) and IFR users, such as filing flight plans, weather information, and rescue operations. See Department of Transportation, Airport and Airway Cost Allocation Study, Part 1, Report: Determination, Allocation, and Recovery of System Costs 21 (1973) (hereinafter DOT Study). These services are provided, principally by the Federal Aviation Administration, pursuant to 49 U. S. C. § 1348.

[3] Believing that the public at large benefits from the existence and operation of the military, Congress decided that the costs imposed on the national airsystem by the military should be paid for from general revenues. See H. R. Rep. No. 91–601, pp. 3–4, 38 (1969); cf. S. Rep. No. 91–699, pp. 4–5, 7 (1970).

The Revenue Act, therefore, enacted for the first time, or increased, several taxes on civil aviation. Congress conceived of each of these revenue measures as user fees and calculated that they would produce revenues that would defray a significant and increasing percentage of the civil share of the annual total federal airport and airway expenditures for the fiscal years 1970 to 1979.[4] To assure that the revenues from these user taxes would be expended only for the expansion, improvement, and maintenance of the air transportation system, an Airport and Airway Trust Fund was created, and Congress provided that the amount of revenue generated by the aviation user charges would, during the 1970's, be paid into this trust fund, as would any money appropriated from general revenues for aviation purposes.[5] Revenue Act, § 208, 84 Stat. 250, 49 U. S. C. § 1742; see H. R. Rep. No. 91–601, p. 41 (1969) (hereinafter H. R. Rep.); S. Rep. No. 91–706, pp. 23–25 (1970) (hereinafter S. Rep.).

The financing measures in the Revenue Act are intended to promote two purposes. First, they are designed to serve the congressional policy of having those who especially benefit from Government activity help bear the cost. See H. R. Rep.

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[4] Congress projected that the total aviation expenditures would increase from $1,029 million in fiscal 1970 to $1,727 million in fiscal 1979 and that total revenues from the user taxes would increase from $446.5 million in fiscal 1970 to $1,399.9 million in fiscal 1979. The additional required appropriations or the total deficit would thus decrease from $582.5 million in fiscal 1970 to $327.1 million in fiscal 1979. Because the military share of the total expenditures—which is paid from general revenues, see n. 3, *supra*—will increase from $178 million in fiscal 1970 to $291 million in fiscal 1979, civil aviation would pay an increasing share of the federal expenditures allocable to it. The "civil share deficit" would decrease from $404.5 million in fiscal 1970 to $36.1 million in fiscal 1979. H. R. Rep. No 91–601, p. 38 (1969); see S. Rep. No. 91–699, pp. 4–5, 7 (1970).

[5] The authority to use trust fund monies for the operating expenses of the air navigational facilities, temporarily suspended in 1971, see Pub. L. 92–172, 85 Stat. 491, has since been restored. See 90 Stat. 873–874.

38; S. Rep. 5. Second, the financing provisions are intended to ensure that the capacity of the national air system would not again be found to be insufficient to meet the demands of increasing use. Congress believed that the inadequacy in past levels of investment in aviation had been due to the substantial competition from nonaviation budgetary requests. See H. R. Rep. 3. The trust fund and the user fees were, therefore, established to provide funding for aviation that would "generally match and grow with the demand" for use of the airways. *Id.*, at 8.

The tax challenged in this case is one of several adopted in the Revenue Act, the annual aircraft registration tax. Revenue Act, § 206, 26 U. S. C. § 4491. It imposes an annual "flat fee" tax on all civil aircraft—including those owned by State and National Governments [6]—that fly in the navigable

[6] The terms of the statutory provision make clear that Congress intended it to apply to state-owned aircraft. By the statutory terms, the levy is to be imposed on "taxable civil aircraft," which is defined by 26 U. S. C. § 4492 (a)(1) to include any engine-driven aircraft "registered, or required to be registered under section 501 (a) of the Federal Aviation Act of 1958 [72 Stat. 771] (49 U. S. C. § 1401 (a))." Since § 501 (a) of the Federal Aviation Act provides that the only aircraft that may be lawfully operated without having been registered are aircraft of the national defense forces of the United States, there is no question under the statute but that state-owned aircraft are subject to the registration tax.

The legislative history supports this view. In connection with the discussion of one of the other taxes enacted by the Revenue Act, the Committee Reports explained that it was terminating the statutory exemption that previously had operated to benefit the States "since this tax is now generally viewed as a user charge[, so] there would appear to be no reason why these governmental [bodies] should not pay for their share of the use of the airway facilities." H. R. Rep. 46; see S. Rep. 17–18. Obviously, this reasoning is equally applicable to all measures the Congress conceived of as user fees. Moreover, the Committee Reports' discussion of § 4491 explicitly stated that the tax was "based upon the premise that *all* aircraft should pay a basic fee as an entry fee to use the system," H. R. Rep. 40 (emphasis supplied); see S. Rep. 20–21, and further that the tax applied to civil aircraft owned by the United States. See H. R.

airspace of the United States.[7] The amount of the annual charge depends upon the type and weight of the aircraft: those with piston-driven engines pay $25 plus 2 cents per pound of the maximum certificated takeoff weight in excess of 2,500 pounds whereas turbine-powered aircraft pay $25 plus 3½ cents per pound of the maximum certificated takeoff weight. See n. 1, *supra*.

As is apparent from both the rate of tax in § 4491 and the legislative history of the Revenue Act, Congress did not contemplate that the annual registration tax would generate significant amounts of revenue, but rather that the bulk of the funds generated by the system would come from other user taxes,[8] each of which is related more directly to the level

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Rep. 49; S. Rep. 20. Since the statute by its terms includes state-owned aircraft and since the legislative history broadly indicates that all government-owned civil aircraft are covered, petitioner has conceded that the statute applies. See Brief for Petitioner 8–9, n. 1; Tr. of Oral Arg. 6–7.

[7] The navigable airspace of the United States is administratively delineated pursuant to 49 U. S. C. § 1301 (24).

[8] The following table from the legislative history illustrates the congressional understanding that the annual registration fee would recover only a small percentage of the costs imposed on the airsystem by civil aviation:

"TABLE 3.—REVENUES FROM AVIATION USER TAXES, SELECTED FISCAL YEARS, 1965–79

[In millions of dollars]

	Actual			Estimated			
User tax	1965	1967	1969	1970	1971	1974	1979
Passenger ticket tax	$147.5	$194.5	$259.5	$373.7	$507.2	$679.2	$1,083.2
Cargo tax, 5 percent				18.7	42.7	63.1	134.2
Fuel tax	16.7	14.4	11.0	26.5	45.8	54.3	76.7
International departure tax, $3				12.4	27.1	36.5	58.7
Taxes on tires and tubes used on aircraft	2.0	2.4	2.6	2.8	3.0	3.5	5.0
Aircraft registration taxes				12.4	26.6	32.3	42.1
Total	166.2	211.3	273.1	446.5	652.4	868.9	1,399.9

"Source: U. S. Treasury Department and Federal Aviation Administra-

of use of the navigable airspace. Thus, commercial aviation's share of the cost of the federal activities would be raised primarily through an 8% tax on the price of domestic air passenger tickets, see Revenue Act, § 203, 26 U. S. C. § 4261; a $3 "head tax" on international flights originating in the United States, *ibid.;* and a 5% tax on the cost of transporting property by air, Revenue Act, § 204, 26 U. S. C. § 4271. Noncommercial general aviation—the generic category that includes state police aircraft—would pay most of its share through a 7-cent-per-gallon tax on aircraft fuel. See Revenue Act, § 202, 26 U. S. C. § 4041.

But while the registration tax was expected to produce only modest revenues and was understood to be only indirectly related to system use, Congress regarded it as an integral and essential part of the network of user charges.[9] Moreover, it is

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tion, Office of Aviation Economics." H. R. Rep. 39 (footnotes omitted); see S. Rep. 10.

Indeed, this table overstates the estimated revenues from the registration tax since it assumes that the rate of tax on piston aircraft will be $25 plus 2 cents per pound, rather than the $25 plus 2 cents for each pound in excess of 2,500 pounds that is provided for in § 4491. *Ibid.* As the table indicates, aircraft are subject to an aircraft tire and tube tax, which is imposed by 26 U. S. C. § 4071, but this is a highly insignificant revenue-generating measure.

[9] The reasons the registration tax was added to the Revenue Act are clearly stated in the Committee Reports:

"The [Committee] determine[s] that, to some extent, the costs of the airport and airway system are incurred because many aircraft may use the system at some time, even though most of the time most of these craft are not in the air. In addition, it appears that heavier and faster aircraft are generally responsible for much of the increased need of sophisticated control facilities and approach and landing facilities." H. R. Rep. 48; see S. Rep. 8–9.

Thus, the registration tax was included in the bill in an attempt to recover part of the marginal cost imposed on the national airsystem by the addition of a possible user and to ensure that the fee system reflects in some manner the additional costs that heavier and faster (*i. e.,* turbine-powered) aircraft impose upon it.

the only tax imposed on those general noncommercial aircraft owned and operated by States. Although Congress was generally of the view that the States should be required to pay aviation user charges since "there would appear to be no reason why [they] should not pay for their fair share of the use of the airway facilities," H. R. Rep. 46; see S. Rep. 17–18, and in fact made the States subject to all the other user charges, it retained a statutory exemption for the States from the aircraft fuel, tire, and tube taxes. See 68A Stat. 480, as amended, 26 U. S. C. § 4041 (g) (1976 ed.); 26 U. S. C. § 4221.

The Commonwealth of Massachusetts owns several aircraft that are subject to the tax imposed by § 4491, including a helicopter which the Commonwealth uses exclusively for patrolling highways and other police functions.[10] In 1973 the United States notified the Commonwealth that it had been assessed for a tax of $131.43 on this state police helicopter for the period from July 1, 1970, to June 30, 1971. The Commonwealth refused to pay and the United States thereafter levied on one of the Commonwealth's bank accounts and collected this tax, plus interest and penalties.

Pursuant to 28 U. S. C. § 1346 (1970 ed. and Supp. V), the Commonwealth then instituted this action for a refund of the money collected, contending that the United States may not constitutionally impose a tax that directly affects the essential and traditional state function of operating a police force. The District Court dismissed the complaint in an unreported decision. It first indicated its view that the most recent decisions of this Court had so limited a State's constitutional immunity from federal taxation that a constitutional challenge could not succeed unless the tax was discriminatory or the State showed that the tax actually impaired a State function. Because the Commonwealth had not alleged that this nondiscrimi-

[10] At oral argument, the Commonwealth informed us that it owns three aircraft in addition to the helicopter that is the subject of this case. See Tr. of Oral Arg. 4.

natory annual fee had in fact impaired the operations of its police force, the District Court concluded dismissal was mandatory. In the alternative, the District Court held that the tax in question is a user fee and that, whatever the present scope of the constitutional principle of implied immunity of a state government from federal taxes, a user fee does not implicate the doctrine. The Court of Appeals for the First Circuit affirmed, solely on the latter ground. 548 F. 2d 33 (1977). We granted certiorari, 432 U. S. 905 (1977), to resolve a conflict between this decision and *Georgia Dept. of Transp.* v. *United States,* 430 F. Supp. 823 (ND Ga. 1976), appeal docketed, No. 77–16. See also *City of New York* v. *United States,* 394 F. Supp. 641 (SDNY 1975), affirmance order, 538 F. 2d 308 (CA2 1976); *Texas* v. *United States,* 72–2 USTC ¶ 16.048 (WD Tex. 1972), aff'd, 73–1 USTC ¶ 16,085 (CA5 1973) (holding that 8% air passenger tax may constitutionally be applied to state employees traveling on official state business). We affirm.

II

A review of the development of the constitutional doctrine of state immunity from federal taxation is a necessary preface to decision of this case. For while the Commonwealth concedes that certain types of user fees may constitutionally be applied to its essential activities,[11] it urges that the decisions of this Court teach that the validity of any impost levied against a State must be judged by a "bright-line" test: If the measure is labeled a tax and/or imposed or collected pursuant to the Internal Revenue Code, it is unconstitutional as applied to an essential state function even if the revenue measure

[11] At oral argument, it conceded that a State could not, even when performing traditional governmental activities, insist on the right to have the Postal Service carry unstamped letters or—if there were such roads—to use federally constructed toll roads without paying the required toll. See *id.,* at 8. Its argument before this Court is that there is a difference of constitutional magnitude between such charges and the tax imposed by § 4491.

operates as a user fee. See Brief for Petitioner 14–28. And the Commonwealth maintains that § 4491 is invalid for the additional reason that the values furthered by this constitutional doctrine necessarily require the invalidation of a levy such as that under § 4491 which, as an annual fee, is not directly related to use. See Brief for Petitioner 28–41. Neither contention has merit. The principles that have animated the development of the doctrine of state tax immunity and the decisions of this Court in analogous contexts persuade us that a State enjoys no constitutional immunity from a nondiscriminatory revenue measure, like § 4491, which operates only to ensure that each member of a class of special beneficiaries of a federal program pay a reasonable approximation of its fair share of the cost of the program to the National Government.[12] Like the Court of Appeals, we have no occasion to decide either the present vitality of the doctrine of state tax immunity or the conditions under which it might be invoked.

A

That the existence of the States implies some restriction on the national taxing power was first decided in *Collector* v. *Day,* 11 Wall. 113 (1871). There this Court held that the immunity that federal instrumentalities and employees then enjoyed from state taxation, see *Dobbins* v. *Commissioners,* 16 Pet. 435 (1842); *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), was to some extent reciprocal and that the salaries paid state judges were immune from a nondiscriminatory federal tax. This immunity of State and Federal Governments

[12] The Commonwealth's arguments and the questions presented in its brief to this Court, see Brief for Petitioner 3–4, establish that our Brother REHNQUIST's dissent errs in suggesting that the discussion establishing this proposition is superfluous. See *post,* at 472. Moreover, the dissent's assertion to the contrary notwithstanding, the United States' brief in this Court recognizes that a decision validating § 4491 requires rejection of the Commonwealth's submission concerning the scope of the doctrine of state tax immunity. See Brief for United States 22–23, n. 19.

from taxation by each other was expanded in decisions over the last third of the 19th century and the first third of this century, see, *e. g., Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218 (1928); *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570 (1931) (sales from a private person to one sovereign may not be taxed by the other), but more recent decisions of this Court have confined the scope of the doctrine.

The immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause, but the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme. *Collector* v. *Day, supra,* emphasized that the States had been in existence as independent sovereigns when the Constitution was adopted, and that the Constitution presupposes and guarantees the continued existence of the States as governmental bodies performing traditional sovereign functions. 11 Wall., at 125–126. To implement this aspect of the constitutional plan, *Collector* v. *Day* concluded that it was imperative absolutely to prohibit any federal taxation that directly affected a traditional state function, quoting Mr. Chief Justice Marshall's aphorisms that " 'the power of taxing . . . may be exercised so far as to destroy,' " *id.,* at 123, quoting *McCulloch* v. *Maryland, supra,* at 427, and " 'a right [to tax], in its nature, acknowledges no limits.' " 11 Wall., at 123, quoting *Weston* v. *Charleston,* 2 Pet. 449, 466 (1829). The Court has more recently remarked that these maxims refer primarily to two attributes of the taxing power. *First,* in imposing a tax to support the services a government provides to the public at large, a legislature need not consider the value of particular benefits to a taxpayer, but may assess the tax solely on the basis of taxpayers' ability to pay. *Second* (of perhaps greater concern in the present context), a tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by im-

posing a heavy tax on its exercise. See *National Cable Television Assn.* v. *United States,* 415 U. S. 336, 340–341 (1974). *Collector* v. *Day,* like the earlier *McCulloch* v. *Maryland,* reflected the view that the awesomeness of the taxing power required a flat and absolute prohibition against a tax implicating an essential state function because the ability of the federal courts to determine whether particular revenue measures would or would not destroy such an essential function was to be doubted.

As the contours of the principle evolved in later decisions, "cogent reasons" were recognized for narrowly limiting the immunity of the States from federal imposts. See *Helvering* v. *Gerhardt,* 304 U. S. 405, 416 (1938). The first is that any immunity for the protection of state sovereignty is at the expense of the sovereign power of the National Government to tax. Therefore, when the scope of the States' constitutional immunity is enlarged beyond that necessary to protect the continued ability of the States to deliver traditional governmental services, the burden of the immunity is thrown upon the National Government without any corresponding promotion of the constitutionally protected values. See, *id.,* at 416–417; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 384–385 (1938); *Willcuts* v. *Bunn,* 282 U. S. 216, 225 (1931). The second, also recognized by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland, supra,* at 435–436, is that the political process is uniquely adapted to accommodating the competing demands "for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other," *Helvering* v. *Gerhardt, supra,* at 416: The Congress, composed as it is of members chosen by state constituencies, constitutes an inherent check against the possibility of abusive taxing of the States by the National Government.[13]

[13] Although the opinion for the Court in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), rejects the argument that the operation of the political process eliminates any reason for reviewing federalism-based

In tacit, and at times explicit, recognition of these considerations, decisions of the Court either have declined to enlarge the scope of state immunity or have in fact restricted its reach. Typical of this trend are decisions holding that the National Government may tax revenue-generating activities of the States that are of the same nature as those traditionally engaged in by private persons. See, *e. g., New York* v. *United States,* 326 U. S. 572 (1946) (tax on water bottled and sold by State upheld); *Allen* v. *Regents,* 304 U. S. 439 (1938) (tax on admissions to state athletic events approved notwithstanding use of proceeds for essential state functions); *Helvering* v. *Powers,* 293 U. S. 214 (1934) (tax on operations of railroad by State); *Ohio* v. *Helvering,* 292 U. S. 360 (1934) (tax on state liquor operation); *South Carolina* v. *United States,* 199 U. S. 437 (1905) (tax on state-run liquor business). It is true that some of the opinions speak of the state activity taxed as "proprietary" and thus not an immune essential *governmental* activity, but the opinions of the Members of the Court in *New York* v. *United States, supra,* the most recent decision, rejected the governmental-proprietary distinction as untenable.[14] Rather the majority [15] reasoned that a nondiscriminatory tax

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challenges to federal regulation of the States *qua* States, we do not believe it follows that the existence of "political checks" has no relevance to a determination of the proper *scope* of a State's immunity from federal taxation. We have regularly relied upon the existence of such political checks in considering the scope of the National Government's immunity from state taxation. See, *e. g., United States* v. *County of Fresno,* 429 U. S. 452 (1977).

[14] All eight Justices who participated in the case indicated that they regarded the governmental-proprietary distinction as an untenable one. See 326 U. S., at 579–581 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.,* at 586 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); and *id.,* at 591 (Douglas, J., dissenting, joined by Black, J.).

[15] In *New York* v. *United States,* Mr. Justice Frankfurter announced the judgment of the Court and an opinion joined by only one of the eight Justices participating in the case. That opinion upheld the tax on a

may be applied to a state business activity where, as was the case there, the recognition of immunity would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise . . . by a nondiscriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen." 326 U. S., at 588–589 (Stone, C. J., concurring).

Illustrative of decisions actually restricting the scope of the immunity is the line of cases that culminated in the overruling of *Collector* v. *Day* in *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939). See, *e. g., Helvering* v. *Gerhardt, supra; Helvering* v. *Mountain Producers Corp., supra; Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514 (1926). *Collector* v. *Day,* of course, involved a nondiscriminatory tax that was imposed not directly on the State but rather on the salary earned by a judicial officer. Neither *Collector* v. *Day* itself nor its progeny or precursors made clear how such a taxing measure could be employed to preclude the States from performing essential functions. In any case, in the line of decisions that culminated in *Graves* v. *New York ex rel. O'Keefe, supra,* the Court demonstrated that an immunity for the salaries paid key state officials is not justifiable. Although key state officials are agents of the State, they are also citizens of the United States, so their income is a natural subject for income taxation. See *Helvering* v. *Gerhardt, supra,* at 420 and 422.

More significantly, because the taxes imposed were nondiscriminatory and thus also applicable to income earned by persons in private employment, the risk was virtually nonexistent that such revenue provisions could significantly impede a State's ability to hire able persons to perform its essential

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broader ground than the concurring opinion of Mr. Chief Justice Stone, joined by three Justices. We therefore conclude that a majority supported the Chief Justice's rationale.

functions. See *Graves* v. *New York ex rel. O'Keefe, supra,* at 484–485; *Helvering* v. *Gerhardt, supra,* at 420–421. The only advantage conceivably to be lost by denying the States such an immunity is that essential state functions might be obtained at a lesser cost because employees exempt from taxation might be willing to work for smaller salaries. See 304 U. S., at 420–421. But that was regarded as an inadequate ground for sustaining the immunity and preventing the National Government from requiring these citizens to support its activities. See *Graves* v. *New York ex rel. O'Keefe, supra,* at 483 and cases cited in n. 3. The purpose of the implied constitutional restriction on the national taxing power is not to give an advantage to the States by enabling them to engage employees at a lower charge than those paid by private entities, see *Helvering* v. *Gerhardt, supra,* at 421–422, but rather is solely to protect the States from undue interference with their traditional governmental functions. While a tax on the salary paid key state officers may increase the cost of government, it will no more preclude the States from performing traditional functions than it will prevent private entities from performing their missions. See *Graves* v. *New York ex rel. O'Keefe, supra,* at 484–485; *Helvering* v. *Gerhardt, supra,* at 420–421.

These two lines of decisions illustrate the "practical construction" that the Court now gives the limitation the existence of the States constitutionally imposes on the national taxing power; "that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." *New York* v. *United States,* 326 U. S., at 589–590 (Stone, C. J., concurring) quoting *Metcalf & Eddy* v. *Mitchell, supra,* at 523–524. Where the subject of tax is a natural and traditional source of federal revenue and where it is inconceivable that such a revenue measure could ever operate to preclude traditional

state activities, the tax is valid. While the Court has by no means abandoned its doubts concerning its ability to make particularized assessments of the impact of revenue measures on essential state operations, compare *New York* v. *United States, supra,* at 581 (opinion of Frankfurter, J.) [16] with 326 U. S., at 590 (Stone, C. J., concurring),[17] it has recognized that some generic types of revenue measures could never seriously threaten the continued functioning of the States and hence are outside the scope of the implied tax immunity.

B

A nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficiary's share of the cost is surely no more offensive to the constitutional scheme than is either a tax on the income earned by state employees or a tax on a State's sale of bottled water.[18] The National Government's interest in being compensated for its expenditures is only too apparent. More significantly perhaps, such revenue measures by their very nature cannot possess the attributes that led Mr. Chief Justice Marshall to proclaim that the power to tax is the power

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[16] "Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges."

[17] "Since all taxes must be laid by general, that is, workable, rules, the effect of [state] immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation."

[18] As is implicit from our summary of the development of the law of state tax immunity, this doctrine does not inflexibly require the invalidation of any revenue measure that is labeled or operates as a tax. That § 4491 is called or can be characterized as a "tax" thus possesses no talismanic significance. We observe, moreover, that Congress did regard § 4491 as a user fee.

to destroy. There is no danger that such measures will not be based on benefits conferred or that they will function as regulatory devices unduly burdening essential state activities. It is, of course, the case that a revenue provision that forces a State to pay its own way when performing an essential function will increase the cost of the state activity. But *Graves* v. *New York ex rel. O'Keefe,* and its precursors, see 306 U. S., at 483 and the cases cited in n. 3, teach that an economic burden on traditional state functions without more is not a sufficient basis for sustaining a claim of immunity. Indeed, since the Constitution explicitly requires States to bear similar economic burdens when engaged in essential operations, see U. S. Const., Amdts. 5, 14; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922) (State must pay just compensation when it "takes" private property for a public purpose); U. S. Const., Art. I, § 10, cl. 1; *United States Trust Co.* v. *New Jersey,* 431 U. S. 1 (1977) (even when burdensome, a State often must comply with the obligations of its contracts), it cannot be seriously contended that federal exactions from the States of their fair share of the cost of specific benefits they receive from federal programs offend the constitutional scheme.

Our decisions in analogous contexts support this conclusion. We have repeatedly held that the Federal Government may impose appropriate conditions on the use of federal property or privileges and may require that state instrumentalities comply with conditions that are reasonably related to the federal interest in particular national projects or programs. See, *e. g., Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U. S. 275, 294–296 (1958); *Oklahoma* v. *Civil Service Comm'n,* 330 U. S. 127, 142–144 (1947); *United States* v. *San Francisco,* 310 U. S. 16 (1940); cf. *National League of Cities* v. *Usery,* 426 U. S. 833, 853 (1976); *Fry* v. *United States,* 421 U. S. 542 (1975). A requirement that States, like all other users, pay a portion of the costs of the benefits they enjoy from federal programs is surely permissible since it is closely related to the

federal interest in recovering costs from those who benefit and since it effects no greater interference with state sovereignty than do the restrictions which this Court has approved.

A clearly analogous line of decisions is that interpreting provisions in the Constitution that also place limitations on the taxing power of government. See, *e. g.*, U. S. Const., Art. I, § 8, cl. 3 (restricting power of States to tax interstate commerce); § 10, cl. 3 (prohibiting any state tax that operates "to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 265–266 (1935)). These restrictions, like the implied state tax immunity, exist to protect constitutionally valued activity from the undue and perhaps destructive interference that could result from certain taxing measures. The restriction implicit in the Commerce Clause is designed to prohibit States from burdening the free flow of commerce, see generally *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), whereas the prohibition against duties on the privilege of entering ports is intended specifically to guard against local hindrances to trade and commerce by vessels. See *Packet Co.* v. *Keokuk*, 95 U. S. 80, 85 (1877).

Our decisions implementing these constitutional provisions have consistently recognized that the interests protected by these Clauses are not offended by revenue measures that operate only to compensate a government for benefits supplied. See, *e. g.*, *Clyde Mallory Lines* v. *Alabama*, *supra* (flat fee charged each vessel entering port upheld because charge operated to defray cost of harbor policing); *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972) ($1 head tax on enplaning commercial air passengers upheld under the Commerce Clause because designed to recoup cost of airport facilities). A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference

with constitutionally valued activity that the Clauses were designed to prohibit.

C

Having established that taxes that operate as user fees may constitutionally be applied to the States, we turn to consider the Commonwealth's argument that § 4491 should not be treated as a user fee because the amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways.[19] This argument has been confronted and rejected in analogous contexts. *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542 (1950), is illustrative. There the Court rejected an attack under the Commerce Clause on an annual Maryland highway tax of "2% upon the fair market value of motor vehicles used in interstate commerce." The carrier argued that the correlation between the tax and use was not sufficiently precise to sustain the tax as a valid user charge. Noting that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id.,* at 545, the Court rejected the carrier's argument:

> "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' . . . Each additional factor adds to administrative burdens of

[19] Only a few words are needed to reject the Commonwealth's suggestion that the United States may not impose this tax under a user-fee rationale because the United States has no proprietary interest in the airports and airways of the United States. Quite simply, we think there is no basis for the position that user fees are constitutional only when the United States has some sort of a right of property. A user-fee rationale may be invoked whenever the United States is recovering a fair approximation of the cost of benefits supplied.

> enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.*, at 546–547. (Citations and footnotes omitted.)

See also *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947) (taxes of $10 and $15 per vehicle sustained against Commerce Clause challenges); *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n, supra* (flat fee designed to defray cost of policing port upheld against claim it was constitutionally prohibited tax on privilege of entering harbor). This Court recently relied upon this reasoning to uphold a tax on commercial aviation activity. In *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc., supra,* we sustained against claims based on the Commerce Clause and on the right to travel a $1 head tax on commercial airline passengers. We held that such taxes are valid so long as they (1) do not discriminate against interstate commerce, (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred. 405 U. S., at 716–720.

The Commonwealth, of course, recognizes that flat fees, and even flat annual fees, have been held constitutionally permissible in these contexts. It urges, however, that such "rough approximations of cost," while appropriate compensatory measures in other settings, should not be permissible here. It maintains that the values protected by the doctrine of state tax immunity require that any user tax be closely calibrated

to the amount of any taxpayer's actual use, and it suggests that we—for purposes of the state tax immunity doctrine only—define user fees as charges for measurable amounts of use of government facilities.

We note first that it is doubtful that the National Government could recover the costs of its aviation activities from those direct beneficiaries without making at least some use of annual flat fees. In arguing that the Revenue Act provisions are not sufficiently user related, the Commonwealth places extensive reliance upon the DOT Study, prepared at the direction of Congress,[20] of the best way to recoup the costs of the federal aviation activities from its beneficiaries. While the report recognized that it would be generally possible, albeit costly in the case of general aviation, to tie the charges to specific measurable benefits received, see DOT Study 61, it indicated that certain costs imposed by general aviation could only be recovered through flat fees. *Id.*, at 61 n. 2.

But even if it were feasible to recover all costs through charges for measurable amounts of use of Government facilities, we fail to see how such a requirement would appreciably advance the policies embodied in the doctrine of state tax immunity. Since a State has no constitutional complaint when it is required to pay the cost of benefits received, the Commonwealth's only legitimate fear is that the flat-fee requirement may result in the collection from it of more than its actual "fair share." We observe first that where the

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[20] Provisions in both the Development Act and the Revenue Act directed the Department of Transportation to conduct a study of how best to recover the costs imposed on the national airsystem by each class of users. See § 4 of the Development Act, 84 Stat. 220, 49 U. S. C. § 1703; § 209 of the Revenue Act, 84 Stat. 252. The existence of these provisions underscores the fact, which is further illustrated by the fact that the taxes imposed by the Revenue Act expire in 1980, see, *e. g.*, 26 U. S. C. § 4491 (e), that Congress regarded the Revenue Act user fees as an interim approach to the recovery of aviation costs from their beneficiaries.

charges imposed by the Federal Government apply to large numbers of private parties as well as to state activities, it is as likely as not that the user fee will result in exacting less money from the State than it would have to pay under a perfect user-fee system. More fundamentally, even when an annual flat fee results in some overcharges, the Commonwealth's solution would often increase the fiscal burden on the States. If the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system. The resulting increment in a State's actual fair share might well be greater than any overcharge resulting from the present fee system. But the complete answer to the Commonwealth's concern is that even if the flat fee does cost it somewhat more than it would have to pay under a perfect user-fee system, there is still no interference with the values protected by the implied constitutional tax immunity of the States. The possibility of a slight overcharge is no more offensive to the constitutional structure than is the increase in the cost of essential operations that results either from the fact that those who deal with the State may be required to pay nondiscriminatory taxes on the money they receive or from the fact a jury may award an eminent domain claimant an amount in excess of what would be "just compensation" in an ideal system of justice.

Whatever the present scope of the principle of state tax immunity, a State can have no constitutional objection to a revenue measure that satisfies the three-prong test of *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*—substituting "state function" for "interstate commerce" in that test. So long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits

to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services. The requirement that total revenues not exceed expenditures places a natural ceiling on the total amount that such charges may generate and the further requirement that the measure be reasonable and nondiscriminatory precludes the adoption of a charge that will unduly burden state activities.[21]

III

Applying these principles to this case demonstrates that the Commonwealth's claim of constitutional immunity is particularly insubstantial. First, there is no question but that the tax imposed by § 4491 is nondiscriminatory. It applies not only to private users of the airways but also to civil aircraft operated by the United States—facts which minimize, if not eliminate entirely, the basis for a conclusion that § 4491 might be an abusive exercise of the taxing power. Indeed, the Revenue Act discriminates in favor of the States since it retains the States' exemption from the 7-cent-per-gallon fuel tax that applies to private noncommercial general aviation—a fact that illustrates the manner in which the political process is peculiarly adapted to the protection of state interests.

Second, the tax satisfies the requirement that it be a fair approximation of the cost of the benefits civil aircraft receive from the federal activities. As we have indicated, the legislative background and terms of the Revenue Act indicate that

[21] Our Brother REHNQUIST'S characterization of this test (which the United States urged us to adopt, see Brief for United States 19–20) as "vague and convoluted" see *post*, at 472, overlooks its consistent applications for years by the Court, without any apparent difficulty, in cases involving the negative implications of the Commerce Clause. It further overlooks that, as our experience today indicates, see Part III, *infra*, there is no reason to suppose that the Court will have any different experience in applying this test in cases involving a State's claim of immunity from federal taxation.

Congress believed that four measures, taken together, would fairly reflect some of the cost of the benefits that redound to the noncommercial general aircraft that fly in the navigable airspace of the United States: a 7-cent-per-gallon fuel tax, a 5-cent-per-pound tax on aircraft tires, a 10-cent-per-pound tax on tubes, see 26 U. S. C. § 4071, and the annual aircraft registration tax. See nn. 4 and 8, *supra*. The formula contained in these four measures taken together does not, of course, give weight to every factor affecting appropriate compensation for airport and airway use. A probable deficiency in the formula arises because not all aircraft make equal use of the federal navigational facilities or of the airports that have been planned or constructed with federal assistance. But the present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives. Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States.[22] And even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users.[23] The four taxes, taken together, fairly

[22] Although a helicopter may be expected to make less intensive use of the federal facilities and services than would an airplane, the Commonwealth has not denied that its state police helicopter has made some use of the federal services, and it conceded as much at oral argument. See Tr. of Oral Arg. 20. In any case, the Commonwealth has indicated that its submission in the case at bar does not depend in any way on the fact that a helicopter is involved, but rather is equally applicable to all aircraft. *Ibid.*

[23] Because aircraft do not invariably use the federal services each time they fly, the Commonwealth suggests that the case at bar is analogous to *Cannon* v. *New Orleans*, 20 Wall. 577 (1874). There, this Court held that when an ordinance taxed the use of wharves or riverbanks indiscriminately, rather than only the use of wharves built by the city, the

reflect the benefits received, since three are geared directly to use, whereas the fourth, the aircraft registration tax, is designed to give weight to factors affecting the level of use of the navigational facilities. See n. 9, *supra.* A more precisely calibrated formula—which would include landing fees, charges for specific services received, and less reliance on annual flat fees, see DOT Study 62—would, of course, be administratively more costly.

It follows that a State may not complain of the application of § 4491 on the ground it is not a fair approximation of use. Since the fuel tax, tire and tube tax, and annual registration fee together constitute an appropriate means of recovering the amount of the federal investment, a State, being exempt from the fuel, tire, and tube taxes, can have no constitutional objection to the application of the registration fee alone.

Finally, the tax is not excessive in relation to the cost of the Government benefits supplied. When Congress enacted the Revenue Act, it contemplated that the user fees imposed on civil aircraft would not be sufficient to cover the federal expenditures on civil aviation in any one year, see n. 4, *supra,* and the actual experience during the first years of operation was that the revenues fell far short of covering the annual civil aviation outlays.[24] Since the Commonwealth pays far

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exaction could not be justified as compensation for use of municipal facilities or services. What distinguishes the case at bar is that the federal services are directed at the entire navigable airspace of the United States and inure to the benefit of all users. The analogous decision is *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n,* 296 U. S. 261 (1935), in which the Court held that a vessel that has not been the recipient of any police services could be required to pay a charge designed to defray their costs since the services redounded to the benefit of all vessels in the port.

[24] The DOT Study, which the Commonwealth asks us judicially to notice, concludes that the system of user fees has not come close to recovering the costs imposed on the national airsystem by the civil users of the airways in the first years of the program. *Id.,* at 43. Indeed, it finds that the greatest shortfall is the revenue produced by the charges imposed on gen-

less than private noncommercial users of the airways, there therefore is no basis for a conclusion that the application of the registration tax to the States produces revenues in excess of the costs [25] incurred by the Federal Government.[26]

Affirmed.

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

MR. JUSTICE STEWART and MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

The petitioner has conceded that a nondiscriminatory user fee may constitutionally be imposed upon a State, and, for substantially the reasons stated in Part II–B of the plurality opinion, we agree. Moreover, we agree with the Court that

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eral aviation, a category that, of course, includes the Commonwealth's aircraft. See *id.*, at 43–50.

[25] Even if the revenues in any one year exceeded the outlays, it would not follow that the tax is invalid as applied. In *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U. S. 707, 719–720 (1972), we indicated that the validity of the tax was determined by comparing total revenue with total outlays: *i. e.*, a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years.

[26] We regard our Brother REHNQUIST's view that the record does not support a conclusion that § 4491 is a user fee as perhaps another way of stating disagreement with our understanding of the governing legal principles. Compare *supra*, at 463 n. 19, and 467–469, with *post*, at 473–474. For under our view of those principles, there plainly is no basis to remand for an evidentiary hearing. In light of the undisputed nature of the tax and the Commonwealth's reliance upon the DOT Study, there is no basis for a dispute among the parties concerning the operation of § 4491, the nature of the services that the United States supplies for the benefit of all users of the airways, or the relationship between the revenues from the various user fees and the federal expenditures on the national airsystem. In this circumstance the record amply justifies our conclusion that each prong of the *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, test is satisfied.

the aircraft registration tax imposed by 26 U. S. C. § 4491 is such a user fee. We therefore see no need to discuss the general contours of state immunity from federal taxation, as the plurality does in Part II–A of its opinion.

On this basis we join Parts I, II–C, and III of the Court's opinion and concur in its judgment.

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

Petitioner, the Commonwealth of Massachusetts, brought suit against the United States to recover a charge of $131.43 plus penalties and interest imposed upon it by reason of its use of a helicopter in connection with its state police force. The United States moved to dismiss petitioner's complaint, and its motion was granted by the District Court for the District of Massachusetts. The Court of Appeals for the First Circuit affirmed that judgment, but expressly chose to do so on a narrower ground than that relied upon by the District Court. 548 F. 2d 33, 34 (1977). The Court of Appeals found it unnecessary to examine the law of intergovernmental tax immunity, because it concluded that the charge imposed here "is, in reality, a user charge." *Id.*, at 35. While the Court of Appeals recognized that the labeling of an assessment as a user charge is not of itself conclusive, cf. *Packet Co.* v. *Keokuk,* 95 U. S. 80, 86 (1877), it quoted the following language in explaining its understanding of the distinction between a tax and a user charge:

> " 'It is a tax or duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property.' " 548 F. 2d, at 36, quoting *Packet Co.* v. *Keokuk, supra,* at 85.

The United States has defended its judgment in this Court solely on the basis that the Court of Appeals was correct in concluding that the exaction in question was a user charge. Its brief states:

> "[T]his case presents no occasion to consider the present status of the doctrine of implied constitutional immunity of the states from federal taxation. Here, the annual excise tax on the use of civil aircraft is not a tax subject to any constitutional restrictions but is simply a required payment by the user for airport and airway facilities funded or provided by the federal government. Petitioner can no more claim the right to free use of these facilities than it could, for example, use the postal service without purchasing stamps." Brief for United States 6–7.

It is therefore somewhat surprising to find Part II–A of today's opinion (which reflects the views of only four Justices) discussing at length the scope of intergovernmental tax immunity. Petitioner insists that it may be able to prove at a trial of the action that the charge is not in fact a user fee; the United States insists that it is a user fee, apparently as a matter of law. This is the issue before the Court, and the only issue before it.

I agree that the United States would have a valid defense to this action if it had established, or could establish, that the charge imposed was reasonably related to services rendered to the petitioner by agencies of the Federal Government. I further conclude that the United States would have a valid defense to this action if it could establish that the charge was based on use by the petitioner of some property which the United States owned or in which it had some other type of proprietary interest. Cf. *Packet Co.* v. *Keokuk, supra,* at 84–85. I am at a loss to know why the Court feels obligated to draw on cases decided under the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, to establish its vague and convoluted

three-part test to determine whether the user fee is valid, since cases regarding intergovernmental relations raise significantly different considerations. Commerce Clause cases, while no doubt useful analogies, are not required to deal with the fact that the payer of the user fee is a State in our constitutional structure, and that its essential sovereign interests are entitled to greater deference than is due to ordinary business enterprises which may be regulated by both State and Federal Governments. Since the United States concedes that the absence of intergovernmental immunity to user fees is a reciprocal one, Tr. of Oral Arg. 26–28, it stands to lose as much from the vagueness of the Court's test as do petitioner and its sister States.

Regardless of the phrasing of the test, I cannot accept the Court's conclusion that the Commonwealth need not be given the opportunity to prove that the test has not been satisfied. The Court, relying heavily on our opinion in *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), holds that the fee need not be precisely calibrated to the value of the service furnished so long as it is not shown to be excessive in relation to the cost to the United States of the benefits conferred. *Ante*, at 466–467. But in the cases considered in that opinion, the Court explicitly noted that the challengers had been given the chance to prove the fee excessive and had failed to do so. 405 U. S., at 720. In addition, there was no doubt that the municipal corporations which sought to impose the head tax in fact owned the airport facilities, nor that passengers who were paying the head tax were taking advantage of the services provided by those facilities.

Neither of those conclusions can be reached as a matter of law on the record before us. The United States does not "own" the airspace above its territorial boundaries, although it undoubtedly has considerable authority to regulate the use of that airspace. Nor does the United States, so far as this record shows, "own" any of the facilities which are used by

the helicopter in question. Indeed, it is not even clear from this record whether the helicopter in question has made use of any of the services, such as air traffic controllers, which are furnished by the United States to those who make use of the airways. Were any of these facts to be found to exist by a finder of fact, I might well concur in the Court's judgment. I cannot, under my view of the law, accept as a substitute for such factual findings House and Senate Reports which merely state that a tax of this kind is " 'generally viewed as a user charge.' " *Ante,* at 449 n. 6, quoting H. R. Rep. No. 91–601, p. 46 (1969).

The Court's reliance upon *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n,* 296 U. S. 261 (1935), which arose under the Duty of Tonnage Clause of the Constitution, Art. I, § 10, cl. 3, as well as the Commerce Clause, is misplaced in this regard. The Court there held that neither provision was violated by a flat fee which was charged by the State as compensation for the "policing service rendered by the state in the aid of the safe and efficient use of its port." 296 U. S., at 264. The Court held that the vessels were properly liable for the fee despite the fact that they had not received any special assistance, because the evidentiary record affirmatively demonstrated that "[t]he benefits which flow from the enforcement of [the] regulations . . . inure to all who enter [the harbor]." *Id.,* at 266.

It may be that upon further development of the record in this case, by trial or by procedures leading to summary judgment, a situation similar to that in *Clyde Mallory Lines, supra,* could be shown by the United States to exist. But that does not justify the order of the District Court dismissing petitioner's complaint without such development. I would therefore reverse the judgment of the Court of Appeals and remand for further proceedings.

Syllabus

HOLLOWAY ET AL. *v.* ARKANSAS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 76–5856. Argued November 2, 1977—Decided April 3, 1978

Petitioners, three codefendants at a state criminal trial in Arkansas, made timely motions, both a few weeks before the trial and before the jury was empaneled, for appointment of separate counsel, based on their appointed counsel's representations that, because of confidential information received from the codefendants, he was confronted with the risk of representing conflicting interests and could not, therefore, provide effective assistance for each client. The trial court denied these motions, and petitioners were subsequently convicted. The Arkansas Supreme Court affirmed, concluding that the record showed no actual conflict of interests or prejudice to petitioners. *Held:*

1. The trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interests was too remote to warrant separate counsel, in the face of the representations made by counsel before trial and again before the jury was empaneled, deprived petitioners of the guarantee of "assistance of counsel" under the Sixth Amendment. Pp. 481–487.

(a) The trial court has a duty to refrain from embarrassing counsel for multiple defendants by insisting or even suggesting that counsel undertake to concurrently represent interests that might conflict, when the possibility of inconsistent interests is brought home to the court by formal objections, motions, and counsel's representations. *Glasser* v. *United States,* 315 U. S. 60, 76. Pp. 484–485.

(b) An attorney's request for the appointment of separate counsel, based on his representations regarding a conflict of interests, should be granted, considering that he is in the best position professionally and ethically to determine when such a conflict exists or will probably develop at trial; that he has the obligation, upon discovering such a conflict, to advise the court at once; and, that as an officer of the court, he so advises the court virtually under oath. Pp. 485–486.

(c) Here no prospect of dilatory practices by the attorney was present to justify the trial court's failure to take adequate steps in response to the repeated motions for appointment of separate counsel. Pp. 486–487.

2. Whenever a trial court improperly requires joint representation over timely objection reversal is automatic, and prejudice is presumed regard-

less of whether it was independently shown. *Glasser* v. *United States, supra,* at 75–76. Pp. 487–491.

(a) The assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman* v. *California,* 386 U. S. 18, 23. P. 489.

(b) That an attorney representing multiple defendants with conflicting interests is physically present at pretrial proceedings, during trial, and at sentencing does not warrant departure from the general rule requiring automatic reversal. Pp. 489–490.

(c) A rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application. Pp. 490–491.

260 Ark. 250, 539 S. W. 2d 435, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post,* p. 491.

Harold L. Hall argued the cause and filed a brief for petitioners.

Joseph H. Purvis, Assistant Attorney General of Arkansas, argued the cause *pro hac vice* for respondent. With him on the brief were *Bill Clinton,* Attorney General, and *Robert Alston Newcomb,* Assistant Attorney General.*

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

Petitioners, codefendants at trial, made timely motions for appointment of separate counsel, based on the representations of their appointed counsel that, because of confidential information received from the codefendants, he was confronted with the risk of representing conflicting interests and could

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**Howard B. Eisenberg* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging reversal.

Rollie R. Rogers filed a brief for the Office of the Colorado State Public Defender as *amicus curiae.*

not, therefore, provide effective assistance for each client. We granted certiorari to decide whether petitioners were deprived of the effective assistance of counsel by the denial of those motions. 430 U. S. 965 (1977).

I

Early in the morning of June 1, 1975, three men entered a Little Rock, Ark., restaurant and robbed and terrorized the five employees of the restaurant. During the course of the robbery, one of the two female employees was raped once; the other, twice. The ensuing police investigation led to the arrests of the petitioners.

On July 29, 1975, the three defendants were each charged with one count of robbery and two counts of rape. On August 5, the trial court appointed Harold Hall, a public defender, to represent all three defendants. Petitioners were then arraigned and pleaded not guilty. Two days later, their cases were set for a consolidated trial to commence September 4.

On August 13, Hall moved the court to appoint separate counsel for each petitioner because "the defendants ha[d] stated to him that there is a possibility of a conflict of interest in each of their cases . . . ." After conducting a hearing on this motion, and on petitioners' motions for a severance, the court declined to appoint separate counsel.[1]

Before trial, the same judge who later presided at petitioners' trial conducted a *Jackson* v. *Denno* hearing[2] to determine the admissibility of a confession purportedly made by petitioner Campbell to two police officers at the time of his arrest. The essence of the confession was that Campbell had entered the restaurant with his codefendants and had remained, armed with a rifle, one flight of stairs above the site

[1] No transcript of this hearing is included in the record, and we are not informed whether the hearing was transcribed.

[2] See *Jackson* v. *Denno*, 378 U. S. 368 (1964).

of the robbery and rapes (apparently serving as a lookout), but had not taken part in the rapes. The trial judge ruled the confession admissible, but ordered deletion of the references to Campbell's codefendants. At trial one of the arresting officers testified to Campbell's confession.

On September 4, before the jury was empaneled, Hall renewed the motion for appointment of separate counsel "on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." The court responded, "I don't know why you wouldn't," and again denied the motion.[3]

The prosecution then proceeded to present its case. The manager of the restaurant identified petitioners Holloway and Campbell as two of the robbers. Another male employee identified Holloway and petitioner Welch. A third identified only Holloway. The victim of the single rape identified Holloway and Welch as two of the robbers but was unable to identify the man who raped her. The victim of the double rape identified Holloway as the first rapist. She was unable to identify the second rapist but identified Campbell as one of the robbers.

On the second day of trial, after the prosecution had rested its case, Hall advised the court that, against his recommendation, all three defendants had decided to testify. He then stated:

> "Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify.

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[3] It is probable that the judge's response, "I don't know why you wouldn't," referred back to counsel's statement, "I will not be able to cross-examine them . . . ." If the response is so read, the judge's later statements, see *infra,* at 479 and 480, are directly contradictory.

"THE COURT: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this court each one blames it on the other one.

"MR. HALL: I have talked to each one of these defendants, and I have talked to them individually, not collectively.

"THE COURT: Now talk to them collectively."

The court then indicated satisfaction that each petitioner understood the nature and consequences of his right to testify on his own behalf, whereupon Hall observed:

"I am in a position now where I am more or less muzzled as to any cross-examination.

"THE COURT: You have no right to cross-examine your own witness.

"MR. HALL: Or to examine them.

"THE COURT: You have a right to examine them, but have no right to cross-examine them. The prosecuting attorney does that.

"MR. HALL: If one [defendant] takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

"THE COURT: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright [*sic*] for them to testify if they want to, or not. It's their business.

. . . . . .

"Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you.

"MR. HALL: Your Honor, I can't even put them on direct examination because if I ask them—

"THE COURT: (Interposing) You can just put them on the stand and tell the Court that you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do." [4]

Holloway took the stand on his own behalf, testifying that during the time described as the time of the robbery he was at his brother's home. His brother had previously given similar testimony. When Welch took the witness stand, the record shows Hall advised him, as he had Holloway, that "I cannot ask you any questions that might tend to incriminate any one of the three of you . . . . Now, the only thing I can say is tell these ladies and gentlemen of the jury what you know about this case . . . ." Welch responded that he did not "have any kind of speech ready for the jury or anything. I thought I was going to be questioned." When Welch denied, from the witness stand, that he was at the restaurant the night of the robbery, Holloway interrupted, asking:

"Your Honor, are we allowed to make an objection?

"THE COURT: No, sir. Your counsel will take care of any objections.

"MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.

"THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyhow."

Welch proceeded with his unguided direct testimony, denying any involvement in the crime and stating that he was at his home at the time it occurred. Campbell gave similar testi-

[4] The record reveals that both the trial court and defense counsel were alert to defense counsel's obligation to avoid assisting in the presentation of what counsel had reason to believe was false testimony, or, at least, testimony contrary to the version of facts given to him earlier and in confidence. Cf. ABA Project on Standards Relating to the Administration of Criminal Justice, The Defense Function § 7.7 (c), p. 133 (1974).

mony when he took the stand. He also denied making any confession to the arresting officers.

The jury rejected the versions of events presented by the three defendants and the alibi witness, and returned guilty verdicts on all counts. On appeal to the Arkansas Supreme Court, petitioners raised the claim that their representation by a single appointed attorney, over their objection, violated federal constitutional guarantees of effective assistance of counsel. In resolving this issue, the court relied on what it characterized as the majority rule:

> "[T]he record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants." 260 Ark. 250, 256, 539 S. W. 2d 435, 439 (1977).

Turning to the record in the case, the court observed that Hall had failed to outline to the trial court both the nature of the confidential information received from his clients and the manner in which knowledge of that information created conflicting loyalties. Because none of the petitioners had incriminated codefendants while testifying, the court concluded that the record demonstrated no actual conflict of interests or prejudice to the petitioners, and therefore affirmed.

II

More than 35 years ago, in *Glasser* v. *United States,* 315 U. S. 60 (1942), this Court held that by requiring an attorney to represent two codefendants whose interests were in conflict the District Court had denied one of the defendants his Sixth Amendment right to the effective assistance of counsel. In that case the Government tried five codefendants in a joint trial for conspiracy to defraud the United States. Two of the defendants, Glasser and Kretske, were represented initially by separate counsel. On the second day of trial, however, Kretske became dissatisfied with his attorney and dismissed him. The District Judge thereupon asked Glasser's attorney, Stewart, if

he would also represent Kretske. Stewart responded by noting a possible conflict of interests: His representation of both Glasser and Kretske might lead the jury to link the two men together. Glasser also made known that he objected to the proposal. The District Court nevertheless appointed Stewart, who continued as Glasser's retained counsel, to represent Kretske. Both men were convicted.

Glasser contended in this Court that Stewart's representation at trial was ineffective because of a conflict between the interests of his two clients. This Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Id.*, at 70. The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart's desire to protect Kretske's interests, and was thus "indicative of Stewart's struggle to serve two masters . . . ." *Id.*, at 75. After identifying this conflict of interests, the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed. Kretske's conviction, however, was affirmed.

One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often

gives strength against a common attack." *Glasser* v. *United States, supra,* at 92 (dissenting opinion).[5]

Since *Glasser* was decided, however, the courts have taken divergent approaches to two issues commonly raised in challenges to joint representation where—unlike this case—trial counsel did nothing to advise the trial court of the actuality or possibility of a conflict between his several clients' interests. First, appellate courts have differed on how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to the effective assistance of counsel. Compare *United States ex rel. Hart* v. *Davenport,* 478 F. 2d 203 (CA3 1973); *Lollar* v. *United States,* 126 U. S. App. D. C. 200, 376 F. 2d 243 (1967); *People* v. *Chacon,* 69 Cal. 2d 765, 447 P. 2d 106 (1968); and *State* v. *Kennedy,* 8 Wash. App. 633, 508 P. 2d 1386 (1973), with *United States* v. *Lovano,* 420 F. 2d 769, 773 (CA2 1970); see also cases collected in Annot., 34 A. L. R. 3d 470, 477–507 (1970). Second, courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests. Compare *United States* v. *Lawriw,* 568 F. 2d 98 (CA8 1977); *United States* v. *Carrigan,* 543 F. 2d 1053 (CA2 1976); and *United States* v. *Foster,* 469 F. 2d 1 (CA1 1972), with *Foxworth* v. *Wainwright,* 516 F. 2d 1072 (CA5 1975), and *United States* v. *Williams,* 429 F. 2d 158 (CA8 1970).[6]

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[5] By inquiring in *Glasser* whether there had been a waiver, the Court also confirmed that a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests. 315 U. S., at 70. In this case, however, Arkansas does not contend that petitioners waived that right.

[6] See ABA Project on Standards Relating to the Administration of Criminal Justice, The Function of the Trial Judge § 3.4 (b), p. 171 (1974):

"Whenever two or more defendants who have been jointly charged, or

We need not resolve these two issues in this case, however. Here trial counsel, by the pretrial motions of August 13 and September 4 and by his accompanying representations, made as an officer of the court, focused explicitly on the probable risk of a conflict of interests. The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.[7] We hold that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of "assistance of counsel."

This conclusion is supported by the Court's reasoning in *Glasser:*

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel. . . .
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> . . . . . .
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> "Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to

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whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

[7] There is no indication in the record, and the State does not suggest, that the hearing held in response to the motion of August 13 disclosed information demonstrating the insubstantiality of Hall's September 4 representations—based, as nearly as can be ascertained, on the codefendants' newly formed decision to testify—respecting a probable conflict of interests. So far as we can tell from this record, the trial judge cut off any opportunity of defense counsel to do more than make conclusory representations. During oral argument in this Court, Hall represented that the trial court did not request him to disclose the basis for his representations as to a conflict of interests. See Tr. of Oral Arg. 14–15.

There is no occasion in this case to determine the constitutional significance, if any, of the trial court's response to petitioners' midtrial objections.

> refrain from embarrassing counsel in the defense of an accused *by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.*" 315 U. S., at 71, 76 (emphasis added).

This reasoning has direct applicability in this case where the "possibility of [petitioners'] inconsistent interests" was "brought home to the court" by formal objections, motions, and defense counsel's representations. It is arguable, perhaps, that defense counsel might have presented the requests for appointment of separate counsel more vigorously and in greater detail. As to the former, however, the trial court's responses hardly encouraged pursuit of the separate-counsel claim; and as to presenting the basis for that claim in more detail, defense counsel was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients.

Additionally, since the decision in *Glasser,* most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. See, *e. g., Shuttle* v. *Smith,* 296 F. Supp. 1315 (Vt. 1969); *State* v. *Davis,* 110 Ariz. 29, 514 P. 2d 1025 (1973); *State* v. *Brazile,* 226 La. 254, 75 So. 2d 856 (1954); but see *Commonwealth* v. *LaFleur,* 1 Mass. App. 327, 296 N. E. 2d 517 (1973). In so holding, the courts have acknowledged and given effect to several interrelated considerations. An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *State* v. *Davis, supra,* at 31, 514 P. 2d, at 1027. Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at

once of the problem. *Ibid.*[8] Finally, attorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' " *State* v. *Brazile, supra,* at 266, 75 So. 2d, at 860–861.[9] (Emphasis deleted.) We find these considerations persuasive.

The State argues, however, that to credit Hall's representations to the trial court would be tantamount to transferring to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict and to appoint separate counsel. In the State's view, the ultimate decision on those matters must remain with the trial judge; otherwise unscrupulous defense attorneys might abuse their "authority," presumably for purposes of delay or obstruction of the orderly conduct of the trial.[10]

The State has an obvious interest in avoiding such abuses. But our holding does not undermine that interest. When an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to

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[8] The American Bar Association in its Standards Relating to the Administration of Criminal Justice, The Defense Function § 3.5 (b), p. 123 (1974) cautions:

"Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

[9] When a considered representation regarding a conflict in clients' interests comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation.

[10] Such risks are undoubtedly present; they are inherent in the adversary system. But courts have abundant power to deal with attorneys who misrepresent facts.

deal with counsel who resort to such tactics. Cf. *United States* v. *Dardi,* 330 F. 2d 316 (CA2), cert. denied, 379 U. S. 845 (1964); *People* v. *Kroeger,* 61 Cal. 2d 236, 390 P. 2d 369 (1964). Nor does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client.[11] See *State* v. *Davis, supra.* In this case the trial court simply failed to take adequate steps in response to the repeated motions, objections, and representations made to it, and no prospect of dilatory practices was present to justify that failure.

III

The issue remains whether the error committed at petitioners' trial requires reversal of their convictions. It has generally been assumed that *Glasser* requires reversal, even in the absence of a showing of specific prejudice to the complaining codefendant, whenever a trial court improperly permits or requires joint representation. See *Austin* v. *Erickson,* 477 F. 2d 620 (CA8 1973); *United States* v. *Gougis,* 374 F. 2d 758 (CA7 1967); *Hall* v. *State,* 63 Wis. 2d 304, 217 N. W. 2d 352 (1974); *Commonwealth ex rel. Whitling* v. *Russell,* 406 Pa. 45, 176 A. 2d 641 (1962); Note, Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel, 58 Geo. L. J. 369, 387 (1969). Some courts and commentators have argued, however, that appellate courts should not reverse automatically in such cases but rather should affirm unless the defendant can demonstrate prejudice. See *United States*

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[11] This case does not require an inquiry into the extent of a court's power to compel an attorney to disclose confidential communications that he concludes would be damaging to his client. Cf. ABA Code of Professional Responsibility, DR 4–101 (C)(2) (1969). Such compelled disclosure creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon later to impose sentences on the attorney's clients.

v. *Woods*, 544 F. 2d 242 (CA6 1976), cert. denied, 430 U. S. 969 (1977); Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 122–125 (1978). This argument rests on two aspects of the Court's decision in *Glasser*. First, although it had concluded that Stewart was forced to represent conflicting interests, the Court did *not* reverse the conviction of Kretske, Stewart's other client, because Kretske failed to "show that the denial of Glasser's constitutional rights *prejudiced* [him] in some manner." 315 U. S., at 76 (emphasis added). Second, the Court justified the reversal of Glasser's conviction, in part, by emphasizing the weakness of the Government's evidence against him; with guilt a close question, "error, which under some circumstances *would not be ground for reversal,* cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Id.*, at 67 (emphasis added). Assessing the strength of the prosecution's evidence against the defendant is, of course, one step in applying a harmless-error standard. See *Schneble* v. *Florida,* 405 U. S. 427 (1972); *Harrington* v. *California,* 395 U. S. 250 (1969).

We read the Court's opinion in *Glasser,* however, as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic. The *Glasser* Court stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the [district] court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 116; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Patton* v. *United States,* 281 U. S. 276, 292." 315 U. S., at 75–76.

This language presupposes that the joint representation, over his express objections, prejudiced the accused in some degree. But from the cases cited it is clear that the prejudice is presumed regardless of whether it was independently shown. *Tumey* v. *Ohio,* 273 U. S. 510 (1927), for example, stands for the principle that "[a] conviction must be reversed if [the asserted trial error occurred], even if no particular prejudice is shown and even if the defendant was clearly guilty." *Chapman* v. *California,* 386 U. S. 18, 43 (1967) (STEWART, J., concurring); see also *id.,* at 23, and n. 8 (opinion of the Court). The Court's refusal to reverse Kretske's conviction is not contrary to this interpretation of *Glasser.* Kretske did *not* raise his own Sixth Amendment challenge to the joint representation. 315 U. S., at 77; see Brief for Petitioner Kretske in *Glasser* v. *United States,* O. T. 1941, No. 31. As the Court's opinion indicates, some of the codefendants argued that the denial of Glasser's right to the effective assistance of counsel prejudiced them as alleged co-conspirators. 315 U. S., at 76–77. In that context, the Court required a showing of prejudice; finding none, it affirmed the convictions of the codefendants, including Kretske.

Moreover, this Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* v. *California, supra,* at 23. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); *White* v. *Maryland,* 373 U. S. 59 (1963).

That an attorney representing multiple defendants with conflicting interests is physically present at pretrial proceedings, during trial, and at sentencing does not warrant departure from this general rule. Joint representation of conflicting interests is suspect because of what it tends to prevent

the attorney from doing. For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

Finally, a rule requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. Compare *Chapman* v. *California, supra,* at 24–26, with *Hamling* v. *United States,* 418 U. S. 87, 108 (1974), and *United States* v. *Valle-Valdez,* 554 F. 2d 911, 914–917 (CA9 1977). But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would

be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

While disavowing a *per se* rule of separate representation, the Court holds today that the trial judge's failure in this case "either to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel" worked a violation of the guarantee of "assistance of counsel" embodied in the Sixth and Fourteenth Amendments. The Court accepts defense counsel's representations of a possible conflict of interests among his clients and of his inability to conduct effective cross-examination as being adequate to trigger the trial court's duty of inquiry. The trial court should have held an appropriate hearing on defense counsel's motions for separate representation, but our task is to decide whether this omission assumes the proportion of a constitutional violation. Because I cannot agree that, in the particular circumstances of this case, the court's failure to inquire requires reversal of petitioners' convictions, and because the Court's opinion contains seeds of a *per se* rule of separate representation merely upon the demand of defense counsel, I respectfully dissent.

I

It is useful to contrast today's decision with the Court's most relevant previous ruling, *Glasser* v. *United States,* 315 U. S. 60 (1942). In that case, the trial court ordered Glasser's

retained lawyer, Stewart, to represent both Glasser and his codefendant, Kretske, even though Stewart had identified "inconsistency in the defense" that counseled against joint representation. *Id.*, at 68. This Court reversed Glasser's conviction because his lawyer had been required to undertake simultaneous representation of "conflicting interests." *Id.*, at 70. The *Glasser* decision did not rest only on the determination that "[t]he possibility of the inconsistent interests of Glasser and Kretske [had been] brought home to the court . . . ." *Id.*, at 71. Instead, the Court proceeded to find record support for Glasser's claim of "impairment" of his Sixth Amendment right to assistance of counsel. The evidence "indicative of Stewart's struggle to serve two masters [could not] seriously be doubted." *Id.*, at 75; see also *id.*, at 76.

Today's decision goes well beyond the limits of *Glasser*. I agree that the representations made by defense counsel in this case, while not as informative as the affidavit of counsel Stewart in *Glasser*, were sufficient to bring into play the trial court's duty to inquire further into the possibility of "conflicting interests." I question, however, whether the Constitution is violated simply by the failure to conduct that inquiry, without any additional determination that the record reveals a case of joint representation in the face of "conflicting interests." The Court's approach in this case is not premised on an ultimate finding of conflict of interest or ineffective assistance of counsel. Rather, it presumes prejudice from the failure to conduct an inquiry, equating that failure with a violation of the Sixth Amendment guarantee. The justification for this approach appears to be the difficulty of a *post hoc* reconstruction of the record to determine whether a different outcome, or even a different defense strategy, might have obtained had the trial court engaged in the requisite inquiry and ordered separate representation. Although such difficulty may be taken into account in the allocation of the burden of persuasion on the questions of conflict and prejudice, see *infra*,

at 495–496, I am not convinced of the need for a prophylactic gloss on the requirements of the Constitution in this area of criminal law. Cf. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Several other aspects of the Court's opinion suggest a rule of separate representation upon demand of defense counsel. The Court leaves little room for maneuver for a trial judge who seeks to inquire into the substantiality of the defense counsel's representations. Apparently, the trial judge must order separate representation unless the asserted risk of conflict "was too remote to warrant separate counsel," *ante,* at 484, a formulation that suggests a minimal showing on the part of defense counsel. The Court also offers the view that defense counsel in this case could not be expected to make the kind of specific proffer that was present in *Glasser* because of "a risk of violating, by more disclosure, his duty of confidentiality to his clients." *Ante,* at 485. Although concededly not necessary to a decision in this case, the Court then states that the trial court's inquiry must be conducted "without improperly requiring disclosure of the confidential communications of the client." *Ante,* at 487, and n. 11.[1] When these intimations are coupled with the Court's policy of automatic reversal, see *ante,* at 488–489, the path may have been cleared for potentially disruptive demands for separate counsel predicated solely on the representations of defense counsel.

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[1] I do not propose to resolve here the tension between the assertion of a constitutional right and a claim of lawyer-client privilege. But I reject the assumption that defense counsel will be unable to discuss in concrete terms the difficulties of joint representation in a particular case without betraying confidential communications. Nor am I persuaded that the courts will be unable to pursue a meaningful inquiry without insisting on a breach of confidentiality. Experience in the somewhat analogous area of claims of exemption from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552 (1976 ed.), supports this point. See, *e. g., EPA* v. *Mink,* 410 U. S. 73, 92–94 (1973); *Vaughn* v. *Rosen,* 157 U. S. App. D. C. 340, 484 F. 2d 820 (1973), cert. denied, 415 U. S. 977 (1974).

II

Recognition of the limits of this Court's role in adding protective layers to the requirements of the Constitution does not detract from the Sixth Amendment obligation to provide separate counsel upon a showing of reasonable probability of need. In my view, a proper accommodation of the interests of defendants in securing effective assistance of counsel and that of the State in avoiding the delay, potential for disruption, and costs inherent in the appointment of multiple counsel,[2] can be achieved by means which sweep less broadly than the approach taken by the Court. I would follow the lead of the several Courts of Appeals that have recognized the trial court's duty of inquiry in joint-representation cases without minimizing the constitutional predicate of "conflicting interests." [3]

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[2] Each addition of a lawyer in the trial of multiple defendants presents increased opportunities for delay in setting the trial date, in disposing of pretrial motions, in selecting the jury, and in the conduct of the trial itself. Additional lawyers also may tend to enhance the possibility of trial errors. Moreover, in light of professional canons of ethics, cf. ABA Code of Professional Responsibility, DR 5–105 (D) (1969); *Allen* v. *District Court,* 184 Colo. 202, 205–206, 519 P. 2d 351, 353 (1974); Tr. of Oral Arg. 6–7, 15–16, a rule requiring separate counsel virtually upon demand may disrupt the operation of public defender offices.

[3] See, *e. g., United States* v. *Carrigan,* 543 F. 2d 1053, 1055–1056 (CA2 1976):

"The mere representation of two or more defendants by a single attorney does not automatically give rise to a constitutional deprivation of counsel. It is settled in this Circuit that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel. *United States* v. *Mari,* . . . 526 F. 2d [117,] 119 [(CA2 1975)]; *United States* v. *Vowteras,* 500 F. 2d 1210, 1211 (2d Cir.), cert. denied, 419 U. S. 1069 . . . (1974); *United States* v. *Wisniewski,* 478 F. 2d 274, 281 (2d Cir. 1973); *United States* v. *Lovano,* 420 F. 2d 769, 773 (2d Cir.), cert. denied, 397 U. S. 1071 . . . (1970). In all of these cases the trial court had carefully inquired as to the possibility of prejudice and elicited the personal responses of the de-

Ordinarily defense counsel has the obligation to raise objections to joint representation as early as possible before the commencement of the trial.[4] When such a motion is made, supported by a satisfactory proffer, the trial court is under a duty to conduct "the most careful inquiry to satisfy itself that no conflict of interest would be likely to result and that the parties involved had no valid objection." *United States* v. *DeBerry,* 487 F. 2d 448, 453 (CA2 1973). At that hearing, the burden is on defense counsel, because his clients are in possession of the relevant facts, to make a showing of a reasonable likelihood of conflict or prejudice. Upon such a showing, separate counsel should be appointed. "If the court has carried out this duty of inquiry, then to the extent a defendant later attacks his conviction on grounds of conflict of interest arising from joint representation he will bear a heavy burden indeed of persuading" the reviewing court "that he was, for that reason, deprived of a fair trial." *United States* v. *Foster,* 469 F. 2d 1, 5 (CA1 1972). If, however, a proper and timely motion is made, and no hearing is held, "the lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the Government." *United States* v. *Carrigan,* 543 F. 2d 1053, 1056 (CA2 1976).

Since the trial judge in this case failed to inquire into the

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fendants involved. Here the record is barren of any inquiry by the court or any concern by the Government.

"In *United States* v. *DeBerry, supra,* 487 F. 2d, at 453–54, we . . . noted with approval the view of the First Circuit in *United States* v. *Foster,* 469 F. 2d 1, 5 (1st Cir. 1972), that the lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the Government. 487 F. 2d at 453 n. 6."

[4] Since a proper, timely objection was interposed in this case, there is no occasion to identify the circumstances which might trigger a duty of inquiry in the absence of such a motion.

Of course, a later motion may be appropriate if the conflict is not known or does not become apparent before trial proceeds. To guard against strategic disruption of the trial, however, the court may require a substantial showing of justification for such midtrial motions.

substantiality of defense counsel's representations of September 4, 1975, *ante,* at 484 n. 7, the burden shifted to the State to establish the improbability of conflict or prejudice. I agree that the State's burden is not met simply by the assertion that the defenses of petitioners were not mutually inconsistent, for that is not an infrequent consequence of improper joint representation. Nevertheless, the record must offer some basis for a reasonable inference that "conflicting interests" hampered a potentially effective defense. See, *e. g., United States* v. *Donahue,* 560 F. 2d 1039, 1044–1045 (CA1 1977). Because the State has demonstrated that such a basis cannot be found in the record of this case,[5] I would affirm the judgment of the Supreme Court of Arkansas.

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[5] It is unlikely that separate counsel would have been able to develop an independent defense in this case because of the degree of overlap in the identification testimony by the State's witnesses and because of the consistency of the alibis advanced by petitioners. Campbell and Welch, who are half brothers, both used the same alibi. Since Campbell was not identified as an actual participant in the rapes, it might be argued that separate counsel would have encouraged him to endorse his earlier confession in an effort to show that he was less culpable than his two codefendants. But, given his common alibi with Welch, Campbell would have found it difficult to extricate himself from his half brother's cause. In any event, such an argument would have been an appeal to jury nullification because, as the court below noted, Campbell's denial of direct involvement in the rapes "had no effect on his guilt as a principal." 260 Ark. 250, 256, 539 S. W. 2d 435, 439 (1976). Conceivably Holloway, who gave an independent alibi, might have wished to argue that while the State had apprehended two of the real culprits, his arrest was due to a mistaken identification. It is most unlikely that separate counsel would have succeeded on such a tack because each witness who identified Holloway also identified one of the other two codefendants. Moreover, petitioners do not argue in this Court that joint representation impeded effective cross-examination of the State's witnesses. In sum, this is not a case where an inquiry into the possibility of "conflicting interests" reasonably might have revealed a basis for separate representation.

Syllabus

MALONE, COMMISSIONER OF LABOR AND INDUSTRY FOR MINNESOTA *v.* WHITE MOTOR CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76–1184. Argued January 10, 1978—Decided April 3, 1978

The 1971 version of a pension plan negotiated by appellee company and the union representing its employees provided that pensions were to be payable only from a fund established under the plan. Funding of the pension plan was in part to be on a deferred basis; the excess of accrued liability of the fund's assets was to be met through contributions from the employer's continuing operations. Though the company had the right to terminate the plan, it guaranteed to pay benefits amounting to $7 million above the fund's assets. A few weeks before appellee, on May 1, 1974, exercised its termination right, Minnesota's Private Pension Benefits Protection Act (Pension Act) was enacted, which imposed "a pension funding charge" directly against any employer who ceased to operate a place of employment or a pension plan. After appellant state official had certified that appellee by application of the Pension Act owed a pension funding charge of over $19 million, appellee brought this suit in District Court, challenging the constitutionality of the Pension Act, *inter alia,* on the ground that it interfered with the process of collective bargaining sanctioned by the National Labor Relations Act (NLRA) and therefore was pre-empted by the NLRA. Section 10 (b) of the federal Welfare and Pension Plans Disclosure Act (Disclosure Act) provided that the Disclosure Act shall not exempt any person from liability provided by any present or future federal or state law affecting the operation of pension plans. Section 10 (a) provided that the Disclosure Act shall not be construed to prevent any State from obtaining additional information relating to a pension plan "or from otherwise regulating such plan." The District Court, having taken note of the § 10 (b) disclaimer, found sufficient evidence of congressional intent that the Pension Act was not pre-empted by federal law, and ruled in favor of appellant. The Court of Appeals reversed, holding that by purporting to override the existing pension plan in several respects, the Pension Act encroached upon subjects that Congress had committed for determination to the collective-bargaining process. The court also concluded that § 10 (b) of the Disclosure Act related only to state

statutes governing those obligations of trust undertaken by persons managing employment benefit funds, the violation of which gives rise to criminal or civil penalties, and that therefore there was no basis for construing the Disclosure Act as leaving a State with power to change the substantive terms of pension plan agreements. *Held:*

1. The NLRA neither expressly nor by implication forecloses state regulatory power over pension plans that may be the subject of collective bargaining. Sections 10 (b) and 10 (a) of the Disclosure Act, together with the legislative history of that statute, indicate Congress' intention to preserve state regulatory authority over pension plans, including those resulting from collective bargaining. Congress was concerned not only with corrupt pension plans but also with the possibility that those that were honestly managed would be prematurely terminated by the employer, leaving employees without funded pensions at retirement age; and the Disclosure Act clearly anticipated a broad regulatory role for the States. Pp. 504–514.

2. That the Pension Act applies to pre-existing collective-bargaining agreements does not render it pre-empted, since it does not render it more or less consistent with congressional policy. Appellee's claim of unfair retroactive impact may be considered in the context of appellee's due process and impairment-of-contract claims, which are not before the Court and which the District Court will consider on remand. Pp. 514–515.

545 F. 2d 599, reversed.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., *post,* p. 515, and POWELL, J., *post,* p. 516, filed dissenting opinions, in which BURGER, C. J., joined. BRENNAN and BLACKMUN, JJ., took no part in the consideration or decision of the case.

Richard B. Allyn, Solicitor General of Minnesota, argued the cause for appellant. With him on the briefs were *Warren Spannaus,* Attorney General, and *Kent G. Harbison, Richard A. Lockridge,* and *Jon K. Murphy,* Special Assistant Attorneys General.

Frank C. Heath argued the cause for appellees. With him on the brief were *Curtis L. Roy, Erwin Griswold,* and *John L. Strauch.*

Allan A. Ryan, Jr., argued the cause for the United States

as *amicus curiae* urging reversal. On the brief were *Solicitor General McCree, John S. Irving, Carl L. Taylor, Norton J. Come, Linda Sher,* and *David S. Fishback.**

MR. JUSTICE WHITE delivered the opinion of the Court.

A Minnesota statute, the Private Pension Benefits Protection Act, Minn. Stat. § 181B.01 *et seq.* (1976) (Pension Act), passed in April 1974, established minimum standards for the funding and vesting of employee pensions. The question in this case is whether this statute, which since January 1, 1975, has been pre-empted by the federal Employee Retirement Income Security Act of 1974 (ERISA),[1] was pre-empted prior to that time by federal labor policy insofar as it purported to override or control the terms of collective-bargaining agreements negotiated under the National Labor Relations Act (NLRA). A Federal District Court held that it was not, 412 F. Supp. 372 (Minn. 1976), but the Court of Appeals for the Eighth Circuit disagreed and held the Pension Act invalid. 545 F. 2d 599 (1976). Because the case fell within our mandatory appellate jurisdiction pursuant to 28 U. S. C. § 1254 (2), we noted probable jurisdiction. 434 U. S. 813. We reverse.

I

In 1963, White Motor Corp. and its subsidiary, White Farm Equipment Co. (hereafter collectively referred to as appellee),

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**Peter G. Nash, Eugene B. Granof,* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

J. Albert Woll and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae*.

[1] ERISA, 88 Stat. 832, 29 U. S. C. § 1001 *et seq.* (1970 ed., Supp. V), provides for comprehensive federal regulation of employee pension plans, and contains a provision expressly pre-empting all state laws regulating covered plans. § 1144 (a) (1970 ed., Supp. V). Because ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case.

purchased from another company two farm equipment manufacturing plants, located in Hopkins, Minn., and Minneapolis, Minn. (on Lake Street). The employees at these plants, represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), were covered by a pension plan established through collective bargaining.

Under the 1971 collective-bargaining contract, the Pension Plan provided that an employee who attained the age of 40 and completed 10 or more years of credited service with the company was entitled to a pension. The amount of the pension would depend upon the age at which the employee retired. In language unchanged since 1950, the 1971 Plan provided that "[p]ensions shall be payable only from the Fund, and rights to pensions shall be enforceable only against the Fund." App. 155.[2] The Plan, however, was to be funded in part on a deferred basis. The unpaid past service liability—the excess of accrued liability over the present value of the assets of the Fund—was to be met through contributions by the employer from its continuing operations.[3]

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[2] Section 6.17 of the Plan also stated:

"No benefits other than those specifically provided for are to be provided under this Plan. No employee shall have any vested right under the Plan prior to his retirement and then only to the extent specifically provided herein." App. to Jurisdictional Statement A–29.

Section 9.04, "Rights of Employees in Fund," is also relevant:

"No employee, participant or pensioner shall have any right to, or interest in any part of any Trust Fund created hereunder, upon termination of employment or otherwise, except as provided under this Plan and only to the extent therein provided. All payments of benefits as provided for in this Plan shall be made only out of the Fund or Funds of the Plan, and neither the Company nor any Trustee nor any Pension Committee or Member thereof shall be liable therefore in any manner or to any extent." App. to Jurisdictional Statement A–7.

[3] The 1971 version of the Plan contained a provision which required the employer to fund the net deficiency over a period of 35 years, beginning

Section 10.02 of the Plan provided that "[t]he Company shall have the sole right at any time to terminate the entire plan." During the 1968 and 1971 negotiations, however, the UAW obtained from appellee guarantees that, upon termination, pensions for those entitled to them would remain at certain designated levels, though lower than those specified in the Plan.[4] By virtue of these guarantees, appellee assumed a direct liability for pension payments amounting to $7 million above the assets in the Fund.

Appellee exercised its contractual right to terminate the Pension Plan on May 1, 1974.[5] A few weeks before, however, the Pension Act had been enacted. This statute imposed "a pension funding charge" directly against any employer who ceased to operate a place of employment or a pension plan. This charge would be sufficient to insure that all employees with 10 or more years of service would receive whatever pension benefits had accrued to them, regardless of whether their rights to those benefits had "vested" within the terms of

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in 1971. The 1968 version contained a similar provision which contemplated that the deficiency would be amortized over a 30-year period.

[4] The effect of the guarantees was to assure that the employees would receive pension benefits at a level about 60% of that specified in the Plan.

[5] In January 1972, after several years of losses, appellee informed the UAW that it intended to close both of the plants at issue. As a result of negotiations, the Hopkins plant continued to operate, but the Lake Street plant was closed. At the time the Lake Street plant was closed, there was a net deficiency in the Pension Fund of $14 million. As of January 1, 1975, there were 981 retirees under the Plan and 233 persons eligible for deferred pensions. In addition, there were 44 terminated employees who at the time of the termination had 10 years of service but had not attained the age of 40. Two hundred and sixty employees continued to work at the Hopkins plant.

Appellee also attempted to terminate the Pension Plan on June 30, 1972, but the UAW challenged this action on the ground that the Plan could not be terminated until expiration of the collective-bargaining agreement on May 1, 1974. An arbitrator upheld the union's position. See *International Union, UAW* v. *White Motor Corp.*, 505 F. 2d 1193 (CA8 1974).

the Plan. The funds obtained through the pension funding charge would then be used to purchase an annuity payable to the employee when he reached normal retirement age. Although the Pension Act did not compel an employer to adopt or continue a pension plan, it did guarantee to employees with 10 or more years' service full payment of their accrued pension benefits.

Pursuant to the Pension Act, the appellant, Commissioner of Labor and Industry of the State of Minnesota, undertook an investigation of the pension plan termination here involved and later certified that the sum necessary to achieve compliance with the Pension Act was $19,150,053. Under the Pension Act, a pension funding charge in this amount became a lien on the assets of appellee. Appellee promptly filed this suit in Federal District Court.

Appellee's complaint, as amended, asserted violations of the Supremacy Clause, the Contract Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The Supremacy Clause claim was based on the argument that the Pension Act was in conflict with several provisions of the NLRA,[6] as amended, 29 U. S. C. § 151 *et seq.*, because it "interferes with the right of Plaintiffs to free collective bargaining under federal law and . . . vitiates collective bargaining agreements entered into under the authority of federal law, by imposing upon Plaintiffs obligations which, by the express terms of such collective bargaining agreements, Plaintiffs were not required to assume." App. A–9—A–10. Appellee moved for partial summary judgment or, alternatively, for a preliminary injunction based on the pre-emption claim.

Distinguishing *Teamsters* v. *Oliver,* 358 U. S. 283 (1959), and relying on evidence of congressional intent contained in

[6] The complaint claimed a conflict with the provisions and policies of §§ 1, 7, 8 (a)(5), 8 (b)(3), and 8 (d) of the NLRA, 29 U. S. C. §§ 151, 157, 158 (a)(5), 158 (b)(3), and 158 (d).

the federal Welfare and Pension Plans Disclosure Act (Disclosure Act), 72 Stat. 997, as amended, 76 Stat. 35, 29 U. S. C. § 301 *et seq.*, the District Court held that the Pension Act was not pre-empted by federal law. 412 F. Supp. 372 (Minn. 1976). On appeal, the Court of Appeals for the Eighth Circuit held that the Pension Act was pre-empted by federal labor law, and reversed the District Court. 545 F. 2d 599 (1976). The reason was that the Pension Act purported to override the terms of the existing pension plan, arrived at through collective bargaining, in at least three ways: It granted employees vested rights not available under the pension plan; to the extent of any deficiency in the pension fund, it required payment from the general assets of the employer, while the pension plan provided that benefits shall be paid only out of the pension fund; and the Pension Act imposed liability for post-termination payments to the pension fund beyond those specifically guaranteed. This, the court ruled, the State could not do; for if, under *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976), "states cannot control the economic weapons of the parties at the bargaining table, *a fortiori,* they may not directly control the substantive terms of the contract which results from that bargaining." 545 F. 2d, at 606. Further, as the court understood the opinion in *Oliver, supra,* "a state cannot modify or change an otherwise valid and effective provision of a collective bargaining agreement." 545 F. 2d, at 608. Finally, the Court of Appeals found that the pre-emption disclaimer in the Disclosure Act relied on by the District Court related only

> "to state statutes governing those obligations of trust undertaken by persons managing, administrating or operating employee benefit funds, the violation of which gives rise to civil and criminal penalties. Accordingly, no warrant exists for construing this legislation to leave to a state the power to change substantive terms of pension plan agreements." *Id.,* at 609.

II

It is uncontested that whether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress. "The purpose of Congress is the ultimate touchstone." *Retail Clerks* v. *Schermerhorn,* 375 U. S. 96, 103 (1963). Often Congress does not clearly state in its legislation whether it intends to pre-empt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. *Ray* v. *Atlantic Richfield Co., ante,* at 157–158; *Jones* v. *Rath Packing Co.,* 430 U. S. 519, 525, 540–541 (1977); *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). "We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the States." *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 289 (1971). The Pension Act "leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters,* 346 U. S. 485, 488 (1953). Here, the Court of Appeals concluded that the Minnesota statute was invalid because it trenched on what the court considered to be subjects that Congress had committed for determination to the collective-bargaining process.

There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension

plans, that may be the subject of collective bargaining. If the Pension Act is pre-empted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here and that a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans is to be found in § 10 of the Disclosure Act. Section 10 (b) provided:

> "The provisions of this Act, except subsection (a) of this section and section 13 and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law."

Also, § 10 (a), after shielding an employer from duplicating state and federal filing requirements, makes clear that other state laws remained unaffected:

> "Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan."

Contrary to the Court of Appeals, we believe that the foregoing provisions, together with the legislative history of the 1958 Disclosure Act, clearly indicate that Congress at that time recognized and preserved state authority to regulate pension plans, including those plans which were the product of collective bargaining. Because the 1958 Disclosure Act was in effect at the time of the crucial events in this case, the expression of congressional intent included therein should control the decision here.[7]

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[7] The Disclosure Act, codified at 29 U. S. C. § 301 *et seq.*, was specifi-

Congressional consideration of the problems in the pension field began in 1954, after the President sent a message to Congress recommending that

> "Congress initiate a thorough study of welfare and pension funds covered by collective bargaining agreements, with a view of enacting such legislation as will protect and conserve these funds for the millions of working men and women who are the beneficiaries." [8]

In the next four years, through hearings, studies, and investigations, a Senate Subcommittee canvassed the problems of the nearly unregulated pension field and possible solutions to them. Although Congress turned up extensive evidence of kickbacks, embezzlement, and mismanagement, it concluded:

> "The most serious single weakness in this private social insurance complex is not in the abuses and failings enumerated above. Overshadowing these is the too frequent practice of withholding from those most directly affected, the employee-beneficiaries, information which will permit them to determine (1) whether the program is being administered efficiently and equitably, and (2) more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them." S. Rep. No. 1440, 85th Cong., 2d Sess., 12 (1958) (hereinafter S. Rep.).

As a first step toward protection of the workers' interests in their pensions, Congress enacted the 1958 Disclosure Act. The statute required plan administrators to file with the Labor

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cally repealed by ERISA. 29 U. S. C. § 1031 (a) (1970 ed., Supp. V). However, ERISA was enacted on September 2, 1974—after the operative events in this case—and the repeal did not take effect until January 1, 1975. § 1031 (b)(1) (1970 ed., Supp. V). See generally n. 1, *supra*.

[8] Public Papers of The Presidents, Dwight D. Eisenhower, 1954, ¶ 5, p. 43 (1960).

Department and make available upon request both a description of the plan and an annual report containing financial information. In the case of a plan funded through a trust, the annual report was to include, *inter alia,*

> "the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of employees both retired and nonretired covered by the plan . . . ,"

as well as a valuation of the assets of the fund.

The statute did not, however, prescribe any substantive rules to achieve either of the two purposes described above. The Senate Report explained:

> "[T]he legislation proposed is not a regulatory statute. It is a disclosure statute and by design endeavors to leave regulatory responsibility to the States." S. Rep. 18.

This objective was reflected in §§ 10 (a) and 10 (b), quoted above. As the Senate Report explained, the statute was designed "to leave to the States the detailed regulations relating to insurance, trusts and other phases of their operations." S. Rep. 19. There was "no desire to get the Federal Government involved in the regulation of these plans but a disclosure statute which is administered in close cooperation with the States could also be of great assistance to the States in carrying out their regulatory functions." *Id.,* at 18.

There is also no doubt that the Congress which adopted the Disclosure Act recognized that it was legislating with respect to pension funds many of which had been established by collective bargaining. The message from the President which had prompted the original inquiry had focused on the need to protect workers "covered by collective bargaining agreements." The problems that Congress had identified were characteristic of bargained-for plans as well as of others. The Reports of both the Senate and House Committees explained that pension funds were frequently established

through the collective-bargaining process. S. Rep. 8; H. R. Rep. No. 2283, 85th Cong., 2d Sess., 9 (1958) (hereinafter H. R. Rep.). The Senate Report emphasized the need for protection even where the plan was incorporated in a collective-bargaining agreement. S. Rep. 4, 8, 14. Congressmen explaining the bill on the floor also made clear that the bill would apply to pension plans "whether or not they have been brought into existence through collective bargaining." 104 Cong. Rec. 16420 (1958) (remarks of Cong. Lane); *id.*, at 16425 (remarks of Cong. Wolverton); see *id.*, at 7049–7052 (remarks of Sen. Kennedy). Indeed, the bill met opposition in both the Senate and the House on the ground that its approach would "require employers to surrender to labor unions economic and bargaining power which should be negotiated through the normal channels of collective bargaining." S. Rep. 34 (minority view of Sen. Allott); accord, H. R. Rep. 25 (minority views).[9] Yet neither the bill as enacted nor its

[9] Opponents of the bill argued that the legislation would "seriously interfere with . . . bargaining relationships" by giving labor unions access to information about the costs of certain employer-administered benefit plans. 104 Cong. Rec. 7209 (1958) (remarks of Sen. Allott). In these level-of-benefit plans, the employer guaranteed to his employees specified benefits and then undertook the full cost and management of the plan. The unions were often not told the annual cost of providing benefits under the plan. Senator Allott, the principal opponent of the bill, argued on the floor:

"Where the employer, either on his own initiative or as a result of collective bargaining, agrees to provide a level-of-benefits plan, the question of whether employees or their representatives should have further information is one to be bargained between them. How the employer intends to meet this financial obligation, or how the financial operation of the fund is set up to pay the benefits, is a matter to be settled by the parties concerned—not granted by operation of law." *Id.*, at 7208.

Congressman Bosch, the leading opponent of the bill in the House, argued bluntly:

"Those level-of-benefits plans which now operate under collective bargaining contracts were agreed to with the full knowledge by the unions

legislative history drew a distinction between collectively bargained and all other plans, either with regard to the disclosure role of the federal legislation or the regulatory functions that would remain with the States.

Appellee argues that the Disclosure Act's allocation of regulatory responsibility to the States is irrelevant here because the Disclosure Act was "enacted to deal with corruption and mismanagement of funds." Brief for Appellees 36. We think that the appellee advances an excessively narrow view of the legislative history. Congress was concerned not only with corruption, but also with the possibility that honestly managed pension plans would be terminated by the employer, leaving the employees without funded pensions at retirement age.

The Senate Report specifically stated: "Entirely aside from abuses or violations, there are compelling reasons why there should be disclosure of the financial operation of all types of plans." S. Rep. 16. The Report then reproduced a chart showing the number of pension plans registered with the Internal Revenue Service that had been terminated during a 2-month period. *Ibid.* The Senate Committee also observed: "Trusteed pension plans commonly limit benefits, even though fixed, to what can be paid out of the funds in the pension trust." *Id.*, at 15. As an illustration, the Report quoted language from a collectively bargained pension plan disclaiming any liability of the company in the event of termination.

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involved that the cost, operation and management were the exclusive right of the persons responsible under the plans and, if the unions desired it otherwise, they could have bargained on some other basis than level-of-benefits. If the labor unions wish to change this situation, they should do it through the normal channels of collective bargaining and not by legislation." *Id.*, at 16424.

Amendments proposed by Senator Allott and Congressman Bosch seeking to exempt level-of-benefits plans from the statute were defeated. *Id.*, at 7333, 16442.

Ibid.[10] The Senate Report also showed an awareness of the problems posed by vesting requirements [11] and expressed concern that "employees whose rights do not mature within such contract period must rely upon the expectation that their union will be able to renew the contract or negotiate a similar one upon its termination." *Id.*, at 8. Thus, Congress was concerned with many of the same issues as are involved in this case—unexpected termination, inadequate funding, unfair vesting requirements. In preserving generally state laws "affecting the operation or administration of employee welfare or pension benefit plans," 72 Stat. 1003, Congress indicated that the States had and were to have authority to deal with these problems.

Moreover, it should be emphasized that § 10 of the Disclosure Act referred specifically to the "future," as well as

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[10] The Report quoted "representative language" from a General Motors-UAW contract which provided:

"The pension benefits of the plan shall be only such as can be provided by the assets of the pension fund or by any insured fund, and there shall be no liability or obligation on the part of the corporation to make any further contributions to the trustee or the insurance company in event of termination of the plan. No liability for the payment of pension benefits under the plan shall be imposed upon the corporation, the officers, directors, or stockholders of the corporation." S. Rep. 15.

[11] Among the "basic facts" noted by the Committee were:

"9. The employees covered by these group plans have no specific rights until they meet the conditions of the particular plans. For example, in the case of a pension plan this might involve 30 years' service and the attainment of age 65 . . . .

"10. Although these plans envisaged a continuing operation to provide benefits for all employees covered—in plans which are not collectively bargained, which constitute the majority of all plans and which are predominantly administered by employers, there is actually no assurance that the benefits will be forthcoming in view of a universally employed clause in such plans to the effect that the employer can terminate the plan at his discretion. Even in collectively bargained plans the employer's agreement to provide for part or all the costs of the benefits is a short-term contract of 1 to 5 years." *Id.*, at 4.

"present" laws of the States. Congress was aware that the States had thus far attempted little regulation of pension plans.[12] The federal Disclosure Act was envisioned as laying a foundation for future state regulation. The Congress sought "to provide adequate information in disclosure legislation for possible later State . . . regulatory laws." H. R. Rep. 2. Senator Kennedy, a manager of the bill, explained to his colleagues:

> "The objective of the bill is to provide more adequate protection for the employee-beneficiaries of these plans through a uniform Federal disclosure act which will . . . make the facts available not only to the participants and the Federal Government but to the States, in order that any desired State regulation can be more effectively accomplished." 104 Cong. Rec. 7050 (1958).

See also S. Rep. 18. Senator Kennedy had "no doubt that this [was] an area in which the States [were] going to begin to move." 104 Cong. Rec. 7053 (1958).

The aim of the Disclosure Act was perhaps best summarized by Senator Smith, the ranking Republican on the Senate Committee and a supporter of the bill. He stated:

> "It seems to be the policy of the pending legislation to extend beyond the problem of corruption. As stated in the language of the bill, one of its aims is to make available to the employee-beneficiaries information which will permit them to determine, first, whether the program is being administered efficiently and equitably; and, second, more importantly, whether or not the assets and

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[12] Senator Ives, who had served as chairman of the Senate Investigating Committee during the 83d Congress, explained:

"Six States already have enacted legislation on the general subject of pension and welfare plans. Other States are considering such legislation." 104 Cong. Rec. 7186–7187 (1958).

The coverage of extant state legislation was more fully discussed in S. Rep. 18.

> prospective income of the programs are sufficient to guarantee the benefits which have been promised to them.
>
> "This present bill provides for far more than anti-corruption legislation directed against the machinations of dishonest men who betray their trust. Rather, it inaugurates a new social policy of accountability. . . .
>
> "This policy could very well lead to the establishment of mandatory standards by which these plans must be governed." *Id.*, at 7517.

It is also clear that Congress contemplated that the primary responsibility for developing such "mandatory standards" would lie with the States.

Although Congress came to a quite different conclusion in 1974 when ERISA was adopted, the 1958 Disclosure Act clearly anticipated a broad regulatory role for the States. In light of this history, we cannot hold that the Pension Act is nevertheless implicitly pre-empted by the collective-bargaining provisions of the NLRA. Congress could not have intended that bargained-for plans, which were among those that had given rise to the very problems that had so concerned Congress, were to be free from either state or federal regulation insofar as their substantive provisions were concerned. The Pension Act seeks to protect the accrued benefits of workers in the event of plan termination and to insure that the assets and prospective income of the plan are sufficient to guarantee the benefits promised—exactly the kind of problems which the 85th Congress hoped that the States would solve.

This conclusion is consistent with the Court's decision in *Teamsters* v. *Oliver*, 358 U. S. 283 (1959), which concerned a claimed conflict between a state antitrust law and the terms of a collective-bargaining agreement specially adapted to the trucking business. The agreement prescribed a wage scale for truckdrivers and, in order to prevent evasion, provided that drivers who own and drive their own vehicles should be paid, in addition to the prescribed wage, a stated minimum rental

for the use of their vehicles. An Ohio court had invalidated this portion of the collective-bargaining agreement under Ohio antitrust law. This Court reversed, noting that "[t]he application [of the Ohio law] would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." *Id.*, at 296.

The *Oliver* opinion contains broad language affirming the independence of the collective-bargaining process from state interference:

> "Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide . . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Ibid.* (citations omitted).

The opinion nevertheless recognizes exceptions to this general rule. One of them, necessarily anticipated, was the situation where it is evident that Congress intends a different result:

> "The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U. S. 301, 307–312." *Ibid.*[13]

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[13] The Court also pointed out:

"We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the

As we understand the 1958 Disclosure Act and its legislative history, the collective-bargaining provisions at issue here dealt with precisely the sort of subject matter "which Congress . . . indicated may be left to [regulation] by the several states." Congress clearly envisioned the exercise of state regulation power over pension funds, and we do not depart from *Oliver* in sustaining the Minnesota statute.

III

Insofar as the Supremacy Clause issue is concerned, no different conclusion is called for because the Minnesota statute was enacted after the UAW-White Motor Corp. agreement had been in effect for several years. Appellee points out that the parties to the 1971 collective-bargaining agreement therefore had no opportunity to consider the impact of any such legislation. Although we understand the equitable considerations which underlie appellee's argument, they are not material to the resolution of the pre-emption issue since they do not render the Minnesota Pension Act any more or less consistent with congressional policy at the time it was adopted.[14]

Our decision in this case is, of course, limited to appellee's claim that the Minnesota statute is inconsistent with the federal labor statutes. Appellee's other constitutional claims are not before us. It remains for the District Court to consider on remand the contentions that the Minnesota Pension Act impairs contractual obligations and fails to provide due

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federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." 358 U. S., at 297. The State claims that the statute is a health or safety regulation that would be valid under *Oliver,* wholly aside from the Disclosure Act. We need not pass on this contention.

[14] We note that the United States as *amicus curiae,* argues that the Minnesota statute is not pre-empted. Its view is that application of the Minnesota Pension Act to pre-1974 labor agreements is not disruptive of the federal labor scheme.

process in violation of the United States Constitution. Without intimating any views on the merits of those questions,[15] we note that appellee's claim of unfair retroactive impact can be considered in that context. All that we decide here is that the decision of the Court of Appeals finding federal pre-emption of the Minnesota Pension Act should be and hereby is

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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

I substantially agree with the reasoning of the Court of Appeals for the Eighth Circuit in this case. 545 F. 2d 599. Accordingly, I would affirm the judgment before us.

The Court today seems to concede that Minnesota's statutory modification of the appellee's substantive obligations under its collective-bargaining agreement would be pre-empted by the federal labor laws if Congress had not somehow indicated that the State was free to impose this particular modification. *Ante,* at 513–514. The Court finds such an indication implicit in Congress' failure to undertake substantive regulation of pension plans when it enacted the so-called Disclosure Act of 1958. I do not believe, however, that inferences drawn largely from what Congress did *not* do in enacting the Disclosure Act are sufficient to override the fundamental policy of the national labor laws to leave undisturbed "the parties' solution of a problem which Congress has

[15] In *Fleck* v. *Spannaus,* 449 F. Supp. 644 (Minn. 1977), a three-judge District Court upheld the Minnesota Pension Act against a federal constitutional challenge based on the Contract Clause, as well as other constitutional provisions. We have noted probable jurisdiction in that case *sub nom. Allied Structural Steel Co.* v. *Spannaus,* 434 U. S. 1045, but have not yet heard oral argument.

required them to negotiate in good faith toward solving . . . ." *Teamsters* v. *Oliver*, 358 U. S. 283, 296.

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

I join MR. JUSTICE STEWART's conclusion that the evidence as to what Congress did *not* do in the federal Welfare and Pension Plans Disclosure Act, 72 Stat. 997, 29 U. S. C. § 301 *et seq.*, is insufficient to override national labor policy barring interference by the States with privately negotiated solutions to problems involving mandatory subjects of collective bargaining.

As in *Teamsters* v. *Oliver*, 358 U. S. 283, 297 (1959), "[w]e have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." The statute in this case removes from the bargaining table certain means of dealing with an inevitable trade-off between somewhat conflicting industrial relations goals—the tension between maintaining competitive standards of present compensation and, at the same time, creating a solvent fund for the security of long-term employees upon retirement. In essence, Minnesota has restricted the available options to the fully funded pension plan that vests upon 10 years of service, whenever an employer ceases to operate a place of employment or pension plan. It also imposes a principle of direct liability that well may discourage employer participation in matters of such vital importance to working men and women.

The retroactivity feature of the Minnesota measure exacerbates the degree of interference with the system of free collective bargaining. Here a statute resulting in the imposition on appellee of substantial financial liability, perhaps as large as $19 million, was enacted and took effect at a time when a

collective-bargaining agreement embodying different provisions continued in force, by virtue of an arbitration decision, even though the plant in question had closed. Essential features of the negotiated plan, including deferred funding of past-service liability, limited employer liability, and a power of termination, were negated by the legislation. The parties were given no opportunity to consider this expansion of liability in determining how the bargain should be struck. It is not unlikely that the provisions of the pension plan in issue would have been different if the parties could have predicted this statutory development. This is not, therefore, a case where state law serves as a backdrop to negotiations, while affording the parties considerable freedom to strike the best possible bargain consistent with state substantive policies. This statute became law in midterm, significantly changing the economic balance reached by the parties at the bargaining table.

In the absence of congressional indication to the contrary, or the type of local health or safety regulation adverted to in *Oliver,* the States may not alter the terms of existing collective-bargaining agreements on mandatory subjects of bargaining. Congress can be expected to take into account the impact of retroactive legislation on the bargaining process, and often provides for a delayed effective date in order to minimize any disruption.* But the States, because their

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*Unlike the Minnesota statute, the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* (1970 ed., Supp. V), provides for a careful phasing in of the statute's requirements in the case of collectively negotiated pension plans. For such plans, ERISA funding requirements will apply only to plan years beginning after termination of the collective-bargaining agreement in effect on January 1, 1974, or plan years beginning after December 31, 1980, whichever is earlier. §§ 1061 (c)(1) and 1086 (c)(1) (1970 ed., Supp. V).

This type of considered congressional response to the special problems of arrangements flowing from collective-bargaining agreements is also found in the Equal Pay Act of 1963, § 4, 77 Stat. 57, amending the Fair Labor Standards Act of 1938, 29 U. S. C. § 206 (d). Congress provided that in

concerns are distinct from the considerations that animate a national labor policy, are unlikely to weigh—with perception and understanding—the relevant private and public interests. There is little evidence that Minnesota took more than a parochial view of these considerations when it amended retroactively the bargaining agreement of the parties.

Until Congress expresses its will in clearer fashion than the ambiguous pre-emption disclaimer of the 1958 Disclosure Act, *ante,* at 505, federal labor policy requires invalidation of the type of statute involved in this case. I would affirm the judgment of the Court of Appeals.

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the case of bona fide collective-bargaining agreements in effect at least 30 days prior to the date of enactment of the 1963 measure, the amendments would take effect upon the termination of such collective-bargaining agreement or upon the expiration of two years from the enactment date, whichever occurred first.

Syllabus

VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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

No. 76–419. Argued November 28, 1977—Decided April 3, 1978*

In No. 76–419, after extensive hearings before the Atomic Safety and Licensing Board (Licensing Board) and over respondents' objections, the Atomic Energy Commission (AEC) granted petitioner Vermont Yankee Nuclear Power Corp. a license to operate a nuclear power plant, and this ruling was affirmed by the Atomic Safety and Licensing Appeal Board (Appeal Board). Subsequently, the AEC, specifically referring to the Appeal Board's decision, instituted rulemaking proceedings to deal with the question of considering environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light-water-cooled nuclear power reactors. In these proceedings the Licensing Board was not to use full formal adjudicatory procedures. Eventually, as a result of these rulemaking proceedings, the AEC issued a so-called fuel cycle rule. At the same time the AEC approved the procedures used at the hearing; indicated that the record, including the Environmental Survey, provided an adequate data base for the rule adopted; and ruled that to the extent the rule differed from the Appeal Board's decision such decision had no further precedential significance, but that since the environmental effects of the uranium fuel cycle had been shown to be relatively insignificant, it was unnecessary to apply the rule to Vermont Yankee's environmental reports submitted prior to the rule's effective date or to the environmental statements circulated for comment prior to such date. Respondents appealed from both the AEC's adoption of the fuel cycle rule and its decision to grant Vermont Yankee's license. With respect to the license, the Court of Appeals first ruled that in the absence of effective rulemaking proceedings, the AEC must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings, and went on to hold that despite the fact that it appeared that the AEC employed all the procedures required by the Administrative Procedure Act (APA) in 5 U. S. C. § 553 (1976 ed.) and more,

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*Together with No. 76–528, *Consumers Power Co.* v. *Aeschliman et al.*, also on certiorari to the same court.

the rulemaking proceedings were inadequate and overturned the rule, and accordingly the AEC's determination with respect to the license was also remanded for further proceedings. In No. 76–528, after examination of a report of the Advisory Committee on Reactor Safeguards (ACRS) and extensive hearings, and over respondent intervenors' objections, the AEC granted petitioner Consumers Power Co. a permit to construct two nuclear reactors, and this ruling was affirmed by the Appeal Board. At about this time the Council on Environmental Quality revised its regulations governing the preparation of environmental impact statements so as to mention for the first time the necessity for considering energy conservation as one of the alternatives to a proposed project. In view of this development and a subsequent AEC ruling indicating that all evidence of energy conservation should not necessarily be barred at the threshold of AEC proceedings, one of the intervenors moved to reopen the permit proceedings so that energy conservation could be considered, but the AEC declined to reopen the proceedings. Respondents appealed from the granting of the construction permit. The Court of Appeals held that the environmental impact statement for the construction of the reactors was fatally defective for failure to examine energy conservation as an alternative to plants of this size, and that the ACRS report was inadequate and should have been returned to the ACRS for further elucidation, understandable to a layman, and remanded the case for appropriate consideration of waste disposal and other unaddressed issues. *Held:*

1. Generally speaking, 5 U. S. C. § 553 (1976 ed.) establishes the maximum procedural requirements that Congress was willing to have the courts impose upon federal agencies in conducting rulemaking proceedings, and while agencies are free to grant additional procedural rights in the exercise of their discretion, reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. And, even apart from the APA, the formulation of procedures should basically be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. Pp. 523–525.

2. The Court of Appeals in these cases has seriously misread or misapplied such statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress, and moreover as to the Court of Appeals' decision with respect to agency action taken after full adjudicatory hearings, it improperly intruded into the agency's decision-making process. Pp. 535–558.

(a) In No. 76–419, the AEC acted well within its statutory authority

when it considered the environmental impact of the fuel processes when licensing nuclear reactors. Pp. 538–539.

(b) Nothing in the APA, the National Environmental Policy Act of 1969 (NEPA), the circumstances of the case in No. 76–419, the nature of the issues being considered, past agency practice, or the statutory mandate under which the AEC operates permitted the Court of Appeals to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the AEC so long as the AEC used at least the statutory *minima*, a matter about which there is no doubt. Pp. 539–548.

(c) As to whether the challenged rule in No. 76–419 finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court, the case is remanded so that the Court of Appeals may review the rule as the APA provides. The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good. P. 549.

(d) In No. 76–528, the Court of Appeals was wrong in holding that rejection of energy conservation on the basis of the "threshold test" was capricious and arbitrary as being inconsistent with the NEPA's basic mandate to the AEC, since the court's rationale basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise. The court seriously mischaracterized the AEC's "threshold test" as placing "heavy substantive burdens on intervenors." On the contrary the AEC's stated procedure as requiring a showing sufficient to require reasonable minds to inquire further is a procedure well within the agency's discretion. Pp. 549–555.

(e) The Court of Appeals' holding in No. 76–528 that the Licensing Board should have returned the ACRS report to the ACRS for further elaboration is erroneous as being an unjustifiable intrusion into the administrative process, and there is nothing in the relevant statutes to justify what the court did. Pp. 556–558.

No. 76–419, 178 U. S. App. D. C. 336, 547 F. 2d 633, and No. 76–528, 178 U. S. App. D. C. 325, 547 F. 2d 622, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN and POWELL, JJ., who took no part in the consideration or decision of the cases.

Thomas G. Dignan, Jr., argued the cause for petitioner in No. 76–419. With him on the briefs were *G. Marshall Moriarty, William L. Patton,* and *R. K. Gad III. Charles A. Horsky* argued the cause for petitioner in No. 76–528. With him on the briefs was *Harold F. Reis.*

Deputy Solicitor General Wallace argued the cause for the federal respondents in support of petitioners in both cases pursuant to this Court's Rule 21 (4). On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Liotta, Harriet S. Shapiro, Edmund B. Clark, John J. Zimmerman, Peter L. Strauss,* and *Stephen F. Eilperin. Henry V. Nickel* and *George C. Freeman, Jr.*, filed a brief for respondents Baltimore Gas & Electric Co. et al. in support of petitioner in No. 76–419 pursuant to Rule 21 (4).

Richard E. Ayres argued the cause and filed briefs for respondents in No. 76–419. *Myron M. Cherry* argued the cause for the nonfederal respondents in No. 76–528. With him on the brief was *Peter A. Flynn.*†

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†Briefs of *amici curiae* urging reversal were filed by *Cameron F. MacRae, Leonard M. Trosten,* and *Harry H. Voigt* for Edison Electric Institute et al. in No. 76–419; by *Leonard J. Theberge, John M. Cannon, Edward H. Dowd,* and *L. Manning Muntzing* for Hans A. Bethe et al. in No. 76–528; and by *Max Dean* and *David S. Heller* for the U. S. Labor Party in No. 76–528.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Philip Weinberg* and *John F. Shea III,* Assistant Attorneys General; *Cabanne Howard,* Assistant Attorney General of Maine; and *Ellyn Weiss,* Assistant Attorney General of Massachusetts, filed a brief for 24 named States as *amici curiae* urging affirmance in both cases, joined by officials for their respective States as follows: *William J. Baxley,* Attorney General of Alabama, and *Henry H. Caddell,* Assistant Attorney General; *Richard R. Wier, Jr.,* Attorney General of Delaware, and *June D. MacArtor,* Deputy Attorney General; *Robert L. Shevin,* Attorney General of Florida, and *Marty Friedman,* Assistant Attorney General; *Arthur K. Bolton,* Attorney General of Georgia, and *Robert Bomar,* Senior Assistant Attorney General; *William J. Scott,* Attorney General of Illinois, and *Richard W. Cosby,* Assistant

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.,* at 40. Section 4 of the Act, 5 U. S. C. § 553 (1976 ed.), dealing with rulemaking, requires in subsection (b) that

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Attorney General; *Curt T. Schneider,* Attorney General of Kansas, and *William Griffin,* Assistant Attorney General; *Robert F. Stephens,* Attorney General of Kentucky, and *David Short,* Assistant Attorney General; *William J. Guste,* Attorney General of Louisiana, and *Richard M. Troy,* Assistant Attorney General; *Joseph E. Brennan,* Attorney General of Maine; *Francis B. Burch,* Attorney General of Maryland, and *Warren K. Rich,* Assistant Attorney General; *Francis X. Bellotti,* Attorney General of Massachusetts; *Frank J. Kelley,* Attorney General of Michigan, and *Stewart H. Freeman,* Assistant Attorney General; *Warren R. Spannaus,* Attorney General of Minnesota, and *Jocelyn F. Olson,* Assistant Attorney General; *John Ashcroft,* Attorney General of Missouri, and *Robert H. Lindholm,* Assistant Attorney General; *Toney Anaya,* Attorney General of New Mexico, and *James Huber,* Assistant Attorney General; *Rufus L. Edmisten,* Attorney General of North Carolina, and *Dan Oakley,* Assistant Attorney General; *William J. Brown,* Attorney General of Ohio, and *David Northrup,* Assistant Attorney General; *James A. Redden,* Attorney General of Oregon, and *Richard M. Sandvik,* Assistant Attorney General; *Robert P. Kane,* Attorney General of Pennsylvania, and *Douglas Blazey,* Assistant Attorney General; *John L. Hill,* Attorney General of Texas, and *Troy C. Webb* and *Paul G. Gosselink,* Assistant Attorneys General; *Robert B. Hansen,* Attorney General of Utah, and *William C. Quigley; M. Jerome Diamond,* Attorney General of Vermont, and *Benson D. Scotch,* Assistant Attorney General; and *Bronson C. LaFollette,* Attorney General of Wisconsisn, and *John E. Kofron,* Assistant Attorney General. *George C. Deptula* and *James N. Barnes* filed a brief for the Union of Concerned Scientists Fund, Inc., as *amicus curiae* urging affirmance in No. 76–419.

Ronald A. Zumbrun, Raymond M. Momboisse, Robert K. Best, Albert Ferri, Jr., and *W. Hugh O'Riordan* filed a brief for the Pacific Legal Foundation as *amicus curiae* in both cases.

"notice of proposed rule making shall be published in the Federal Register . . . ," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Interpreting this provision of the Act in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972), and *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224 (1973), we held that generally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.[1] Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In *FCC* v. *Schreiber*, 381 U. S. 279, 290 (1965), the Court explicated

[1] While there was division in this Court in *United States* v. *Florida East Coast R. Co.* with respect to the constitutionality of such an interpretation in a case involving ratemaking, which Mr. Justice Douglas and MR. JUSTICE STEWART felt was "adjudicatory" within the terms of the Act, the cases in the Court of Appeals for the District of Columbia Circuit which we review here involve rulemaking procedures in their most pristine sense.

this principle, describing it as "an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." The Court there relied on its earlier case of *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), where it had stated that a provision dealing with the conduct of business by the Federal Communications Commission delegated to the Commission the power to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions."

It is in the light of this background of statutory and decisional law that we granted certiorari to review two judgments of the Court of Appeals for the District of Columbia Circuit because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. 429 U. S. 1090 (1977). We conclude that the Court of Appeals has done just that in these cases, and we therefore remand them to it for further proceedings. We also find it necessary to examine the Court of Appeals' decision with respect to agency action taken after full adjudicatory hearings. We again conclude that the court improperly intruded into the agency's decisionmaking process, making it necessary for us to reverse and remand with respect to this part of the cases also.

I

A

Under the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.*, the Atomic Energy Com-

mission [2] was given broad regulatory authority over the development of nuclear energy. Under the terms of the Act, a utility seeking to construct and operate a nuclear power plant must obtain a separate permit or license at both the construction and the operation stage of the project. See 42 U. S. C. §§ 2133, 2232, 2235, 2239. In order to obtain the construction permit, the utility must file a preliminary safety analysis report, an environmental report, and certain information regarding the antitrust implications of the proposed project. See 10 CFR §§ 2.101, 50.30 (f), 50.33a, 50.34 (a) (1977). This application then undergoes exhaustive review by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of distinguished experts in the field of atomic energy. Both groups submit to the Commission their own evaluations, which then become part of the record of the utility's application.[3] See 42 U. S. C. §§ 2039, 2232 (b). The Commission staff also undertakes the review required by the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, and prepares a draft environmental impact statement, which, after being circulated for comment, 10 CFR §§ 51.22–51.25 (1977), is revised and becomes a final environmental impact statement. § 51.26. Thereupon a three-member Atomic Safety and Licensing Board conducts a public adjudicatory hearing, 42 U. S. C. § 2241, and reaches a decision [4] which can be

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[2] The licensing and regulatory functions of the Atomic Energy Commission (AEC) were transferred to the Nuclear Regulatory Commission (NRC) by the Energy Reorganization Act of 1974, 42 U. S. C. § 5801 *et seq.* (1970 ed., Supp. V). Hereinafter both the AEC and NRC will be referred to as the Commission.

[3] ACRS is required to review each construction permit application for the purpose of informing the Commission of the "hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards." 42 U. S. C. § 2039.

[4] The Licensing Board issues a permit if it concludes that there is reasonable assurance that the proposed plant can be constructed and operated without undue risk, 42 U. S. C. § 2241; 10 CFR § 50.35 (a)

appealed to the Atomic Safety and Licensing Appeal Board, and currently, in the Commission's discretion, to the Commission itself. 10 CFR §§ 2.714, 2.721, 2.786, 2.787 (1977). The final agency decision may be appealed to the courts of appeals. 42 U. S. C. § 2239; 28 U. S. C. § 2342. The same sort of process occurs when the utility applies for a license to operate the plant, 10 CFR § 50.34 (b) (1977), except that a hearing need only be held in contested cases and may be limited to the matters in controversy. See 42 U. S. C. § 2239 (a); 10 CFR § 2.105 (1977); 10 CFR pt. 2, App. A, V (f) (1977).[5]

These cases arise from two separate decisions of the Court of Appeals for the District of Columbia Circuit. In the first, the court remanded a decision of the Commission to grant a license to petitioner Vermont Yankee Nuclear Power Corp. to operate a nuclear power plant. *Natural Resources Defense Council* v. *NRC,* 178 U. S. App. D. C. 336, 547 F. 2d 633 (1976). In the second, the court remanded a decision of that same agency to grant a permit to petitioner Consumers Power Co. to construct two pressurized water nuclear reactors to generate electricity and steam. *Aeschliman* v. *NRC,* 178 U. S. App. D. C. 325, 547 F. 2d 622 (1976).

B

In December 1967, after the mandatory adjudicatory hearing and necessary review, the Commission granted petitioner Vermont Yankee a permit to build a nuclear power plant in Vernon, Vt. See 4 A. E. C. 36 (1967). Thereafter, Vermont Yankee applied for an operating license. Respondent Natural Resources Defense Council (NRDC) objected to the granting

(1977), and that the environmental cost-benefit balance favors the issuance of a permit.

[5] When a license application is contested, the Licensing Board must find reasonable assurance that the plant can be operated without undue risk and will not be inimical to the common defense and security or to the health and safety of the public. See 42 U. S. C. § 2232 (a); 10 CFR § 50.57 (a) (1977). The Licensing Board's decision is subject to review similar to that afforded the Board's decision with respect to a construction permit.

of a license, however, and therefore a hearing on the application commenced on August 10, 1971. Excluded from consideration at the hearings, over NRDC's objection, was the issue of the environmental effects of operations to reprocess fuel or dispose of wastes resulting from the reprocessing operations.[6] This ruling was affirmed by the Appeal Board in June 1972.

In November 1972, however, the Commission, making specific reference to the Appeal Board's decision with respect to the Vermont Yankee license, instituted rulemaking proceedings "that would specifically deal with the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors." App. 352. The notice of proposed rulemaking offered two alternatives, both predicated on a report prepared by the Commission's staff entitled Environmental Survey of the Nuclear Fuel Cycle. The first would have required no quantitative evaluation of the environmental hazards of fuel reprocessing or disposal because the Environmental Survey had found them to be slight. The second would have specified numerical values for the environmental impact of this part of the fuel cycle, which values would then be incorporated into a table, along with the other relevant factors, to determine the overall cost-benefit balance for each operating license. See *id.*, at 356–357.

Much of the controversy in this case revolves around the

[6] The nuclear fission which takes place in light-water nuclear reactors apparently converts its principal fuel, uranium, into plutonium, which is itself highly radioactive but can be used as reactor fuel if separated from the remaining uranium and radioactive waste products. Fuel reprocessing refers to the process necessary to recapture usable plutonium. Waste disposal, at the present stage of technological development, refers to the storage of the very long lived and highly radioactive waste products until they detoxify sufficiently that they no longer present an environmental hazard. There are presently no physical or chemical steps which render this waste less toxic, other than simply the passage of time.

procedures used in the rulemaking hearing which commenced in February 1973. In a supplemental notice of hearing the Commission indicated that while discovery or cross-examination would not be utilized, the Environmental Survey would be available to the public before the hearing along with the extensive background documents cited therein. All participants would be given a reasonable opportunity to present their position and could be represented by counsel if they so desired. Written and, time permitting, oral statements would be received and incorporated into the record. All persons giving oral statements would be subject to questioning by the Commission. At the conclusion of the hearing, a transcript would be made available to the public and the record would remain open for 30 days to allow the filing of supplemental written statements. See generally *id.*, at 361–363. More than 40 individuals and organizations representing a wide variety of interests submitted written comments. On January 17, 1973, the Licensing Board held a planning session to schedule the appearance of witnesses and to discuss methods for compiling a record. The hearing was held on February 1 and 2, with participation by a number of groups, including the Commission's staff, the United States Environmental Protection Agency, a manufacturer of reactor equipment, a trade association from the nuclear industry, a group of electric utility companies, and a group called Consolidated National Intervenors which represented 79 groups and individuals including respondent NRDC.

After the hearing, the Commission's staff filed a supplemental document for the purpose of clarifying and revising the Environmental Survey. Then the Licensing Board forwarded its report to the Commission without rendering any decision. The Licensing Board identified as the principal procedural question the propriety of declining to use full formal adjudicatory procedures. The major substantive issue was the technical adequacy of the Environmental Survey.

In April 1974, the Commission issued a rule which adopted the second of the two proposed alternatives described above. The Commission also approved the procedures used at the hearing,[7] and indicated that the record, including the Environmental Survey, provided an "adequate data base for the regulation adopted." *Id.*, at 392. Finally, the Commission ruled that to the extent the rule differed from the Appeal Board decisions in Vermont Yankee "those decisions have no further precedential significance," *id.*, at 386, but that since "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant, . . . it is unnecessary to apply the amendment to applicant's environmental reports submitted prior to its effective date or to Final Environmental Statements for which Draft Environmental Statements have been circulated for comment prior to the effective date," *id.*, at 395.

Respondents appealed from both the Commission's adoption of the rule and its decision to grant Vermont Yankee's license to the Court of Appeals for the District of Columbia Circuit.

C

In January 1969, petitioner Consumers Power Co. applied for a permit to construct two nuclear reactors in Midland,

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[7] The Commission stated:

"In our view, the procedures adopted provide a more than adequate basis for formulation of the rule we adopted. All parties were fully heard. Nothing offered was excluded. The record does not indicate that any evidentiary material would have been received under different procedures. Nor did the proponent of the strict 'adjudicatory' approach make an offer of proof—or even remotely suggest—what substantive matters it would develop under different procedures. In addition, we note that 11 documents including the Survey were available to the parties several weeks before the hearing, and the Regulatory staff, though not requested to do so, made available various drafts and handwritten notes. Under all of the circumstances, we conclude that adjudicatory type procedures were not warranted here." App. 389–390 (footnote omitted).

Mich. Consumers Power's application was examined by the Commission's staff and the ACRS. The ACRS issued reports which discussed specific problems and recommended solutions. It also made reference to "other problems" of a more generic nature and suggested that efforts should be made to resolve them with respect to these as well as all other projects.[8] Two groups, one called Saginaw and another called Mapleton, intervened and opposed the application.[9] Saginaw filed with the Board a number of environmental contentions, directed over 300 interrogatories to the ACRS, attempted to depose the chairman of the ACRS, and requested discovery of various ACRS documents. The Licensing Board denied the various discovery requests directed to the ACRS. Hearings were then held on numerous radiological health and safety issues.[10] Thereafter, the Commission's staff issued a draft

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[8] The ACRS report as quoted, 178 U. S. App. D. C., at 333, 547 F. 2d, at 630, stated:

"Other problems related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that resolution of these items should apply equally to the Midland Plant Units 1 & 2.

"The Committee believes that the above items can be resolved during construction and that, if due consideration is given to these items, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public."

[9] Saginaw included the Saginaw Valley Nuclear Study Group, the Citizens Committee for Environmental Protection of Michigan, the United Automobile Workers International, and three other environmental groups. Mapleton included Nelson Aeschliman and five other residents of a community near the proposed plantsite. Mapleton did not raise any contentions relating to energy conservation.

[10] Pursuant to the regulations then in effect, the Licensing Board refused to consider most of the environmental issues in this first set of hearings. On the last day of those hearings, however, the Court of Appeals for the District of Columbia Circuit decided *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971), which invalidated the Commission's NEPA regulations. One effect of that decision was to

environmental impact statement. Saginaw submitted 119 environmental contentions which were both comments on the proposed draft statement and a statement of Saginaw's position in the upcoming hearings. The staff revised the statement and issued a final environmental statement in March 1972. Further hearings were then conducted during May and June 1972. Saginaw, however, choosing not to appear at or participate in these latter hearings, indicated that it had "no conventional findings of fact to set forth" and had not "chosen to search the record and respond to this proceeding by submitting citations of matters which we believe were proved or disproved." See App. 190 n. 9. But the Licensing Board, recognizing its obligations to "independently consider the final balance among conflicting environmental factors in the record," nevertheless treated as contested those issues "as to which intervenors introduced affirmative evidence or engaged in substantial cross examination." *Id.*, at 205, 191.

At issue now are 17 of those 119 contentions which are claimed to raise questions of "energy conservation." The Licensing Board indicated that as far as appeared from the record, the demand for the plant was made up of normal industrial and residential use. *Id.*, at 207. It went on to state that it was "beyond our province to inquire into whether the customary uses being made of electricity in our society are 'proper' or 'improper.'" *Ibid.* With respect to claims that Consumers Power stimulated demand by its advertising the Licensing Board indicated that "[n]o evidence was offered on this point and absent some evidence that Applicant is creating abnormal demand, the Board did not consider the

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require that environmental matters be considered in pending proceedings, including this one. Accordingly, the Commission revised its regulations and then undertook an extensive environmental review of the proposed nuclear plants, requiring Consumers Power to file a lengthy environmental report. Thereafter the Commission's staff prepared the draft environmental impact statement discussed in text.

question." *Id.*, at 207–208. The Licensing Board also failed to consider the environmental effects of fuel reprocessing or disposal of radioactive wastes. The Appeal Board ultimately affirmed the Licensing Board's grant of a construction permit and the Commission declined to further review the matter.

At just about the same time, the Council on Environmental Quality revised its regulations governing the preparation of environmental impact statements. 38 Fed. Reg. 20550 (1973). The regulations mentioned for the first time the necessity of considering in impact statements energy conservation as one of the alternatives to a proposed project. The new guidelines were to apply only to final impact statements filed after January 28, 1974. *Id.*, at 20557. Thereafter, on November 6, 1973, more than a year after the record had been closed in the *Consumers Power* case and while that case was pending before the Court of Appeals, the Commission ruled in another case that while its statutory power to compel conservation was not clear, it did not follow that all evidence of energy conservation issues should therefore be barred at the threshold. *In re Niagara Mohawk Power Corp.*, 6 A. E. C. 995 (1973). Saginaw then moved the Commission to clarify its ruling and reopen the *Consumers Power* proceedings.

In a lengthy opinion, the Commission declined to reopen the proceedings. The Commission first ruled it was required to consider only energy conservation alternatives which were " 'reasonably available,' " would in their aggregate effect curtail demand for electricity to a level at which the proposed facility would not be needed, and were susceptible of a reasonable degree of proof. App. 332. It then determined, after a thorough examination of the record, that not all of Saginaw's contentions met these threshold tests. *Id.*, at 334–340. It further determined that the Board had been willing at all times to take evidence on the other contentions. Saginaw had simply failed to present any such evidence. The

Commission further criticized Saginaw for its total disregard of even those minimal procedural formalities necessary to give the Board some idea of exactly what was at issue. The Commission emphasized that "[p]articularly in these circumstances, Saginaw's complaint that it was not granted a hearing on alleged energy conservation issues comes with ill grace." [11] *Id.*, at 342. And in response to Saginaw's contention that regardless of whether it properly raised the issues, the Licensing Board must consider all environmental issues, the Commission basically agreed, as did the Board itself, but further reasoned that the Board must have some workable procedural rules and these rules

> "in this setting must take into account that energy conservation is a novel and evolving concept. NEPA 'does not require a "crystal ball" inquiry.' *Natural Resources Defense Council* v. *Morton,* [148 U. S. App. D. C. 5, 15, 458 F. 2d 827, 837 (1972)]. This consideration has led us to hold that we will not apply *Niagara* retroactively. As we gain experience on a case-by-case basis and hopefully, feasible energy conservation techniques emerge, the applicant, staff, and licensing boards will have obligations to develop an adequate record on these issues in appropriate cases, whether or not they are raised by intervenors.
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> "However, at this emergent stage of energy conservation principles, intervenors also have their responsibilities. They must state clear and reasonably specific energy conservation contentions in a timely fashion. Beyond that, they have a burden of coming forward with some

[11] The Licensing Board had highlighted this same problem in its initial decision, noting "that the failure to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested." App. 190 n. 10. The Appeal Board was even less charitable, noting that that "[p]articipation in this manner, in our opinion, subverts the entire adjudicatory process." *Id.*, at 257.

affirmative showing if they wish to have these novel contentions explored further." [12] *Id.*, at 344 (footnotes omitted).

Respondents then challenged the granting of the construction permit in the Court of Appeals for the District of Columbia Circuit.

D

With respect to the challenge of Vermont Yankee's license, the court first ruled that in the absence of effective rulemaking proceedings,[13] the Commission must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings. 178 U. S. App. D. C., at 344, 547 F. 2d, at 641. The court then examined the rulemaking proceedings and, despite the fact that it appeared that the agency employed all the procedures required by 5 U. S. C. § 553 (1976 ed.) and more, the court determined the proceedings to be inadequate and overturned the rule. Accordingly, the Commission's determination with respect to Vermont Yankee's license was also remanded for further proceedings.[14] 178 U. S. App. D. C., at 358, 547 F. 2d, at 655.

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[12] In what was essentially dictum, the Commission also ruled, after considering the various relevant factors—such as the extent to which the new rule represents a departure from prior practice, the degree of reliance on past practice and consequent burdens imposed by retroactive application of the rule—that the rule enunciated in *Niagara* should not be applied retroactively to cases which had progressed to final order and issuance of construction permits before *Niagara* was decided. App. 337.

[13] In the Court of Appeals no one questioned the Commission's authority to deal with fuel cycle issues by informal rulemaking as opposed to adjudication. 178 U. S. App. D. C., at 345–346, 547 F. 2d, at 642–643. Neither does anyone seriously question before this Court the Commission's authority in this respect.

[14] After the decision of the Court of Appeals the Commission promulgated a new interim rule pending issuance of a final rule. 42 Fed. Reg. 13803 (1977). See *Vermont Yankee Nuclear Power Corp.*, 5 N. R. C. 717

With respect to the permit to Consumers Power, the court first held that the environmental impact statement for construction of the Midland reactors was fatally defective for

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(1977). The Commission then, at the request of the New England Coalition on Nuclear Pollution, applied the interim rule to Vermont Yankee and determined that the cost-benefit analysis was still in the plant's favor. *Vermont Yankee Nuclear Power Corp.*, 6 N. R. C. 25 (1977). That decision is presently on appeal to the Court of Appeals for the First Circuit. The Commission has also indicated in its brief that it intends to complete the proceedings currently in progress looking toward the adoption of a final rule regardless of the outcome of this case. Brief for Federal Respondents 37 n. 36. Following oral argument, respondent NRDC, relying on the above facts, filed a suggestion of mootness and a motion to dismiss the writ of certiorari as improvidently granted. We hold that the case is not moot, and deny the motion to dismiss the writ of certiorari as improvidently granted.

Upon remand, the majority of the panel of the Court of Appeals is entirely free to agree or disagree with Judge Tamm's conclusion that the rule pertaining to the back end of the fuel cycle under which petitioner Vermont Yankee's license was considered is arbitrary and capricious within the meaning of § 10 (e) of the Administrative Procedure Act, 5 U. S. C. § 706 (1976 ed.), even though it may not hold, as it did in its previous opinion, that the rule is invalid because of the inadequacy of the agency procedures. Should it hold the rule invalid, it appears in all probability that the Commission will proceed to promulgate a rule resulting from rulemaking proceedings currently in progress. Brief for Federal Respondents 37 n. 36. In all likelihood the Commission would then be required, under the compulsion of the court's order, to examine Vermont Yankee's license under that new rule.

If, on the other hand, a majority of the Court of Appeals should decide that it was unwilling to hold the rule in question arbitrary and capricious merely on the basis of § 10 (e) of the Administrative Procedure Act, Vermont Yankee would not necessarily be required to have its license reevaluated. So far as petitioner Vermont Yankee is concerned, there is certainly a case or controversy in this Court with respect to whether it must, by virtue of the Court of Appeals' decision, submit its license to the Commission for reevaluation and possible revocation under a new rule. It is true that we do not finally determine here the validity of the rule upon which the validity of Vermont Yankee's license in turn depends. Neither should

failure to examine energy conservation as an alternative to a plant of this size. 178 U. S. App. D. C., at 331, 547 F. 2d, at 628. The court also thought the report by ACRS was inadequate, although it did not agree that discovery from individual ACRS members was the proper way to obtain further explication of the report. Instead, the court held that the Commission should have *sua sponte* sent the report back to the ACRS for further elucidation of the "other problems" and their resolution. *Id.*, at 335, 547 F. 2d, at 632. Finally, the court ruled that the fuel cycle issues in this case were controlled by *NRDC* v. *NRC*, discussed above, and remanded for appropriate consideration of waste disposal and other unaddressed fuel cycle issues as described in that opinion. 178 U. S. App. D. C., at 335, 547 F. 2d, at 632.

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anything we say today be taken as a limitation on the Court of Appeals' discretion to take due account, if appropriate, of any additions made to the record by the Commission or to consolidate this appeal with the appeal from the interim rulemaking proceeding which is already pending. But the fact that the question of the validity of the first rule remains open upon remand makes the controversy no less "live."

As we read the opinion of the Court of Appeals, its view that reviewing courts may in the absence of special circumstances justifying such a course of action impose additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case. Since the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals. Finally, this decision will continue to play a major role in the instant litigation regardless of the Commission's decision to press ahead with further rulemaking proceedings. As we note in n. 15, *infra*, not only is the NRDC relying on the decision of the Court of Appeals as a device to force the agency to provide more procedures, but it is also challenging the interim rules promulgated by the agency in the Court of Appeals, alleging again the inadequacy of the procedures and citing the opinion of the Court of Appeals as binding precedent to that effect.

II

A

Petitioner Vermont Yankee first argues that the Commission may grant a license to operate a nuclear reactor without any consideration of waste disposal and fuel reprocessing. We find, however, that this issue is no longer presented by the record in this case. The Commission does not contend that it is not required to consider the environmental impact of the spent fuel processes when licensing nuclear power plants. Indeed, the Commission has publicly stated subsequent to the Court of Appeals' decision in the instant case that consideration of the environmental impact of the back end of the fuel cycle in "the environmental impact statements for individual LWR's [light-water power reactors] would represent a full and candid assessment of costs and benefits consistent with the legal requirements and spirit of NEPA." 41 Fed. Reg. 45849 (1976). Even prior to the Court of Appeals' decision the Commission implicitly agreed that it would consider the back end of the fuel cycle in all licensing proceedings: It indicated that it was not necessary to reopen prior licensing proceedings because "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant," and thus incorporation of those effects into the cost-benefit analysis would not change the results of such licensing proceedings. App. 395. Thus, at this stage of the proceedings the only question presented for review in this regard is whether the Commission may consider the environmental impact of the fuel processes when licensing nuclear reactors. In addition to the weight which normally attaches to the agency's determination of such a question, other reasons support the Commission's conclusion.

Vermont Yankee will produce annually well over 100 pounds of radioactive wastes, some of which will be highly toxic. The Commission itself, in a pamphlet published by its

information office, clearly recognizes that these wastes "pose the most severe potential health hazard . . . ." U. S. Atomic Energy Commission, Radioactive Wastes 12 (1965). Many of these substances must be isolated for anywhere from 600 to hundreds of thousands of years. It is hard to argue that these wastes do not constitute "adverse environmental effects which cannot be avoided should the proposal be implemented," or that by operating nuclear power plants we are not making "irreversible and irretrievable commitments of resources." 42 U. S. C. §§ 4332 (2)(C)(ii), (v). As the Court of Appeals recognized, the environmental impact of the radioactive wastes produced by a nuclear power plant is analytically indistinguishable from the environmental effects of "the stack gases produced by a coal-burning power plant." 178 U. S. App. D. C., at 341, 547 F. 2d, at 638. For these reasons we hold that the Commission acted well within its statutory authority when it considered the back end of the fuel cycle in individual licensing proceedings.

B

We next turn to the invalidation of the fuel cycle rule. But before determining whether the Court of Appeals reached a permissible result, we must determine exactly what result it did reach, and in this case that is no mean feat. Vermont Yankee argues that the court invalidated the rule because of the inadequacy of the procedures employed in the proceedings. Brief for Petitioner in No. 76–419, pp. 30–38. Respondents, on the other hand, labeling petitioner's view of the decision a "straw man," argue to this Court that the court merely held that the record was inadequate to enable the reviewing court to determine whether the agency had fulfilled its statutory obligation. Brief for Respondents in No. 76–419, pp. 28–30, 40. But we unfortunately have not found the parties' characterization of the opinion to be entirely reliable; it appears here, as in *Orloff* v. *Willoughby*, 345 U. S. 83, 87 (1953), that

"in this Court the parties changed positions as nimbly as if dancing a quadrille." [15]

After a thorough examination of the opinion itself, we con-

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[15] Vermont Yankee's interpretation has been consistent throughout the litigation. That cannot be said of the other parties, however. The Government, Janus-like, initially took both positions. While the petition for certiorari was pending, a brief was filed on behalf of the United States and the Commission, with the former indicating that it believed the court had unanimously held the record to be inadequate, while the latter took Vermont Yankee's view of the matter. See Brief for Federal Respondents 5–9 (filed Jan. 10, 1977). When announcing its intention to undertake licensing of reactors pending the promulgation of an "interim" fuel cycle rule, however, the Commission said:

"[T]he court found that the rule was inadequately supported by the record insofar as it treated two particular aspects of the fuel cycle—the impacts from reprocessing of spent fuel and the impacts from radioactive waste management." 41 Fed. Reg. 45850 (1976).

And even more recently, in opening another rulemaking proceeding to replace the rule overturned by the Court of Appeals, the Commission stated:

"The original procedures proved adequate for the development and illumination of a wide range of fuel cycle impact issues . . . .

". . . The court here indicated that the procedures previously employed could suffice, and indeed did for other issues.

. . . . . .

"Accordingly, notice is hereby given that the rules for the conduct of the reopened hearing and the authorities and responsibilities of the Hearing Board will be the same as originally applied in this matter (38 Fed. Reg. 49, January 3, 1973) except that specific provision is hereby made for the Hearing Board to entertain suggestions from participants as to questions which the Board should ask of witnesses for other participants." 42 Fed. Reg. 26988–26989 (1977).

Respondent NRDC likewise happily switches sides depending on the forum. As indicated above, it argues here that the Court of Appeals held only that the record was inadequate. Almost immediately after the Court of Appeals rendered its decision, however, NRDC filed a petition for rulemaking with the Commission which listed over 13 pages of procedural suggestions it thought "necessary to comply with the Court's order and with the mandate of [NEPA]." NRDC, Petition for Rulemaking, NRC

clude that while the matter is not entirely free from doubt, the majority of the Court of Appeals struck down the rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings. The court first determined the intervenors' primary argument to be "that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." 178 U. S. App. D. C., at 346, 547 F. 2d, at 643. The court then went on to frame the issue for decision thus:

> "Thus, we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues." *Ibid.*, 547 F. 2d, at 643.

The court conceded that absent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow, but it likewise clearly thought it entirely appropriate to "scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided . . . ." *Id.*, at 347, 547 F. 2d, at 644. The court also refrained from actually ordering the agency to follow any specific procedures, *id.*, at 356–357, 547 F. 2d, at 653–654, but there is little doubt in our minds that

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Docket No. RM–50–3 (Aug. 10, 1976). These proposals include cross-examination, discovery, and subpoena power. *Id.*, Attachment, Rules for Conduct of Hearing on Environmental Effects of the Uranium Fuel Cycle, ¶¶ 5 (a), 9 (b), 11. NRDC likewise challenged the interim fuel cycle rule and suggested to the Court of Appeals that it hold the case pending our decision in this case because the interim rules were "defective due to the inadequacy of the procedures used in developing the rule . . . ." Motion to Hold Petition for Review in Abeyance 1, in *NRDC* v. *NRC*, No. 77–1448 (DC Cir., petition for review filed May 13, 1977; motion filed July 5, 1977). NRDC has likewise challenged the procedures being used in the final rulemaking proceeding as being "no more than a re-run of hearing procedures which were found inadequate [by the Court of Appeals]." NRDC Petition for Reconsideration of the Ruling Reopening the Hearings on the Environmental Effects of the Uranium Fuel Cycle 10, NRC Docket No. RM–50–3 (June 6, 1977).

the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate. This conclusion is particularly buttressed by the fact that after the court examined the record, particularly the testimony of Dr. Pittman, and declared it insufficient, the court proceeded to discuss at some length the necessity for further procedural devices or a more "sensitive" application of those devices employed during the proceedings. *Ibid.* The exploration of the record and the statement regarding its insufficiency might initially lead one to conclude that the court was only examining the sufficiency of the evidence, but the remaining portions of the opinion dispel any doubt that this was certainly not the sole or even the principal basis of the decision. Accordingly, we feel compelled to address the opinion on its own terms, and we conclude that it was wrong.

In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a " 'quasi-judicial' " determination by which a very small number of persons are " 'exceptionally affected, in each case upon individual grounds,' " in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.[16] *United States* v. *Florida East Coast R. Co.,* 410 U. S., at 242, 245, quoting from *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441, 446 (1915). It might also be true, although we do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.[17]

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[16] Respondent NRDC does not now argue that additional procedural devices were required under the Constitution. Since this was clearly a rulemaking proceeding in its purest form, we see nothing to support such a view. See *United States* v. *Florida East Coast R. Co.,* 410 U. S. 224, 244–245 (1973); *Bowles* v. *Willingham,* 321 U. S. 503 (1944); *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441 (1915).

[17] NRDC argues that the agency has in the past provided more than the minimum procedures specified in § 4 of the APA and therefore something

But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC* v. *Schreiber*, 381 U. S., at 290, quoting from *FCC* v. *Pottsville*

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more is required here, since "[a]gencies are not free to alter their procedures on a whim, grossly constricting parties' procedural rights when it deems them an impediment or embarrassment to implementing its own views." Brief for Respondents in No. 76–419, p. 46. In support NRDC first argues that the Commission has considered other equally generic issues in adjudicatory proceedings. But NRDC conceded in the court below that the agency could promulgate rules regarding the fuel cycle in rulemaking proceedings. 178 U. S. App. D. C., at 346, 547 F. 2d, at 643. Moreover, even here it concedes "that the Commission has in the past chosen to consider both environmental and safety issues that would ordinarily be addressed in adjudicatory licensing proceedings through 'generic' rulemaking, a practice with which the lower court did not take issue." Brief for Respondents in No. 76–419, p. 48. It now contends, however, that the Commission provided more procedural safeguards in those rulemaking proceedings than in the proceeding presently under review. In support it cites three previous proceedings where cross-examination was supposedly provided. *Id.*, at 49 n. 69.

Pretermitting both the fact that the Court of Appeals in no way relied upon this argument in its decision and the question of whether courts can impose additional procedures even when an agency substantially departs from past practice, we find NRDC's argument without merit. In the first place, three proceedings out of the many held by NRC and its predecessor hardly establish the type of longstanding and well-established practice deviation from which might justify judicial intervention. It appears, moreover, that in fact the hearings cited by NRDC are not only not part of a longstanding practice but are themselves aberrational. Since 1970 the Commission has conducted a large number of rulemaking proceedings, some of which have involved matters of substantial importance, and almost none of which have involved cross-examination. See, *e. g.*, Quality Assurance Criteria for Nuclear Power Plants, 35 Fed. Reg. 10499 (1970); General Design Criteria for Nuclear Power Plants, 36 Fed. Reg. 3255 (1971); Pre-Construction Permit Activities, 39 Fed. Reg. 14506 (1974); Environmental Protection—Licensing and Regulatory Policy and Procedures. *Id.*, at 26279.

Broadcasting Co., 309 U. S., at 143. Indeed, our cases could hardly be more explicit in this regard. The Court has, as we noted in *FCC* v. *Schreiber, supra,* at 290, and n. 17, upheld this principle in a variety of applications,[18] including that case where the District Court, instead of inquiring into the validity of the Federal Communications Commission's exercise of its rulemaking authority, devised procedures to be followed by the agency on the basis of its conception of how the public and private interest involved could best be served. Examining § 4 (j) of the Communications Act of 1934, the Court unanimously held that the Court of Appeals erred in upholding that action. And the basic reason for this decision was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.

We have continually repeated this theme through the years, most recently in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U. S. 326 (1976), decided just two Terms ago. In that case, in determining the proper scope of judicial review of agency action under the Natural Gas Act, we held that while a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops." *Id.*, at 333. We went on to emphasize:

> "At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate

[18] See, *e. g.*, *CAB* v. *Hermann*, 353 U. S. 322 (1957); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186 (1946); *Wallace Corp.* v. *NLRB*, 323 U. S. 248 (1944); *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943); *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 306 U. S. 56 (1939); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933).

> review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' *SEC* v. *Chenery Corp.,* 332 U. S. 194, 196 (1947)." *Ibid.*

Respondent NRDC argues that § 4 of the Administrative Procedure Act, 5 U. S. C. § 553 (1976 ed.), merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or "Issues of Great Public Import." Brief for Respondents in No. 76–419, p. 49. We have, however, previously shown that our decisions reject this view. *Supra,* at 542 to this page. We also think the legislative history, even the part which it cites, does not bear out its contention. The Senate Report explains what eventually became § 4 thus:

> "This subsection states . . . the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures." S. Rep. No. 752, 79th Cong., 1st Sess., 14–15 (1945).

The House Report is in complete accord:

> " '[U]niformity has been found possible and desirable for all classes of both equity and law actions in the courts . . . .

> It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power.'
>
> . . . . . .
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> "The bill is an outline of minimum essential rights and procedures. . . . It affords private parties a means of knowing what their rights are and how they may protect them . . . .
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> . . . . . .
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> ". . . [The bill contains] the essentials of the different forms of administrative proceedings . . . ." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 9, 16–17 (1946).

And the Attorney General's Manual on the Administrative Procedure Act 31, 35 (1947), a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation,[19] further confirms that view. In short, all of this leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed.

There are compelling reasons for construing § 4 in this manner. In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ

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[19] See *Power Reactor Co.* v. *Electricians,* 367 U. S. 396, 408 (1961); *United States* v. *Zucca,* 351 U. S. 91, 96 (1956).

the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest," *Wong Yang Sung* v. *McGrath*, 339 U. S., at 40, but all the inherent advantages of informal rulemaking would be totally lost.[20]

Secondly, it is obvious that the court in these cases reviewed the agency's choice of procedures on the basis of the record actually produced at the hearing, 178 U. S. App. D. C., at 347, 547 F. 2d, at 644, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.

Finally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. See 5 U. S. C. § 553 (c) (1976 ed.). Thus, the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to sup-

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[20] See Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 387–388 (1974).

port the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.

Respondent NRDC also argues that the fact that the Commission's inquiry was undertaken in the context of NEPA somehow permits a court to require procedures beyond those specified in § 4 of the APA when investigating factual issues through rulemaking. The Court of Appeals was apparently also of this view, indicating that agencies may be required to "develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking." 178 U. S. App. D. C., at 356, 547 F. 2d, at 653. But we search in vain for something in NEPA which would mandate such a result. We have before observed that "NEPA does not repeal by implication any other statute." *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U. S. 289, 319 (1975). See also *United States* v. *SCRAP,* 412 U. S. 669, 694 (1973). In fact, just two Terms ago, we emphasized that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act. *Kleppe* v. *Sierra Club,* 427 U. S. 390, 405–406 (1976). Thus, it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA.

In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima,* a matter about which there is no doubt in this case.

There remains, of course, the question of whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court. Judge Tamm, concurring in the result reached by the majority of the Court of Appeals, thought that it did not. There are also intimations in the majority opinion which suggest that the judges who joined it likewise may have thought the administrative proceedings an insufficient basis upon which to predicate the rule in question. We accordingly remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides. We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." *Camp* v. *Pitts,* 411 U. S. 138, 143 (1973). See also *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943). The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.[21]

III

A

We now turn to the Court of Appeals' holding "that rejection of energy conservation on the basis of the 'threshold test'

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[21] Of course, the court must determine whether the agency complied with the procedures mandated by the relevant statutes. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 417 (1971). But, as we indicated above, there is little doubt that the agency was in full compliance with all the applicable requirements of the Administrative Procedure Act.

was capricious and arbitrary," 178 U. S. App. D. C., at 332, 547 F. 2d, at 629, and again conclude the court was wrong.

The Court of Appeals ruled that the Commission's "threshold test" for the presentation of energy conservation contentions was inconsistent with NEPA's basic mandate to the Commission. *Id.,* at 330, 547 F. 2d, at 627. The Commission, the court reasoned, is something more than an umpire who sits back and resolves adversary contentions at the hearing stage. *Ibid.,* 547 F. 2d, at 627. And when an intervenor's comments "bring 'sufficient attention to the issue to stimulate the Commission's consideration of it,' " the Commission must "undertake its own preliminary investigation of the proffered alternative sufficient to reach a rational judgment whether it is worthy of detailed consideration in the EIS. Moreover, the Commission must explain the basis for each conclusion that further consideration of a suggested alternative is unwarranted." *Id.,* at 331, 547 F. 2d, at 628, quoting from *Indiana & Michigan Electric Co.* v. *FPC,* 163 U. S. App. D. C. 334, 337, 502 F. 2d 336, 339 (1974), cert. denied, 420 U. S. 946 (1975).

While the court's rationale is not entirely unappealing as an abstract proposition, as applied to this case we think it basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise.

There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. 42 U. S. C. § 2021 (k). The Commission's prime area of concern in the licensing context, on the other hand, is national security, public health, and safety. §§ 2132, 2133, 2201. And it is clear that the need, as that term is conventionally used, for the power was thoroughly explored in the hearings. Even the Federal Power Commission, which regu-

lates sales in interstate commerce, 16 U. S. C. § 824 *et seq.* (1976 ed.), agreed with Consumers Power's analysis of projected need. App. 207.

NEPA, of course, has altered slightly the statutory balance, requiring "a detailed statement by the responsible official on . . . alternatives to the proposed action." 42 U. S. C. § 4332 (C). But, as should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility. As the Court of Appeals for the District of Columbia Circuit has itself recognized:

> "There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed." *Natural Resources Defense Council* v. *Morton,* 148 U. S. App. D. C. 5, 15–16, 458 F. 2d 827, 837–838 (1972).

See also *Life of the Land* v. *Brinegar,* 485 F. 2d 460 (CA9 1973), cert. denied, 416 U. S. 961 (1974). Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

With these principles in mind we now turn to the notion of "energy conservation," an alternative the omission of which was thought by the Court of Appeals to have been "forcefully pointed out by Saginaw in its comments on the draft EIS." 178 U. S. App. D. C., at 328, 547 F. 2d, at 625. Again, as the Commission pointed out, "the phrase 'energy conservation' has a deceptively simple ring in this context. Taken literally, the phrase suggests a virtually limitless range of possible actions and developments that might, in one way or another, ultimately reduce projected demands for electricity from a particular proposed plant." App. 331. Moreover, as a practical matter, it is hard to dispute the observation that it is largely the events of recent years that have emphasized not only the need but also a large variety of alternatives for energy conservation. Prior to the drastic oil shortages incurred by the United States in 1973, there was little serious thought in most Government circles of energy conservation alternatives. Indeed, the Council on Environmental Quality did not promulgate regulations which even remotely suggested the need to consider energy conservation in impact statements until August 1, 1973. See 40 CFR § 1500.8 (a) (4) (1977); 38 Fed. Reg. 20554 (1973). And even then the guidelines were not made applicable to draft and final statements filed with the Council before January 28, 1974. *Id.*, at 20557, 21265. The Federal Power Commission likewise did not require consideration of energy conservation in applications to build hydroelectric facilities until June 19, 1973. 18 CFR pt. 2, App. A., § 8.2 (1977); 38 Fed. Reg. 15946, 15949 (1973). And these regulations were not made retroactive either. *Id.*, at 15946. All this occurred over a year and a half after the draft environmental statement for Midland had been prepared, and over a year after the final environmental statement had been prepared and the hearings completed.

We think these facts amply demonstrate that the concept of "alternatives" is an evolving one, requiring the agency to

explore more or fewer alternatives as they become better known and understood. This was well understood by the Commission, which, unlike the Court of Appeals, recognized that the Licensing Board's decision had to be judged by the information then available to it. And judged in that light we have little doubt the Board's actions were well within the proper bounds of its statutory authority. Not only did the record before the agency give every indication that the project was actually needed, but also there was nothing before the Board to indicate to the contrary.

We also think the court's criticism of the Commission's "threshold test" displays a lack of understanding of the historical setting within which the agency action took place and of the nature of the test itself. In the first place, while it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. This is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory, as was the question of energy conservation in the late 1960's and early 1970's.

> "[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . ." *Portland Cement Assn.* v. *Ruckelshaus,* 158 U. S. App. D. C. 308, 327, 486 F. 2d 375, 394 (1973), cert. denied *sub nom. Portland Cement Corp.* v. *Administrator, EPA,* 417 U. S. 921 (1974).

Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making

cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

We also think the court seriously mischaracterized the Commission's "threshold test" as placing "heavy substantive burdens . . . on intervenors . . . ." 178 U. S. App. D. C., at 330, and n. 11, 547 F. 2d, at 627, and n. 11. On the contrary, the Commission explicitly stated:

> "We do not equate this burden with the civil litigation concept of a *prima facie* case, an unduly heavy burden in this setting. But the showing should be sufficient to require reasonable minds to inquire further." App. 344 n. 27.

We think this sort of agency procedure well within the agency's discretion.

In sum, to characterize the actions of the Commission as "arbitrary or capricious" in light of the facts then available to it as described at length above, is to deprive those words of any meaning. As we have said in the past:

> "Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order

> litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *ICC* v. *Jersey City,* 322 U. S. 503, 514 (1944).

See also *Northern Lines Merger Cases,* 396 U. S. 491, 521 (1970).

We have also made it clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.

> "Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe* v. *Sierra Club,* 427 U. S., at 410 n. 21.

We think the Court of Appeals has forgotten that injunction here and accordingly its judgment in this respect must also be reversed.[22]

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[22] The court also indicated at the end of the opinion in *Aeschliman* that since "this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's [the principal customer for the plant's steam] need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities." 178 U. S. App. D. C., at 335, 547 F. 2d, at 632. As we read the Court of Appeals opinion, however, this was not an independent basis for vacating and remanding the Commission's licensing decision. It also appears from the record that the Commision has reconsidered the changed circumstances and refused to reopen the proceedings at least three times, see App. 346–347, 348–349, 350–351, and possibly a fourth, see Brief for Nonfederal Respondents in No. 76–528, pp. 19–20, n. 8. We see no error in the Commission's actions in this respect.

B

Finally, we turn to the Court of Appeals' holding that the Licensing Board should have returned the ACRS report to ACRS for further elaboration, understandable to a layman, of the reference to other problems.

The Court of Appeals reasoned that since one function of the report was "that all concerned may be apprised of the safety or possible hazard of the facilities," the report must be in terms understandable to a layman and replete with cross-references to previous reports in which the "other problems" are detailed. Not only that, but if the report does not so elaborate, and the Licensing Board fails to *sua sponte* return the report to ACRS for further development, the entire agency action, made after exhaustive studies, reviews, and 14 days of hearings, must be nullified.

Again the Court of Appeals has unjustifiably intruded into the administrative process. It is true that Congress thought publication of the ACRS report served an important function. But the legislative history shows that the function of publication was subsidiary to its main function, that of providing technical advice from a body of experts uniquely qualified to provide assistance. See 42 U. S. C. § 2039; S. Rep. No. 296, 85th Cong., 1st Sess., 24 (1957); Joint Committee on Atomic Energy, A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, 85th Cong., 1st Sess., 32–34 (Comm. Print 1957). The basic information to be conveyed to the public is not necessarily a full technical exposition of every facet of nuclear energy, but rather the ACRS's position, and reasons therefor, with respect to the safety of a proposed nuclear reactor. Accordingly, the ACRS cannot be faulted for not dealing with every facet of nuclear energy in every report it issues.

Of equal significance is the fact that the ACRS was not obfuscating its findings. The reports to which it referred were matters of public record, on file in the Commission's

public-documents room. Indeed, all ACRS reports are on file there. Furthermore, we are informed that shortly after the Licensing Board's initial decision, ACRS prepared a list which identified its "generic safety concerns." In light of all this it is simply inconceivable that a reviewing court should find it necessary or permissible to order the Board to *sua sponte* return the report to ACRS. Our view is confirmed by the fact that the putative reason for the remand was that the public did not understand the report, and yet *not one* member of the supposedly uncomprehending public even asked that the report be remanded. This surely is, as petitioner Consumers Power claims, "judicial intervention run riot." Brief for Petitioner in No. 76–528, p. 37.

We also think it worth noting that we find absolutely nothing in the relevant statutes to justify what the court did here. The Commission very well might be able to remand a report for further clarification, but there is nothing to support a court's ordering the Commission to take that step or to support a court's requiring the ACRS to give a short explanation, understandable to a layman, of each generic safety concern.

All this leads us to make one further observation of some relevance to this case. To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement. Consumers Power first applied in 1969 for a construction permit—not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years, and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque. Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a

choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. See 42 U. S. C. § 4332. See also *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U. S., at 319. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, *Consolo* v. *FMC,* 383 U. S. 607, 620 (1966), not simply because the court is unhappy with the result reached. And a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.

Reversed and remanded.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

PROCTOR *v.* WARDEN, MARYLAND PENITENTIARY

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

No. 77–5898. Decided April 17, 1978

Where it appears that petitioner state prisoner was not accorded effective review of his appeal from the District Court's denial of his habeas corpus petition because the Court of Appeals in its affirmance order referred to denial of relief under the wrong federal statute and to the wrong District Court and case, the Court of Appeals' judgment is vacated and the case is remanded to that court for further consideration.

Certiorari granted; vacated and remanded.

PER CURIAM.

A Federal District Court entered a final order denying the petitioner habeas corpus relief. Under federal law the petitioner had a statutory right to appellate review of that decision. 28 U. S. C. § 2253. Because it appears that effective appellate review may not have been accorded in this case, the writ of certiorari is granted, and the case is remanded to the Court of Appeals for the Fourth Circuit.

The petitioner pleaded guilty to narcotics and firearms violations in the Criminal Court of Baltimore City and was sentenced to a term of 20 years in the Maryland state penitentiary. In 1975, after exhausting state post-conviction remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Maryland, alleging that several specific constitutional violations had occurred in the state prosecution. The District Court dismissed the petition without an evidentiary hearing. The petitioner, *pro se,* took an appeal to the Court of Appeals, which affirmed the order of the District Court in the following language:

"PER CURIAM:

"A review of the record and of the district court's opinion discloses that this appeal from the order of the district

court denying relief under 42 U. S. C. § 1983 is without merit. Accordingly, the order is affirmed for the reasons stated by the district court. *Blizzard v. Mahan,* C/A No. 76–0117–CRT (E. D. N. C., Sept. 13, 1976).

"AFFIRMED."

Clearly, this *per curiam* order has nothing whatsoever to do with the petitioner's case. He had filed a petition for a writ of habeas corpus, not a civil rights action under 42 U. S. C. § 1983. He had sought relief in a federal court in Maryland, not one in North Carolina. The case of *Blizzard* v. *Mahan,* in short, is wholly unrelated to the petitioner's case.*

It may be that the petitioner's contentions are wholly frivolous. But it is not enough that a just result may have been reached. "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U. S. 11, 14." *In re Murchison,* 349 U. S. 133, 136 (1955); cf. *In re Gault,* 387 U. S. 1, 26 (1967). Accordingly, in the exercise of our power to "require such further proceedings to be had as may be just under the circumstances," 28 U. S. C. § 2106, we grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari, vacate the judgment of the Court of Appeals, and remand this case to it for further consideration.

It is so ordered.

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*The petition for certiorari in No. 77–939, *Blizzard* v. *Mahan* (denied, *post,* p. 951), shows that the Court of Appeals' *per curiam* order in that case (filed on the same day as the order in the present case) is identical to the one quoted in the text above.

Syllabus

FRANK LYON CO. *v.* UNITED STATES

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

No. 76–624. Argued November 2, 1977—Decided April 18, 1978

A state bank, which was a member of the Federal Reserve System, upon realizing that it was not feasible, because of various state and federal regulations, for it to finance by conventional mortgage and other financing a building under construction for its headquarters and principal banking facility, entered into sale-and-leaseback agreements by which petitioner took title to the building and leased it back to the bank for long-term use, petitioner obtaining both a construction loan and permanent mortgage financing. The bank is obligated to pay rent equal to the principal and interest payments on petitioner's mortgage and has an option to repurchase the building at various times at prices equal to the then unpaid balance of petitioner's mortgage and initial $500,000 investment. On its federal income tax return for the year in which the building was completed and the bank took possession, petitioner accrued rent from the bank and claimed as deductions depreciation on the building, interest on its construction loan and mortgage, and other expenses related to the sale-and-leaseback transaction. The Commissioner of Internal Revenue disallowed the deductions on the ground that petitioner was not the owner of the building for tax purposes but that the sale-and-leaseback arrangement was a financing transaction in which petitioner loaned the bank $500,000 and acted as a conduit for the transmission of principal and interest to petitioner's mortgagee. This resulted in a deficiency in petitioner's income tax, which it paid. After its claim for a refund was denied, it brought suit in the District Court to recover the amount so paid. That court held that the claimed deductions were allowable, but the Court of Appeals reversed, agreeing with the Commissioner. *Held:* Petitioner is entitled to the claimed deductions. Pp. 572–584.

(a) Although the rent agreed to be paid by the bank equaled the amounts due from the petitioner to its mortgagee, the sale-and-leaseback transaction is not a simple sham by which petitioner was but a conduit used to forward the mortgage payments made under the guise of rent paid by the bank to petitioner, on to the mortgagee, but the construction loan and mortgage note obligations on which petitioner paid interest are its obligations alone, and, accordingly, it is entitled to claim deductions

therefor under § 163 (a) of the Internal Revenue Code of 1954. *Helvering* v. *Lazarus & Co.*, 308 U. S. 252, distinguished. Pp. 572–581.

(b) While it is clear that none of the parties to the sale-and-leaseback agreements is the owner of the building in any simple sense, it is equally clear that petitioner is the one whose capital was invested in the building and is therefore the party entitled to claim depreciation for the consumption of that capital under § 167 of the Code. P. 581.

(c) Where, as here, there is a genuine multiple-party transaction with economic substance that is compelled or encouraged by business or regulatory realities, that is imbued with tax-independent considerations, and that is not shaped solely by tax-avoidance features to which meaningless labels are attached, the Government should honor the allocation of rights and duties effectuated by the parties; so long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes. Pp. 581–584.

536 F. 2d 746, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting statement, *post*, p. 584. STEVENS, J., filed a dissenting opinion, *post*, p. 584.

Erwin N. Griswold argued the cause for petitioner. With him on the briefs was *J. Gaston Williamson.*

Stuart A. Smith argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Ferguson,* and *John A. Dudeck, Jr.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the federal income tax consequences of a sale-and-leaseback in which petitioner Frank Lyon Company (Lyon) took title to a building under construction by Worthen Bank & Trust Company (Worthen) of Little Rock, Ark., and simultaneously leased the building back to Worthen for long-term use as its headquarters and principal banking facility.

**George G. Gallantz* filed a brief for the National Realty Committee as *amicus curiae* urging reversal.

I

The underlying pertinent facts are undisputed. They are established by stipulations, App. 9, 14, the trial testimony, and the documentary evidence, and are reflected in the District Court's findings.

A

Lyon is a closely held Arkansas corporation engaged in the distribution of home furnishings, primarily Whirlpool and RCA electrical products. Worthen in 1965 was an Arkansas-chartered bank and a member of the Federal Reserve System. Frank Lyon was Lyon's majority shareholder and board chairman; he also served on Worthen's board. Worthen at that time began to plan the construction of a multistory bank and office building to replace its existing facility in Little Rock. About the same time Worthen's competitor, Union National Bank of Little Rock, also began to plan a new bank and office building. Adjacent sites on Capitol Avenue, separated only by Spring Street, were acquired by the two banks. It became a matter of competition, for both banking business and tenants, and prestige as to which bank would start and complete its building first.

Worthen initially hoped to finance, to build, and to own the proposed facility at a total cost of $9 million for the site, building, and adjoining parking deck. This was to be accomplished by selling $4 million in debentures and using the proceeds in the acquisition of the capital stock of a wholly owned real estate subsidiary. This subsidiary would have formal title and would raise the remaining $5 million by a conventional mortgage loan on the new premises. Worthen's plan, however, had to be abandoned for two significant reasons:

1. As a bank chartered under Arkansas law, Worthen legally could not pay more interest on any debentures it might issue than that then specified by Arkansas law. But the proposed obligations would not be marketable at that rate.

2. Applicable statutes or regulations of the Arkansas State Bank Department and the Federal Reserve System required Worthen, as a state bank subject to their supervision, to obtain prior permission for the investment in banking premises of any amount (including that placed in a real estate subsidiary) in excess of the bank's capital stock or of 40% of its capital stock and surplus.[1] See Ark. Stat. Ann. § 67–547.1 (Supp. 1977); 12 U. S. C. § 371d (1976 ed.); 12 CFR § 265.2 (f)(7) (1977). Worthen, accordingly, was advised by staff employees of the Federal Reserve System that they would not recommend approval of the plan by the System's Board of Governors.

Worthen therefore was forced to seek an alternative solution that would provide it with the use of the building, satisfy the state and federal regulators, and attract the necessary capital. In September 1967 it proposed a sale-and-leaseback arrangement. The State Bank Department and the Federal Reserve System approved this approach, but the Department required that Worthen possess an option to purchase the leased property at the end of the 15th year of the lease at a set price, and the federal regulator required that the building be owned by an independent third party.

Detailed negotiations ensued with investors that had indicated interest, namely, Goldman, Sachs & Company; White, Weld & Co.; Eastman Dillon, Union Securities & Company; and Stephens, Inc. Certain of these firms made specific proposals.

Worthen then obtained a commitment from New York Life Insurance Company to provide $7,140,000 in permanent mortgage financing on the building, conditioned upon its approval of the titleholder. At this point Lyon entered the negotiations and it, too, made a proposal.

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[1] Worthen, as of June 30, 1967, had capital stock of $4 million and surplus of $5 million. During the period the building was under construction Worthen became a national bank subject to the supervision and control of the Comptroller of the Currency.

Worthen submitted a counterproposal that incorporated the best features, from its point of view, of the several offers. Lyon accepted the counterproposal, suggesting, by way of further inducement, a $21,000 reduction in the annual rent for the first five years of the building lease. Worthen selected Lyon as the investor. After further negotiations, resulting in the elimination of that rent reduction (offset, however, by higher interest Lyon was to pay Worthen on a subsequent unrelated loan), Lyon in November 1967 was approved as an acceptable borrower by First National City Bank for the construction financing, and by New York Life, as the permanent lender. In April 1968 the approvals of the state and federal regulators were received.

In the meantime, on September 15, before Lyon was selected, Worthen itself began construction.

B

In May 1968 Worthen, Lyon, City Bank, and New York Life executed complementary and interlocking agreements under which the building was sold by Worthen to Lyon as it was constructed, and Worthen leased the completed building back from Lyon.

1. Agreements between Worthen and Lyon. Worthen and Lyon executed a ground lease, a sales agreement, and a building lease.

Under the ground lease dated May 1, 1968, App. 366, Worthen leased the site to Lyon for 76 years and 7 months through November 30, 2044. The first 19 months were the estimated construction period. The ground rents payable by Lyon to Worthen were $50 for the first 26 years and 7 months and thereafter in quarterly payments:

12/1/94 through 11/30/99 (5 years)—$100,000 annually
12/1/99 through 11/30/04 (5 years)—$150,000 annually
12/1/04 through 11/30/09 (5 years)—$200,000 annually
12/1/09 through 11/30/34 (25 years)—$250,000 annually
12/1/34 through 11/30/44 (10 years)—$10,000 annually.

Under the sales agreement dated May 19, 1968, *id.*, at 508, Worthen agreed to sell the building to Lyon, and Lyon agreed to buy it, piece by piece as it was constructed, for a total price not to exceed $7,640,000, in reimbursements to Worthen for its expenditures for the construction of the building.[2]

Under the building lease dated May 1, 1968, *id.*, at 376, Lyon leased the building back to Worthen for a primary term of 25 years from December 1, 1969, with options in Worthen to extend the lease for eight additional 5-year terms, a total of 65 years. During the period between the expiration of the building lease (at the latest, November 30, 2034, if fully extended) and the end of the ground lease on November 30, 2044, full ownership, use, and control of the building were Lyon's, unless, of course, the building had been repurchased by Worthen. *Id.*, at 369. Worthen was not obligated to pay rent under the building lease until completion of the building. For the first 11 years of the lease, that is, until November 30, 1980, the stated quarterly rent was $145,581.03 ($582,324.12 for the year). For the next 14 years, the quarterly rent was $153,289.32 ($613,157.28 for the year), and for the option periods the rent was $300,000 a year, payable quarterly. *Id.*, at 378–379. The total rent for the building over the 25-year primary term of the lease thus was $14,989,767.24. That rent equaled the principal and interest payments that would amortize the $7,140,000 New York Life mortgage loan over the same period. When the mortgage was paid off at the end of the primary term, the annual building rent, if Worthen extended the lease, came down to the stated $300,000. Lyon's

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[2] This arrangement appeared advisable and was made because purchases of materials by Worthen (which then had become a national bank) were not subject to Arkansas sales tax. See Ark. Stat. Ann. § 84–1904 (*l*) (1960); *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U. S. 339 (1968). Sales of the building elements to Lyon also were not subject to state sales tax, since they were sales of real estate. See Ark. Stat. Ann. § 84–1902 (c) (Supp. 1977).

net rentals from the building would be further reduced by the increase in ground rent Worthen would receive from Lyon during the extension.[3]

The building lease was a "net lease," under which Worthen was responsible for all expenses usually associated with the maintenance of an office building, including repairs, taxes, utility charges, and insurance, and was to keep the premises in good condition, excluding, however, reasonable wear and tear.

Finally, under the lease, Worthen had the option to repurchase the building at the following times and prices:

11/30/80 (after 11 years)—$6,325,169.85
11/30/84 (after 15 years)—$5,432,607.32
11/30/89 (after 20 years)—$4,187,328.04
11/30/94 (after 25 years)—$2,145,935.00

These repurchase option prices were the sum of the unpaid balance of the New York Life mortgage, Lyon's $500,000 investment, and 6% interest compounded on that investment.

2. Construction financing agreement. By agreement dated May 14, 1968, *id.*, at 462, City Bank agreed to lend Lyon $7,000,000 for the construction of the building. This loan was secured by a mortgage on the building and the parking deck, executed by Worthen as well as by Lyon, and an assignment by Lyon of its interests in the building lease and in the ground lease.

3. Permanent financing agreement. By Note Purchase

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[3] This, of course, is on the assumption that Worthen exercises its option to extend the building lease. If it does not, Lyon remains liable for the substantial rents prescribed by the ground lease. This possibility brings into sharp focus the fact that Lyon, in a very practical sense, is at least the ultimate owner of the building. If Worthen does not extend, the building lease expires and Lyon may do with the building as it chooses.

The Government would point out, however, that the net amounts payable by Worthen to Lyon during the building lease's extended terms, if all are claimed, would approximate the amount required to repay Lyon's $500,000 investment at 6% compound interest. Brief for United States 14.

Agreement dated May 1, 1968, *id.*, at 443, New York Life agreed to purchase Lyon's $7,140,000 6¾% 25-year secured note to be issued upon completion of the building. Under this agreement Lyon warranted that it would lease the building to Worthen for a noncancelable term of at least 25 years under a net lease at a rent at least equal to the mortgage payments on the note. Lyon agreed to make quarterly payments of principal and interest equal to the rentals payable by Worthen during the corresponding primary term of the lease. *Id.*, at 523. The security for the note was a first deed of trust and Lyon's assignment of its interests in the building lease and in the ground lease. *Id.*, at 527, 571. Worthen joined in the deed of trust as the owner of the fee and the parking deck.

In December 1969 the building was completed and Worthen took possession. At that time Lyon received the permanent loan from New York Life, and it discharged the interim loan from City Bank. The actual cost of constructing the office building and parking complex (excluding the cost of the land) exceeded $10,000,000.

C

Lyon filed its federal income tax returns on the accrual and calendar year basis. On its 1969 return, Lyon accrued rent from Worthen for December. It asserted as deductions one month's interest to New York Life; one month's depreciation on the building; interest on the construction loan from City Bank; and sums for legal and other expenses incurred in connection with the transaction.

On audit of Lyon's 1969 return, the Commissioner of Internal Revenue determined that Lyon was "not the owner for tax purposes of any portion of the Worthen Building," and ruled that "the income and expenses related to this building are not allowable . . . for Federal income tax purposes." App. 304–305, 299. He also added $2,298.15 to Lyon's 1969 income as "accrued interest income." This was the computed 1969 portion of a gain, considered the equivalent of interest income,

the realization of which was based on the assumption that Worthen would exercise its option to buy the building after 11 years, on November 30, 1980, at the price stated in the lease, and on the additional determination that Lyon had "loaned" $500,000 to Worthen. In other words, the Commissioner determined that the sale-and-leaseback arrangement was a financing transaction in which Lyon loaned Worthen $500,000 and acted as a conduit for the transmission of principal and interest from Worthen to New York Life.

All this resulted in a total increase of $497,219.18 over Lyon's reported income for 1969, and a deficiency in Lyon's federal income tax for that year in the amount of $236,596.36. The Commissioner assessed that amount, together with interest of $43,790.84, for a total of $280,387.20.[4]

Lyon paid the assessment and filed a timely claim for its refund. The claim was denied, and this suit, to recover the amount so paid, was instituted in the United States District Court for the Eastern District of Arkansas within the time allowed by 26 U. S. C. § 6532 (a)(1).

After trial without a jury, the District Court, in a memorandum letter-opinion setting forth findings and conclusions, ruled in Lyon's favor and held that its claimed deductions were allowable. 75–2 USTC ¶ 9545 (1975), 36 AFTR 2d ¶ 75–5059 (1975); App. 296–311. It concluded that the legal intent of the parties had been to create a bona fide sale-and-leaseback in accordance with the form and language of the documents evidencing the transactions. It rejected the argument that Worthen was acquiring an equity in the building through its rental payments. It found that the rents were unchallenged and were reasonable throughout the period of the lease, and that the option prices, negotiated at arm's length between the parties, represented fair estimates of market value on the applicable dates. It rejected any negative

[4] These figures do not include uncontested adjustments not involved in this litigation.

inference from the fact that the rentals, combined with the options, were sufficient to amortize the New York Life loan and to pay Lyon a 6% return on its equity investment. It found that Worthen would acquire an equity in the building only if it exercised one of its options to purchase, and that it was highly unlikely, as a practical matter, that any purchase option would ever be exercised. It rejected any inference to be drawn from the fact that the lease was a "net lease." It found that Lyon had mixed motivations for entering into the transaction, including the need to diversify as well as the desire to have the benefits of a "tax shelter." App. 296, 299.

The United States Court of Appeals for the Eighth Circuit reversed. 536 F. 2d 746 (1976). It held that the Commissioner correctly determined that Lyon was not the true owner of the building and therefore was not entitled to the claimed deductions. It likened ownership for tax purposes to a "bundle of sticks" and undertook its own evaluation of the facts. It concluded, in agreement with the Government's contention, that Lyon "totes an empty bundle" of ownership sticks. *Id.*, at 751. It stressed the following: (a) The lease agreements circumscribed Lyon's right to profit from its investment in the building by giving Worthen the option to purchase for an amount equal to Lyon's $500,000 equity plus 6% compound interest and the assumption of the unpaid balance of the New York Life mortgage.[5] (b) The option prices did not take into account possible appreciation of the value of the building or inflation.[6] (c) Any award realized as a

[5] Lyon here challenges this assertion on the grounds that it had the right and opportunities to sell the building at a greater profit at any time; the return to Lyon was not insubstantial and was attractive to a true investor in real estate; the 6% return was the minimum Lyon would realize if Worthen exercised one of its options, an event the District Court found highly unlikely; and Lyon would own the building and realize a greater return than 6% if Worthen did not exercise an option to purchase.

[6] Lyon challenges this observation by pointing out that the District

result of destruction or condemnation of the building in excess of the mortgage balance and the $500,000 would be paid to Worthen and not Lyon.[7] (d) The building rental payments during the primary term were exactly equal to the mortgage payments.[8] (e) Worthen retained control over the ultimate disposition of the building through its various options to repurchase and to renew the lease plus its ownership of the site.[9] (f) Worthen enjoyed all benefits and bore all burdens incident to the operation and ownership of the building so that, in the Court of Appeals' view, the only economic advantages accruing to Lyon, in the event it were considered to be the true owner of the property, were income tax savings of approximately $1.5 million during the first 11

Court found the option prices to be the negotiated estimate of the parties of the fair market value of the building on the option dates and to be reasonable. App. 303, 299.

[7] Lyon asserts that this statement is true only with respect to the total destruction or taking of the building on or after December 1, 1980. Lyon asserts that it, not Worthen, would receive the excess above the mortgage balance in the event of total destruction or taking before December 1, 1980, or in the event of partial damage or taking at any time. *Id.*, at 408–410, 411.

[8] Lyon concedes the accuracy of this statement, but asserts that it does not justify the conclusion that Lyon served merely as a conduit by which mortgage payments would be transmitted to New York Life. It asserts that Lyon was the sole obligor on the New York Life note and would remain liable in the event of default by Worthen. It also asserts that the fact the rent was sufficient to amortize the loan during the primary term of the lease was a requirement imposed by New York Life, and is a usual requirement in most long-term loans secured by a long-term lease.

[9] As to this statement, Lyon asserts that the Court of Appeals ignored Lyon's right to sell the building to another at any time; the District Court's finding that the options to purchase were not likely to be exercised; the uncertainty that Worthen would renew the lease for 40 years; Lyon's right to lease to anyone at any price during the last 10 years of the ground lease; and Lyon's continuing ownership of the building after the expiration of the ground lease.

years of the arrangement.[10] *Id.*, at 752–753.[11] The court concluded, *id.*, at 753, that the transaction was "closely akin" to that in *Helvering* v. *Lazarus & Co.*, 308 U. S. 252 (1939). "In sum, the benefits, risks, and burdens which [Lyon] has incurred with respect to the Worthen building are simply too insubstantial to establish a claim to the status of owner for tax purposes. . . . The vice of the present lease is that all of [its] features have been employed in the same transaction with the cumulative effect of depriving [Lyon] of any significant ownership interest." 536 F. 2d, at 754.

We granted certiorari, 429 U. S. 1089 (1977), because of an indicated conflict with *American Realty Trust* v. *United States*, 498 F. 2d 1194 (CA4 1974).

II

This Court, almost 50 years ago, observed that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930). In a number of cases, the Court has refused to permit the transfer of formal legal title to shift the incidence of taxation attributable to ownership of property where the transferor continues to retain significant control

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[10] In response to this, Lyon asserts that the District Court found that the benefits of occupancy Worthen will enjoy are common in most long-term real estate leases, and that the District Court found that Lyon had motives other than tax savings in entering into the transaction. It also asserts that the net cash after-tax benefit would be $312,220, not $1.5 million.

[11] Other factors relied on by the Court of Appeals, 536 F. 2d, at 752, were the allocation of the investment credit to Worthen, and a claim that Lyon's ability to sell the building to a third party was "carefully circumscribed" by the lease agreements. The investment credit by statute is freely allocable between the parties, § 48 (d) of the 1954 Code, 26 U. S. C. § 48 (d), and the Government has not pressed either of these factors before this Court.

over the property transferred. *E. g., Commissioner* v. *Sunnen,* 333 U. S. 591 (1948); *Helvering* v. *Clifford,* 309 U. S. 331 (1940). In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed. The Court has never regarded "the simple expedient of drawing up papers," *Commissioner* v. *Tower,* 327 U. S. 280, 291 (1946), as controlling for tax purposes when the objective economic realities are to the contrary. "In the field of taxation, administrators of the laws, and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding." *Helvering* v. *Lazarus & Co.,* 308 U. S., at 255. See also *Commissioner* v. *P. G. Lake, Inc.,* 356 U. S. 260, 266–267 (1958); *Commissioner* v. *Court Holding Co.,* 324 U. S. 331, 334 (1945). Nor is the parties' desire to achieve a particular tax result necessarily relevant. *Commissioner* v. *Duberstein,* 363 U. S. 278, 286 (1960).

In the light of these general and established principles, the Government takes the position that the Worthen-Lyon transaction in its entirety should be regarded as a sham. The agreement as a whole, it is said, was only an elaborate financing scheme designed to provide economic benefits to Worthen and a guaranteed return to Lyon. The latter was but a conduit used to forward the mortgage payments, made under the guise of rent paid by Worthen to Lyon, on to New York Life as mortgagee. This, the Government claims, is the true substance of the transaction as viewed under the microscope of the tax laws. Although the arrangement was cast in sale-and-leaseback form, in substance it was only a financing transaction, and the terms of the repurchase options and lease renewals so indicate. It is said that Worthen could reacquire the building simply by satisfying the mortgage debt and paying Lyon its $500,000 advance plus interest, regardless of the fair market value of the building at the time; similarly, when the mortgage was paid off, Worthen could extend the lease at

drastically reduced bargain rentals that likewise bore no relation to fair rental value but were simply calculated to pay Lyon its $500,000 plus interest over the extended term. Lyon's return on the arrangement in no event could exceed 6% compound interest (although the Government conceded it might well be less, Tr. of Oral Arg. 32). Furthermore, the favorable option and lease renewal terms made it highly unlikely that Worthen would abandon the building after it in effect had "paid off" the mortgage. The Government implies that the arrangement was one of convenience which, if accepted on its face, would enable Worthen to deduct its payments to Lyon as rent and would allow Lyon to claim a deduction for depreciation, based on the cost of construction ultimately borne by Worthen, which Lyon could offset against other income, and to deduct mortgage interest that roughly would offset the inclusion of Worthen's rental payments in Lyon's income. If, however, the Government argues, the arrangement was only a financing transaction under which Worthen was the owner of the building, Worthen's payments would be deductible only to the extent that they represented mortgage interest, and Worthen would be entitled to claim depreciation; Lyon would not be entitled to deductions for either mortgage interest or depreciation and it would not have to include Worthen's "rent" payments in its income because its function with respect to those payments was that of a conduit between Worthen and New York Life.

The Government places great reliance on *Helvering* v. *Lazarus & Co., supra,* and claims it to be precedent that controls this case. The taxpayer there was a department store. The legal title of its three buildings was in a bank as trustee for land-trust certificate holders. When the transfer to the trustee was made, the trustee at the same time leased the buildings back to the taxpayer for 99 years, with option to renew and purchase. The Commissioner, in stark contrast to his posture in the present case, took the position that the

statutory right to depreciation followed legal title. The Board of Tax Appeals, however, concluded that the transaction between the taxpayer and the bank in reality was a mortgage loan and allowed the taxpayer depreciation on the buildings. This Court, as had the Court of Appeals, agreed with that conclusion and affirmed. It regarded the "rent" stipulated in the leaseback as a promise to pay interest on the loan, and a "depreciation fund" required by the lease as an amortization fund designed to pay off the loan in the stated period. Thus, said the Court, the Board justifiably concluded that the transaction, although in written form a transfer of ownership with a leaseback, was actually a loan secured by the property involved.

The *Lazarus* case, we feel, is to be distinguished from the present one and is not controlling here. Its transaction was one involving only two (and not multiple) parties, the taxpayer-department store and the trustee-bank. The Court looked closely at the substance of the agreement between those two parties and rightly concluded that depreciation was deductible by the taxpayer despite the nomenclature of the instrument of conveyance and the leaseback. See also *Sun Oil Co.* v. *Commissioner,* 562 F. 2d 258 (CA3 1977) (a two-party case with the added feature that the second party was a tax-exempt pension trust).

The present case, in contrast, involves three parties, Worthen, Lyon, and the finance agency. The usual simple two-party arrangement was legally unavailable to Worthen. Independent investors were interested in participating in the alternative available to Worthen, and Lyon itself (also independent from Worthen) won the privilege. Despite Frank Lyon's presence on Worthen's board of directors, the transaction, as it ultimately developed, was not a familial one arranged by Worthen, but one compelled by the realities of the restrictions imposed upon the bank. Had Lyon not appeared, another interested investor would have been selected.

The ultimate solution would have been essentially the same. Thus, the presence of the third party, in our view, significantly distinguishes this case from *Lazarus* and removes the latter as controlling authority.

III

It is true, of course, that the transaction took shape according to Worthen's needs. As the Government points out, Worthen throughout the negotiations regarded the respective proposals of the independent investors in terms of its own cost of funds. *E. g.*, App. 355. It is also true that both Worthen and the prospective investors compared the various proposals in terms of the return anticipated on the investor's equity. But all this is natural for parties contemplating entering into a transaction of this kind. Worthen needed a building for its banking operations and other purposes and necessarily had to know what its cost would be. The investors were in business to employ their funds in the most remunerative way possible. And, as the Court has said in the past, a transaction must be given its effect in accord with what actually occurred and not in accord with what might have occurred. *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U. S. 134, 148–149 (1974); *Central Tablet Mfg. Co.* v. *United States*, 417 U. S. 673, 690 (1974).

There is no simple device available to peel away the form of this transaction and to reveal its substance. The effects of the transaction on all the parties were obviously different from those that would have resulted had Worthen been able simply to make a mortgage agreement with New York Life and to receive a $500,000 loan from Lyon. Then *Lazarus* would apply. Here, however, and most significantly, it was Lyon alone, and not Worthen, who was liable on the notes, first to City Bank, and then to New York Life. Despite the facts that Worthen had agreed to pay rent and that this rent equaled the amounts due from Lyon to New York Life, should anything go awry in the later years of the lease, Lyon

was primarily liable.[12] No matter how the transaction could have been devised otherwise, it remains a fact that as the agreements were placed in final form, the obligation on the notes fell squarely on Lyon.[13] Lyon, an ongoing enterprise, exposed its very business well-being to this real and substantial risk.

The effect of this liability on Lyon is not just the abstract possibility that something will go wrong and that Worthen will not be able to make its payments. Lyon has disclosed this liability on its balance sheet for all the world to see. Its financial position was affected substantially by the presence of this long-term debt, despite the offsetting presence of the building as an asset. To the extent that Lyon has used its capital in this transaction, it is less able to obtain financing for other business needs.

In concluding that there is this distinct element of economic reality in Lyon's assumption of liability, we are mindful that the characterization of a transaction for financial accounting purposes, on the one hand, and for tax purposes, on the other, need not necessarily be the same. *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345, 355 (1971); *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 562 (1932). Accounting methods or descriptions, without more, do not lend substance to that which has no substance. But in this case accepted accounting methods, as understood by the several parties to the respective agreements and as applied to the transaction by others, gave the transaction a meaningful character consonant with the form it was given.[14] Worthen

[12] New York Life required Lyon, not Worthen, to submit financial statements periodically. See Note Purchase Agreement, App. 453–454, 458–459.

[13] It may well be that the remedies available to New York Life against Lyon would be far greater than any remedy available to it against Worthen, which, as lessee, is liable to New York Life only through Lyon's assignment of its interest as lessor.

[14] We are aware that accounting standards have changed significantly since 1968 and that the propriety of Worthen's and Lyon's methods of

was not allowed to enter into the type of transaction which the Government now urges to be the true substance of the arrangement. Lyon and Worthen cannot be said to have en-

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disclosing the transaction in question may be a matter for debate under these new standards. Compare Acccounting Principles Bd. Opinion No. 5, Reporting of Leases in Financial Statements of Lessee (1964), and Accounting Principles Bd. Opinion No. 7, Accounting for Leases in Financial Statements of Lessors (1966), with Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 13, Accounting for Leases (1976). See also Comptroller of the Currency, Banking Circular No. 95 (Nov. 11, 1977), instructing that national banks revise their financial statements in accord with FASB Standard No. 13. Standard No. 13, however, by its terms, states, ¶ 78, that there are many instances where tax and financial accounting treatments diverge. Further, Standard No. 13 is nonapplicable with respect to a lease executed prior to January 1, 1977 (as was the Lyon-Worthen lease), until January 1, 1981. Obviously, Banking Circular No. 95 was not in effect in 1968 when the Lyon-Worthen lease was executed.

Then-existing pronouncements of the Internal Revenue Service gave Lyon very little against which to measure the transaction. The most complete statement on the general question of characterization of leases as sales, Rev. Rul. 55–540, 1955–2 Cum. Bull. 39, by its terms dealt only with equipment leases. In that ruling it was stated that the Service will look at the intent of the parties at the time the agreement was executed to determine the proper characterization of the transaction. Generally, an intent to enter into a conditional sales agreement will be found to be present if (a) portions of the rental payments are made specifically applicable to an equity acquired by the lessee, (b) the lessee will acquire a title automatically after certain payments have been made, (c) the rental payments are a disproportionately large amount in relation to the sum necessary to complete the sale, (d) the rental payments are above fair rental value, (e) title can be acquired at a nominal option price, or (f) some portion of the rental payments are identifiable as interest. See also Rev. Rul. 60–122, 1960–1 Cum. Bull. 56; Rev. Rul. 72–543, 1972–2 Cum. Bull. 87.

The Service announced more specific guidelines, indicating under what circumstances it would answer requests for rulings on leverage leasing transactions, in Rev. Proc. 75–21, 1975–1 Cum. Bull. 715. In general, "[u]nless other facts and circumstances indicate a contrary intent," the Service will not rule that a lessor in a leveraged lease transaction is to be treated as the owner of the property in question unless (a) the lessor has

tered into the transaction intending that the interests involved were allocated in a way other than that associated with a sale-and-leaseback.

Other factors also reveal that the transaction cannot be viewed as anything more than a mortgage agreement between Worthen and New York Life and a loan from Lyon to Worthen. There is no legal obligation between Lyon and Worthen representing the $500,000 "loan" extended under the Government's theory. And the assumed 6% return on this putative loan—required by the audit to be recognized in the taxable year in question—will be realized only when and if Worthen exercises its options.

The Court of Appeals acknowledged that the rents alone, due after the primary term of the lease and after the mortgage has been paid, do not provide the simple 6% return which, the Government urges, Lyon is guaranteed, 536 F. 2d, at 752. Thus, if Worthen chooses not to exercise its options, Lyon is gambling that the rental value of the building during the last 10 years of the ground lease, during which the ground rent is minimal, will be sufficient to recoup its investment before it must negotiate again with Worthen regarding the ground lease. There are simply too many contingencies, including variations in the value of real estate, in the cost of money, and in the capital structure of Worthen, to permit the conclusion that the parties intended to enter into the transaction as

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incurred and maintains a minimal investment equal to 20% of the cost of the property, (b) the lessee has no right to purchase except at fair market value, (c) no part of the cost of the property is furnished by the lessee, (d) the lessee has not lent to the lessor or guaranteed any indebtedness of the lessor, and (e) the lessor must demonstrate that it expects to receive a profit on the transaction other than the benefits received solely from the tax treatment. These guidelines are not intended to be definitive, and it is not clear that they provide much guidance in assessing real estate transactions. See Rosenberg & Weinstein, Sale-leasebacks: An analysis of these transactions after the *Lyon* decision, 45 J. Tax. 146, 147 n. 1 (1976).

structured in the audit and according to which the Government now urges they be taxed.

It is not inappropriate to note that the Government is likely to lose little revenue, if any, as a result of the shape given the transaction by the parties. No deduction was created that is not either matched by an item of income or that would not have been available to one of the parties if the transaction had been arranged differently. While it is true that Worthen paid Lyon less to induce it to enter into the transaction because Lyon anticipated the benefit of the depreciation deductions it would have as the owner of the building, those deductions would have been equally available to Worthen had it retained title to the building. The Government so concedes. Tr. of Oral Arg. 22–23. The fact that favorable tax consequences were taken into account by Lyon on entering into the transaction is no reason for disallowing those consequences.[15] We cannot ignore the reality that the tax laws affect the shape of nearly every business transaction. See *Commissioner* v. *Brown,* 380 U. S. 563, 579–580 (1965) (Harlan, J., concurring). Lyon is not a corporation with no purpose other than to hold title to the bank building. It was not created by Worthen or even financed to any degree by Worthen.

The conclusion that the transaction is not a simple sham to be ignored does not, of course, automatically compel the further conclusion that Lyon is entitled to the items claimed as deductions. Nevertheless, on the facts, this readily follows. As has been noted, the obligations on which Lyon paid interest

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[15] Indeed, it is not inevitable that the transaction, as treated by Lyon and Worthen, will not result in more revenues to the Government rather than less. Lyon is gambling that in the first 11 years of the lease it will have income that will be sheltered by the depreciation deductions, and that it will be able to make sufficiently good use of the tax dollars preserved thereby to make up for the income it will recognize and pay taxes on during the last 14 years of the initial term of the lease and against which it will enjoy no sheltering deduction.

were its obligations alone, and it is entitled to claim deductions therefor under § 163 (a) of the 1954 Code, 26 U. S. C. § 163 (a).

As is clear from the facts, none of the parties to this sale-and-leaseback was the owner of the building in any simple sense. But it is equally clear that the facts focus upon Lyon as the one whose capital was committed to the building and as the party, therefore, that was entitled to claim depreciation for the consumption of that capital. The Government has based its contention that Worthen should be treated as the owner on the assumption that throughout the term of the lease Worthen was acquiring an equity in the property. In order to establish the presence of that growing equity, however, the Government is forced to speculate that one of the options will be exercised and that, if it is not, this is only because the rentals for the extended term are a bargain. We cannot indulge in such speculation in view of the District Court's clear finding to the contrary.[16] We therefore conclude that it is Lyon's capital that is invested in the building according to the agreement of the parties, and it is Lyon that is entitled to depreciation deductions, under § 167 of the 1954 Code, 26 U. S. C. § 167. Cf. *United States* v. *Chicago B. & Q. R. Co.*, 412 U. S. 401 (1973).

IV

We recognize that the Government's position, and that taken by the Court of Appeals, is not without superficial appeal. One, indeed, may theorize that Frank Lyon's presence on the Worthen board of directors; Lyon's departure from its principal corporate activity into this unusual venture; the parallel between the payments under the building lease and the amounts due from Lyon on the New York Life mortgage; the provisions relating to condemnation or destruction of the

[16] The general characterization of a transaction for tax purposes is a question of law subject to review. The particular facts from which the characterization is to be made are not so subject. See *American Realty Trust* v. *United States*, 498 F. 2d 1194, 1198 (CA4 1974).

property; the nature and presence of the several options available to Worthen; and the tax benefits, such as the use of double declining balance depreciation, that accrue to Lyon during the initial years of the arrangement, form the basis of an argument that Worthen should be regarded as the owner of the building and as the recipient of nothing more from Lyon than a $500,000 loan.

We, however, as did the District Court, find this theorizing incompatible with the substance and economic realities of the transaction: the competitive situation as it existed between Worthen and Union National Bank in 1965 and the years immediately following; Worthen's undercapitalization; Worthen's consequent inability, as a matter of legal restraint, to carry its building plans into effect by a conventional mortgage and other borrowing; the additional barriers imposed by the state and federal regulators; the suggestion, forthcoming from the state regulator, that Worthen possess an option to purchase; the requirement, from the federal regulator, that the building be owned by an independent third party; the presence of several finance organizations seriously interested in participating in the transaction and in the resolution of Worthen's problem; the submission of formal proposals by several of those organizations; the bargaining process and period that ensued; the competitiveness of the bidding; the bona fide character of the negotiations; the three-party aspect of the transaction; Lyon's substantiality [17] and its independence from Worthen; the fact that diversification was Lyon's principal motivation; Lyon's being liable alone on the successive notes to City Bank and New York Life; the reasonableness, as the District Court found, of the rentals and of the option prices; the substantiality of the purchase prices;

[17] Lyon's consolidated balance sheet on December 31, 1968, showed assets of $12,225,612, and total stockholders' equity of $3,818,671 Of the assets, the sum of $2,674,290 represented its then investment in the Worthen building. App. 587–588.

Lyon's not being engaged generally in the business of financing; the presence of all building depreciation risks on Lyon; the risk, borne by Lyon, that Worthen might default or fail, as other banks have failed; the facts that Worthen could "walk away" from the relationship at the end of the 25-year primary term, and probably would do so if the option price were more than the then-current worth of the building to Worthen; the inescapable fact that if the building lease were not extended, Lyon would be the full owner of the building, free to do with it as it chose; Lyon's liability for the substantial ground rent if Worthen decides not to exercise any of its options to extend; the absence of any understanding between Lyon and Worthen that Worthen would exercise any of the purchase options; the nonfamily and nonprivate nature of the entire transaction; and the absence of any differential in tax rates and of special tax circumstances for one of the parties—all convince us that Lyon has far the better of the case.[18]

In so concluding, we emphasize that we are not condoning manipulation by a taxpayer through arbitrary labels and dealings that have no economic significance. Such, however, has not happened in this case.

In short, we hold that where, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is

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[18] Thus, the facts of this case stand in contrast to many others in which the form of the transaction actually created tax advantages that, for one reason or another, could not have been enjoyed had the transaction taken another form. See, *e. g., Sun Oil Co.* v. *Commissioner,* 562 F. 2d 258 (CA3 1977) (sale-and-leaseback of land between taxpayer and tax-exempt trust enabled the taxpayer to amortize, through its rental deductions, the cost of acquiring land not otherwise depreciable). Indeed, the arrangements in this case can hardly be labeled as tax-avoidance techniques in light of the other arrangments being promoted at the time. See, *e. g.,* Zeitlin, Tax Planning in Equipment-Leasing Shelters, 1969 So. Cal. Tax Inst. 621; Marcus, Real Estate Purchase-Leasebacks as Secured Loans, 2 Real Estate L. J. 664 (1974).

imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties. Expressed another way, so long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes. What those attributes are in any particular case will necessarily depend upon its facts. It suffices to say that, as here, a sale-and-leaseback, in and of itself, does not necessarily operate to deny a taxpayer's claim for deductions.[19]

The judgment of the Court of Appeals, accordingly, is reversed.

It is so ordered.

MR. JUSTICE WHITE dissents and would affirm the judgment substantially for the reasons stated in the opinion in the Court of Appeals for the Eighth Circuit. 536 F. 2d 746 (1976).

MR. JUSTICE STEVENS, dissenting.

In my judgment the controlling issue in this case is the economic relationship between Worthen and petitioner, and matters such as the number of parties, their reasons for structuring the transaction in a particular way, and the tax benefits which may result, are largely irrelevant. The question whether a leasehold has been created should be answered by examining the character and value of the purported lessor's reversionary estate.

For a 25-year period Worthen has the power to acquire full ownership of the bank building by simply repaying the

[19] See generally *Commissioner* v. *Danielson,* 378 F. 2d 771 (CA3), cert. denied, 389 U. S. 858 (1967), on remand, 50 T. C. 782 (1968); *Levinson* v. *Commissioner,* 45 T. C. 380 (1966); *World Publishing Co.* v. *Commissioner,* 299 F. 2d 614 (CA8 1962); *Northwest Acceptance Corp.* v. *Commissioner,* 58 T. C. 836 (1972), aff'd, 500 F. 2d 1222 (CA9 1974); *Cubic Corp.* v. *United States,* 541 F. 2d 829 (CA9 1976).

amounts, plus interest, advanced by the New York Life Insurance Company and petitioner. During that period, the economic relationship among the parties parallels exactly the normal relationship between an owner and two lenders, one secured by a first mortgage and the other by a second mortgage.[1] If Worthen repays both loans, it will have unencumbered ownership of the property. What the character of this relationship suggests is confirmed by the economic value that the parties themselves have placed on the reversionary interest.

All rental payments made during the original 25-year term are credited against the option repurchase price, which is exactly equal to the unamortized cost of the financing. The value of the repurchase option is thus limited to the cost of the financing, and Worthen's power to exercise the option is cost free. Conversely, petitioner, the nominal owner of the reversionary estate, is not entitled to receive *any* value for the surrender of its supposed rights of ownership.[2] Nor does

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[1] "[W]here a fixed price, as in *Frank Lyon Company,* is designed merely to provide the lessor with a predetermined fixed return, the substantive bargain is more akin to the relationship between a debtor and creditor than between a lessor and lessee." Rosenberg & Weinstein, Sale-leasebacks: An analysis of these transactions after the *Lyon* decision, 45 J. Tax. 146, 149 (1976).

[2] It is worth noting that the proposals submitted by two other potential investors in the building, see *ante,* at 564, did contemplate that Worthen would pay a price above the financing costs for acquisition of the leasehold interest. For instance, Goldman, Sachs & Company proposed that, at the end of the lease's primary term, Worthen would have the option to repurchase the property for either its fair market value or 20% of its original cost, whichever was the greater. See Brief for United States 8 n. 7. A repurchase option based on fair market value, since it acknowledges the lessor's equity interest in the property, is consistent with a lessor-lessee relationship. See *Breece Veneer & Panel Co.* v. *Commissioner,* 232 F. 2d 319 (CA7 1956); *LTV Corp.* v. *Commissioner,* 63 T. C. 39, 50 (1974); see generally Comment, Sale and Leaseback Transactions, 52 N. Y. U. L. Rev. 672, 688–689, n. 117 (1977).

it have any power to control Worthen's exercise of the option.[3]

"It is fundamental that 'depreciation is not predicated upon ownership of property *but rather upon an investment in property.*' No such investment exists when payments of the purchase price in accordance with the design of the parties yield no equity to the purchaser." *Estate of Franklin* v. *Commissioner*, 544 F. 2d 1045, 1049 (CA9 1976) (citations omitted; emphasis in original). Here, the petitioner has, in effect, been guaranteed that it will receive its original $500,000 plus accrued interest. But that is all. It incurs neither the risk of depreciation,[4] nor the benefit of possible appreciation. Under the terms of the sale-leaseback, it will stand in no better or worse position after the 11th year of the lease—when Worthen can first exercise its option to repurchase—whether the property has appreciated or depreciated.[5] And this remains true throughout the rest of the 25-year period.

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[3] The situation in this case is thus analogous to that in *Corliss* v. *Bowers*, 281 U. S. 376, where the Court held that the grantor of a trust who retains an unrestricted cost-free power of revocation remains the owner of the trust assets for tax purposes. Worthen's power to exercise its repurchase option is similar; the only restraints upon it are those normally associated with the repayment of a loan, such as limitations on the timing of repayment and the amount due at the stated intervals.

[4] Petitioner argues that it bears the risk of depreciation during the primary term of the lease, because the option price decreases over time. Brief for Petitioner 29–30. This is clearly incorrect. Petitioner will receive $500,000 plus interest, and no more or less, whether the option is exercised as soon as possible or only at the end of 25 years. Worthen, on the other hand, does bear the risk of depreciation, since its opportunity to make a profit from the exercise of its repurchase option hinges on the value of the building at the time.

[5] After the 11th year of the lease, there are three ways that the lease might be terminated. The property might be condemned, the building might be destroyed by act of God, or Worthen might exercise its option to purchase. In any such event, if the property had increased in value, the entire benefit would be received by Worthen and petitioner would receive only its $500,000 plus interest. See Reply Brief for Petitioner 8–9, n. 2.

Petitioner has assumed only two significant risks. First, like any other lender, it assumed the risk of Worthen's insolvency. Second, it assumed the risk that Worthen might *not* exercise its option to purchase at or before the end of the original 25-year term.[6] If Worthen should exercise that right *not* to repay, perhaps it would *then* be appropriate to characterize petitioner as the owner and Worthen as the lessee. But speculation as to what might happen in 25 years cannot justify the *present* characterization of petitioner as the owner of the building. Until Worthen has made a commitment either to exercise or not to exercise its option,[7] I think the Government is correct in its view that petitioner is not the owner of the building for tax purposes. At present, since Worthen has

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[6] The possibility that Worthen might not exercise its option is a risk for petitioner because in that event petitioner's advance would be amortized during the ensuing renewal lease terms, totaling 40 years. Yet there is a possibility that Worthen would choose not to renew for the full 40 years or that the burdens of owning a building and paying a ground rental of $10,000 during the years 2034 through 2044 would exceed the benefits of ownership. *Ante,* at 579.

[7] In this case, the lessee is not "economically compelled" to exercise its option. See *American Realty Trust* v. *United States,* 498 F. 2d 1194 (CA4 1974). Indeed, it may be more advantageous for Worthen to let its option lapse since the present value of the renewal leases is somewhat less than the price of the option to repurchase. See Brief for United States 40 n. 26. But whether or not Worthen is likely to exercise the option, as long as it retains its unrestricted cost-free power to do so, it must be considered the owner of the building. See *Sun Oil Co.* v. *Commissioner,* 562 F. 2d 258, 267 (CA3 1977) (repurchase option enabling lessee to acquire leased premises by repaying financing costs indicative of lessee's equity interest in those premises).

In effect, Worthen has an option to "put" the building to petitioner if it drops in value below $500,000 plus interest. Even if the "put" appears likely because of bargain lease rates after the primary terms, that would not justify the present characterization of petitioner as the owner of the building.

the unrestricted right to control the residual value of the property for a price which does not exceed the cost of its unamortized financing, I would hold, as a matter of law, that it is the owner.

I therefore respectfully dissent.

Syllabus

NIXON *v.* WARNER COMMUNICATIONS, INC., ET AL.

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

No. 76–944. Argued November 8, 1977—Decided April 18, 1978

During the criminal trial of several of petitioner ex-President's former advisers on charges, *inter alia,* of conspiring to obstruct justice in connection with the so-called Watergate investigation, some 22 hours of tape recordings made of conversations in petitioner's offices in the White House and Executive Office Building were played to the jury and the public in the courtroom, and the reels of the tapes were admitted into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with transcripts, which were not admitted as evidence but were widely reprinted in the press. At the close of the trial, in which four of the defendants were convicted, and after an earlier unsuccessful attempt over petitioner's objections to obtain court permission to copy, broadcast, and sell to the public portions of the tapes, respondent broadcasters petitioned for immediate access to the tapes. The District Court denied the petitions on the grounds that since the convicted defendants had filed notices of appeal, their rights would be prejudiced if respondents' petitions were granted, and that since the transcripts had apprised the public of the tapes' contents, the public's "right to know" did not overcome the need to safeguard the defendants' rights on appeal. The Court of Appeals reversed, holding that the mere possibility of prejudice to defendants' rights did not outweigh the public's right of access, that the common-law right of access to judicial records required the District Court to release the tapes in its custody, and that therefore the District Court abused its discretion in refusing immediate access. *Held:*

1. Considering all the circumstances, the common-law right of access to judicial records does not authorize release of the tapes in question from the District Court's custody. Pp. 597–608.

(a) The common-law right to inspect and copy judicial records is not absolute, but the decision whether to permit access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. Pp. 597–599.

(b) Because of the congressionally prescribed avenue of public access to the tapes provided by the Presidential Recordings and Mate-

rials Preservation Act, whose existence is a decisive element in the proper exercise of discretion with respect to release of the tapes, it is not necessary to weigh the parties' competing arguments for and against release as though the District Court were the only potential source of information regarding these historical materials, and the presence of an alternative means of public access tips the scales in favor of denying release. Pp. 599–608.

2. The release of the tapes is not required by the First Amendment guarantee of freedom of the press. The question here is not whether the press must be permitted access to public information to which the public generally has access, but whether the tapes, to which the public has never had *physical* access, must be made available for copying. There is in this case no question of a truncated flow of information to the public, as the contents of the tapes were given wide publicity by all elements of the media, *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, distinguished, and under the First Amendment the press has no right to information about a trial superior to that of the general public. Pp. 608–610.

3. Nor is release of the tapes required by the Sixth Amendment guarantee of a public trial. While public understanding of the highly publicized trial may remain incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning, the same could be said of a live witness' testimony, yet there is no constitutional right to have such testimony recorded and broadcast. The guarantee of a public trial confers no special benefit on the press nor does it require that the trial, or any part of it, be broadcast live or on tape to the public, but such guarantee is satisfied by the opportunity of the public and the press to attend the trial and to report what they have observed. P. 610.

179 U. S. App. D. C. 293, 551 F. 2d 1252, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, *post,* p. 611. MARSHALL, J., *post,* p. 612, and STEVENS, J., *post,* p. 613, filed dissenting opinions.

William H. Jeffress, Jr., argued the cause for petitioner. With him on the briefs were *Herbert J. Miller, Jr.,* and *R. Stan Mortenson.*

Floyd Abrams and *Edward Bennett Williams* argued the cause for respondents. With Mr. Abrams on the brief for

respondent National Broadcasting Company, Inc., et al. were *Eugene R. Scheiman, Corydon B. Dunham,* and *J. Laurent Scharff.* With Mr. Williams on the brief for respondent Warner Communications, Inc., were *Gregory B. Craig* and *Sidney Rosdeitcher.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence at the trial of petitioner's former advisers. Respondents wish to copy the tapes for broadcasting and sale to the public. The Court of Appeals for the District of Columbia Circuit held that the District Court's refusal to permit immediate copying of the tapes was an abuse of discretion. *United States* v. *Mitchell,* 179 U. S. App. D. C. 293, 551 F. 2d 1252 (1976). We granted certiorari, 430 U. S. 944 (1977), and for the reasons that follow, we reverse.

I

On July 16, 1973, testimony before the Senate Select Committee on Presidential Campaign Activities revealed that petitioner, then President of the United States, had maintained a system for tape recording conversations in the White House Oval Office and in his private office in the Executive Office Building. Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., 2074–2076 (1973). A week later, the Watergate Special Prosecutor issued a subpoena *duces tecum* directing petitioner to produce before a federal grand jury tape recordings of eight meetings and one telephone conversation recorded in petitioner's offices. When petitioner refused to comply with the subpoena, the District Court for the District of Columbia ordered production of the recordings. *In re Subpoena to Nixon,* 360 F. Supp. 1, aff'd *sub nom. Nixon* v. *Sirica,* 159 U. S. App. D. C. 58, 487 F. 2d 700

(1973). In November 1973, petitioner submitted seven of the nine subpoenaed recordings and informed the Office of the Special Prosecutor that the other two were missing.

On March 1, 1974, the grand jury indicted seven individuals [1] for, among other things, conspiring to obstruct justice in connection with the investigation of the 1972 burglary of the Democratic National Committee headquarters. In preparation for this trial, styled *United States* v. *Mitchell*,[2] the Special Prosecutor, on April 18, 1974, issued a second subpoena *duces tecum*, directing petitioner to produce tape recordings and documents relating to some 64 additional Presidential meetings and conversations. The District Court denied petitioner's motions to quash. *United States* v. *Mitchell*, 377 F. Supp. 1326 (1974). This Court granted certiorari before judgment in the Court of Appeals and affirmed. *United States* v. *Nixon*, 418 U. S. 683 (1974). In accordance with our decision, the subpoenaed tapes were turned over to the

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[1] The seven defendants were as follows: John N. Mitchell, former Attorney General and head of the Committee for the Re-election of the President; H. R. Haldeman, former Assistant to the President, serving as White House Chief of Staff; John D. Ehrlichman, former Assistant to the President for Domestic Affairs; Charles W. Colson, former Special Counsel to the President; Robert C. Mardian, former Assistant Attorney General and official of the Committee for the Re-election of the President; Kenneth W. Parkinson, hired as the Committee's counsel in June 1972; and Gordon Strachan, staff assistant to Haldeman.

[2] Crim. No. 74–110 (DC 1974). Defendant Colson pleaded guilty to other charges before trial, and the case against him was dismissed. Strachan's case was severed and ultimately dismissed. The jury acquitted Parkinson and found Mardian guilty of conspiracy. Mitchell, Haldeman, and Ehrlichman were convicted of conspiracy, obstruction of justice, and perjury.

The convictions of Mitchell, Haldeman, and Ehrlichman were affirmed. *United States* v. *Haldeman*, 181 U. S. App. D. C. 254, 559 F. 2d 31 (1976), cert. denied, 431 U. S. 933 (1977). Mardian's conviction was reversed, *United States* v. *Mardian*, 178 U. S. App. D. C. 207, 546 F. 2d 973 (1976), and no further proceedings were instituted against him.

District Court for *in camera* inspection. The court arranged to have copies made of the relevant and admissible portions. It retained one copy and gave the other to the Special Prosecutor.[3]

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[3] The Clerk of the District Court described the copying procedure:

"White House tape recordings were submitted to the Court pursuant to two separate subpoenas. The first group of tapes were delivered in November 1973 and the second in July and August 1974. In each instance, the Court received what purported to be the entire reel of original recording on which was found any portion of a subpoenaed conversation.

"As the time for trial in *U. S. v. Mitchell, et al.*, CR 74–110, approached, the Court reproduced subpoenaed conversations from the original recordings, using technical assistance supplied by the Watergate Special Prosecutor. Portions of conversations and, in some cases, entire conversations which the Court had previously declared to be subject to privilege were not reproduced. Two copies of each conversation were produced simultaneously and were designated Copy A and Copy B. The Copy B series was delivered to the Special Prosecutor pursuant to the subpoenas aforementioned for use in the preparation of transcripts. Copy A series tapes were retained by the Court and later marked for identification as Government Exhibits in CR 74–110. These tapes are contained on about 50 separate reels.

"In the Government's case at trial, some, but not all, of the Copy A series tapes were admitted into evidence. Some, but again not all, of the tape exhibits were published to the jury. Those published were played to the jury either in whole or in part. Where exhibits were not published in their entirety, the deletions had been made either by the Government on its own motion or pursuant to an order of Judge Sirica. Deletions were effected not by modifying the exhibit itself, but by skipping deleted portions on the tape or by interrupting the sound transmission to the jurors' headphones. The exhibits remain as originally constituted.

"The jurors were provided with transcripts of the tape recorded conversations for use as aids in listening to the exhibits. These written transcripts were marked for identification as Government Exhibits, and copies provided to the individual jurors, counsel, and news media representatives at the time the tapes were played. Deletions in the copies of transcripts used by the jurors and others matched precisely the deletions in tapes as they were published at trial.

"In many instances the Copy A series tapes introduced as Government Exhibits contain material that has not been published to the jury and

The trial began on October 1, 1974, before Judge Sirica. During its course, some 22 hours of taped conversations were played for the jury and the public in the courtroom. The reels of tape containing conversations played for the jury were entered into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with earphones and with transcripts prepared by the Special Prosecutor. The transcripts were not admitted as evidence, but were widely reprinted in the press.

Six weeks after the trial had begun, respondent broadcasters [4] filed a motion before Judge Sirica, seeking permission to copy, broadcast, and sell to the public the portions of the tapes played at trial. Petitioner opposed the application. Because *United States* v. *Mitchell* was consuming all of Judge Sirica's time, this matter was transferred to Judge Gesell.

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others present in the courtroom." Affidavit of James F. Davey, Nov. 26, 1974, pp. 2–3; App. 24–25.

The District Court retains custody of the Copy A tapes, which are at issue here, and of the original recordings, which are not. The Copy B series is in the files of the Office of the Special Prosecutor, stored at the National Archives.

We note that under § 101 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695, note following 44 U. S. C. § 2107 (1970 ed., Supp. V), the original tape recordings are subject to the control of the Administrator of General Services.

[4] On September 17, 1974, representatives of the three commercial television networks had written informally to Judge Sirica, asking permission to copy for broadcasting purposes portions of the tapes played during the course of the trial. Judge Sirica referred this request to Chief Judge Hart, who consulted with other judges of the District Court and advised against permitting such copying. On October 2, 1974, Judge Sirica informed the network representatives that copying would not be allowed.

The three commercial networks and the Radio-Television News Directors Association filed with the District Court this formal application to copy the tapes on November 12, 1974. The Public Broadcasting System joined the application the next day. Warner Communications, Inc., filed a separate application on December 2, 1974.

On December 5, 1974, Judge Gesell held that a common-law privilege of public access to judicial records permitted respondents to obtain copies of exhibits in the custody of the clerk, including the tapes in question. *United States* v. *Mitchell*, 386 F. Supp. 639, 641. Judge Gesell minimized petitioner's opposition to respondents' motion, declaring that neither his alleged property interest in the tapes nor his asserted executive privilege sufficed to prevent release of recordings already publicly aired and available, in transcription, to the world at large. *Id.*, at 642. Judge Gesell cautioned, however, against "overcommercialization of the evidence." *Id.*, at 643. And because of potential administrative and mechanical difficulties, he prohibited copying until the trial was over. *Ibid.* He requested that the parties submit proposals for access and copying procedures that would minimize overcommercialization and administrative inconvenience at that time. *Ibid.* In an order of January 8, 1975, Judge Gesell rejected respondents' joint proposals as insufficient. *Id.*, at 643–644. Noting the close of the *Mitchell* trial, he transferred the matter back to Judge Sirica.

On April 4, 1975, Judge Sirica denied without prejudice respondents' petitions for immediate access to the tapes. *United States* v. *Mitchell*, 397 F. Supp. 186. Observing that all four men convicted in the *Mitchell* trial had filed notices of appeal, he declared that their rights could be prejudiced if the petitions were granted. Immediate access to the tapes might "result in the manufacture of permanent phonograph records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales." *Id.*, at 188. Since release of the transcripts had apprised the public of the tapes' contents, the public's "right to know" did not, in Judge Sirica's view, overcome the need to safeguard the defendants' rights on appeal. *Id.*, at 188–189. Judge Sirica also noted the passage of the Presidential Recordings and Materials Preservation Act

(Presidential Recordings Act), 88 Stat. 1695, note following 44 U. S. C. § 2107 (1970 ed., Supp. V),[5] and the duty thereunder of the Administrator of General Services (Administrator) to submit to Congress regulations governing access to Presidential tapes in general. Under the proposed regulations then before Congress,[6] public distribution of copies would be delayed for 4½ years. Although Judge Sirica doubted that the Act covered the copies at issue here, he viewed the proposed regulations as suggesting that immediate release was not of overriding importance. 397 F. Supp., at 189.

The Court of Appeals reversed. *United States* v. *Mitchell,* 179 U. S. App. D. C. 293, 551 F. 2d 1252 (1976). It stressed the importance of the common-law privilege to inspect and copy judicial records and assigned to petitioner the burden of proving that justice required limitations on the privilege. In the court's view, the mere possibility of prejudice to defendants' rights in the event of a retrial did not outweigh the public's right of access. *Id.,* at 302–304, 551 F. 2d, at 1261–1263. The court concluded that the District Court had "abused its discretion in allowing those diminished interests in confidentiality to interfere with the public's right to inspect and copy the tapes." *Id.,* at 302, 551 F. 2d, at 1261. It remanded for the development of a plan of release, but noted—in apparent contrast to the admonitions of Judge Gessell—that the "court's power to control the uses to which the tapes are put *once released* . . . is sharply limited by the First Amendment." *Id.,* at 304 n. 52, 551 F. 2d, at 1263 n. 52 (emphasis in original). We granted certiorari to review this holding that the common-law right of access to judicial records requires the District Court to release the tapes in its custody.

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[5] For a detailed discussion of the terms and validity of the Act, see *Nixon* v. *Administrator of General Services,* 433 U. S. 425 (1977).

[6] 40 Fed. Reg. 2670 (1975). Those regulations ultimately were disapproved. S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609–28614 (1975). See also n. 16, *infra.*

II

Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision. Indeed, no case directly in point—that is, addressing the applicability of the common-law right to exhibits subpoenaed from third parties—has been cited or discovered.

A

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents,[7] including judicial records and documents.[8] In contrast to the English practice, see, *e. g., Browne* v. *Cumming,* 10 B. & C. 70, 109 Eng. Rep. 377 (K. B. 1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance

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[7] See, *e. g., McCoy* v. *Providence Journal Co.,* 190 F. 2d 760, 765–766 (CA1), cert. denied, 342 U. S. 894 (1951); *Fayette County* v. *Martin,* 279 Ky. 387, 395–396, 130 S. W. 2d 838, 843 (1939); *Nowack* v. *Auditor General,* 243 Mich. 200, 203–205, 219 N. W. 749, 750 (1928); *In re Egan,* 205 N. Y. 147, 154–155, 98 N. E. 467, 469 (1912); *State ex rel. Nevada Title Guaranty & Trust Co.* v. *Grimes,* 29 Nev. 50, 82–86, 84 P. 1061, 1072–1074 (1906); *Brewer* v. *Watson,* 71 Ala. 299, 303–306 (1882); *People ex rel. Gibson* v. *Peller,* 34 Ill. App. 2d 372, 374–375, 181 N. E. 2d 376, 378 (1962). In many jurisdictions this right has been recognized or expanded by statute. See, *e. g.,* Ill. Rev. Stat., ch. 116, § 43.7 (1975).

[8] See, *e. g., Sloan Filter Co.* v. *El Paso Reduction Co.,* 117 F. 504 (CC Colo. 1902); *In re Sackett,* 30 C. C. P. A. 1214 (Pat.), 136 F. 2d 248 (1943); *C.* v. *C.,* 320 A. 2d 717, 724–727 (Del. 1974); *State ex rel. Williston Herald, Inc.* v. *O'Connell,* 151 N. W. 2d 758, 762–763 (N. D. 1967). See also *Ex parte Uppercu,* 239 U. S. 435 (1915). This common-law right has been recognized in the courts of the District of Columbia since at least 1894. *Ex parte Drawbaugh,* 2 App. D. C. 404 (1894). See also *United States* v. *Burka,* 289 A. 2d 376 (D. C. App. 1972).

of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, *e. g., State ex rel. Colscott* v. *King,* 154 Ind. 621, 621–627, 57 N. E. 535, 536–538 (1900); *State ex rel. Ferry* v. *Williams,* 41 N. J. L. 332, 336–339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, *e. g., State ex rel. Youmans* v. *Owens,* 28 Wis. 2d 672, 677, 137 N. W. 2d 470, 472 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N. W. 2d 241 (1966). But see *Burton* v. *Reynolds,* 110 Mich. 354, 68 N. W. 217 (1896).

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." *In re Caswell,* 18 R. I. 835, 836, 29 A. 259 (1893). Accord, *e. g., C.* v. *C.,* 320 A. 2d 717, 723, 727 (Del. 1974). See also *King* v. *King,* 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park* v. *Detroit Free Press Co.,* 72 Mich. 560, 568, 40 N. W. 731, 734–735 (1888); see *Cowley* v. *Pulsifer,* 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer* v. *Blaisdell,* 268 App. Div. 9, 11, 48 N. Y. S. 2d 355, 356 (1944); see also *Sanford* v. *Boston Herald-Traveler Corp.,* 318 Mass. 156, 158, 61 N. E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, see, *e. g., Schmedding* v. *May,* 85 Mich. 1, 5–6, 48 N. W. 201, 202 (1891); *Flexmir, Inc.* v. *Herman,* 40 A. 2d 799, 800 (N. J. Ch. 1945).

It is difficult to distill from the relatively few judicial

decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.[9] In any event, we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo,* that it applies to the tapes at issue here.[10]

B

Petitioner advances several reasons supporting the exercise of discretion against release of the tapes.[11]

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[9] Cf. *State ex rel. Youmans* v. *Owens,* 28 Wis. 2d 672, 682, 137 N. W. 2d 470, 474–475 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N. W. 2d 241 (1966).

[10] See n. 11, *infra.*

[11] Petitioner also contends that the District Court was totally without discretion to consider release of the tapes at all. He offers three principal arguments in support of that position: (i) exhibit materials subpoenaed from third parties are not "court records" in terms of the common-law right of access; (ii) recorded materials, as opposed to written documents, are not subject to release by the court in custody; and (iii) the assertion of third-party property and privacy interests precludes release of the tapes to the public.

As we assume for the purposes of this case (see text above) that the common-law right of access is applicable, we do not reach or intimate any view as to the merits of these various contentions by petitioner.

Petitioner further argues that this is not a "right of access" case, for the District Court already has permitted considerable public access to the taped conversations through the trial itself and through publication of the printed transcripts. We need not decide whether such facts ever could be decisive. In view of our disposition of this case, the fact that substantial access already has been accorded the press and the public is simply one factor to be weighed.

Whatever the merits of these claims and those considered in the text, petitioner has standing to object to the release of the tapes. As the party

First, petitioner argues that he has a property interest in the sound of his own voice, an interest that respondents intend to appropriate unfairly.[12] In respondents' view, our decision in *Nixon* v. *Administrator of General Services,* 433 U. S. 425 (1977), upholding the constitutionality of the Presidential Recordings Act, divested petitioner of any property rights in the tapes that could be asserted against the general public. Petitioner insists, however, that respondents' point is not fully responsive to his argument. Petitioner is not asserting a proprietary right to the tapes themselves. He likens his interest to that of a third party whose voice is recorded in the course of a lawful wiretap by police officers and introduced into evidence on tape. In petitioner's view, use of one's voice as evidence in a criminal trial does not give rise to a license for commercial exploitation.

Petitioner also maintains that his privacy would be infringed if aural copies of the tapes were distributed to the public.[13] The Court of Appeals rejected this contention. It reasoned that with the playing of the tapes in the courtroom, the publication of their contents in the form of written transcripts, and the passage of the Presidential Recordings Act—in which Congress contemplated ultimate public distribution of aural copies—any realistic expectation of privacy disappeared. 179 U. S. App. D. C., at 304–305, 551 F. 2d, at 1263–1264.

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from whom the original tapes were subpoenaed, and as one of the persons whose conversations are recorded, his allegations of further embarrassment, unfair appropriation of his voice, and additional exploitation of materials originally thought to be confidential establish injury in fact that would be redressed by a favorable decision of his claim. Thus, the constitutional element of standing is present. See *Warth* v. *Seldin,* 422 U. S. 490, 498–502 (1975).

[12] Petitioner develops this argument more fully in support of his claim that the District Court lacks power to release these tapes. See n. 11, *supra.* The argument also is relevant, however, in determining whether the discretionary exercise of such power was proper.

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

Furthermore, the court ruled that as Presidential documents the tapes were "impressed with the 'public trust' " and not subject to ordinary privacy claims. *Id.*, at 305, 551 F. 2d, at 1264. Respondents add that aural reproduction of actual conversations, reflecting nuances and inflections, is a more accurate means of informing the public about this important historical event than a verbatim written transcript. Petitioner disputes this claim of "accuracy," emphasizing that the tapes required 22 hours to be played. If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners. Petitioner insists that this use would infringe his privacy, resulting in embarrassment and anguish to himself and the other persons who participated in private conversations that they had every reason to believe would remain confidential.

Third, petitioner argues that our decision in *United States* v. *Nixon,* 418 U. S. 683 (1974), authorized only the most limited use of subpoenaed Presidential conversations consistent with the constitutional duty of the judiciary to ensure justice in criminal prosecutions. The Court of Appeals concluded, however, that the thrust of our decision in that case was to protect the confidentiality of Presidential conversations that were neither relevant nor admissible in the criminal proceeding; it did not relate to uses of conversations actually introduced into evidence. Since these conversations were no longer confidential, 179 U. S. App. D. C., at 305–306, 551 F. 2d, at 1264–1265, Presidential privilege no longer afforded any protection.

Finally, petitioner argues that it would be improper for the courts to facilitate the commercialization of these White House tapes. The court below rejected this argument, hold-

ing it a "question of taste" that could not take precedence over the public's right of access. *Id.*, at 306, 551 F. 2d, at 1265. Petitioner rejoins that such matters of taste induce courts to deny public access to court files in divorce and libel litigation. See, *e. g., In re Caswell,* 18 R. I. 835, 29 A. 259 (1893); *Munzer* v. *Blaisdell,* 268 App. Div., at 11, 48 N. Y. S. 2d, at 356. Moreover, argues petitioner, widespread publication of the transcripts has satisfied the public's legitimate interests; the marginal gain in information from the broadcast and sale of aural copies is outweighed by the unseemliness of enlisting the court, which obtained these recordings by subpoena for a limited purpose, to serve as the vehicle of their commercial exploitation "at cocktail parties, . . . in comedy acts or dramatic productions, . . . and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies." Brief for Petitioner 30.

C

At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts.[14] On respondents' side of the scales is the incremental gain in public understanding of an immensely important historical occurrence that arguably would flow from the release of aural copies of these tapes, a gain said to be not inconsequential despite the already widespread dissemination of printed transcripts. Also on respondents' side is the presumption—however gauged—in favor of public access to judicial records. On petitioner's side are the arguments identified above, which must be assessed in the context of court custody of the tapes. Underlying each of petitioner's arguments is the crucial fact that respondents require a court's cooperation in furthering their commercial

[14] Judge Sirica's principal reason for refusing to release the tapes—fairness to the defendants, who were appealing their convictions—is no longer a consideration. All appeals have been resolved. See n. 2, *supra.*

plans. The court—as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in the fair administration of criminal justice," *United States* v. *Nixon, supra,* at 713—has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal," *In re Caswell, supra,* at 836, 29 A. 259, with no corresponding assurance of public benefit.

We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below. In the Presidential Recordings Act, Congress directed the Administrator of General Services to take custody of petitioner's Presidential tapes and documents. The materials are to be screened by Government archivists so that those private in nature may be returned to petitioner, while those of historical value may be preserved and made available for use in judicial proceedings and, eventually, made accessible to the public. Thus, Congress has created an administrative procedure for processing and releasing to the public, on terms meeting with congressional approval, all of petitioner's Presidential materials of historical interest, including recordings of the conversations at issue here.[15]

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[15] Both sides insist that the Act does not in terms cover the copies of the tapes involved in this case. Section 101 (a) of the Act directs the Administrator to "receive, obtain, or retain, complete possession and control of all *original* tape recordings of conversations which were recorded

In *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977), we noted two major objects of the Act. First, it created a centralized custodian for the preservation and "orderly processing" of petitioner's historical materials. Second, it mandated protection of the "rights of [petitioner] and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained." *Id.*, at 436. To these ends, the Act directed the Administrator to formulate regulations that would permit consideration of a number of different factors.[16] Thus, the Act provides for

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or caused to be recorded by any officer or employee of the Federal Government and which—

"(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

"(2) *were recorded in the White House or in the office of the President* in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

"(3) *were recorded during the period beginning January 20, 1969, and ending August 9, 1974.*" 88 Stat. 1695 (emphasis added).

The tapes at issue here are not "originals." See n. 3, *supra*. Nor were they recorded during the relevant period or in the designated areas.

MR. JUSTICE WHITE would direct that the copies of the tapes at issue in this case be delivered forthwith to the Administrator. He reaches this result by construing § 101 (b) of the Act, in conjunction with 44 U. S. C. § 2101, as sweeping within the ambit of the Act's provisions *copies* as well as the originals of the tapes and materials generated by petitioner during the specified period (*i. e.*, Jan. 20, 1969, to Aug. 9, 1974). Apart from the point that these copies were created after the close of that period, it is difficult to believe that § 101 (b) was intended to sweep so broadly. In any event, we need not consider in this case what Congress may have intended by § 101 (b). That section specifies duties of the Administrator. He is not a party to this case, has made no claim to entitlement to these copies, and the scope of § 101 (b) has not been fully briefed and argued.

[16] Under § 104 of the Act, the Administrator is to propose regulations governing public access to the Presidential tapes. These regulations must

legislative and executive appraisal of the most appropriate means of assuring public access to the material, subject to prescribed safeguards. Because of this congressionally pre-

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meet with congressional approval. Section 104 provides in pertinent part as follows:

"REGULATIONS RELATING TO PUBLIC ACCESS

"Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title [Dec. 19, 1974] submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

"(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

"(2) the need to make such recordings and materials available for use in judicial proceedings;

"(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

"(4) the need to protect every individual's right to a fair and impartial trial;

"(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

"(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

"(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

"(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

"(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

"(3) The provisions of this subsection shall apply to any change in the

scribed avenue of public access we need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.

Respondents argue that immediate release would serve the policies of the Act. The Executive and Legislative Branches, however, possess superior resources for assessing the proper implementation of public access and the competing rights, if any, of the persons whose voices are recorded on the tapes. These resources are to be brought to bear under the Act, and court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons. Simply stated, the policies of the Act can best be carried out under the Act itself. Indeed, Judge Sirica—as we have noted *supra,* at 595–596—referred to the scheme established under the Act in assessing the need for immediate release. 397 F. Supp., at 189; cf. *United States* v. *Monjar,* 154 F. 2d 954 (CA3 1946). But because defendants' appeals were pending, he merely denied respondents' petition without prejudice, contemplating reconsideration after exhaustion of all appeals.[17]

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regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a)." 88 Stat. 1696–1697.

The Administrator's fourth set of proposed regulations has become final. 42 Fed. Reg. 63626 (1977). The first set was disapproved, S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609–28614 (1975), as was the second, S. Res. 428, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 10159–10160 (1976). The House rejected six provisions of a third set. H. R. Res. 1505, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 30251 (1976). See also S. Rep. No. 94–368 (1975); H. R. Rep. No. 94–560 (1975); S. Rep. No. 94–748 (1976).

[17] The suggestion of MR. JUSTICE STEVENS, *post,* at 614, that the trial court has exercised its discretion to permit release of the copies is not

Thus, he did not have to confront the question whether the existence of the Act is, as we hold, a decisive element in the proper exercise of discretion with respect to release of the tapes.

We emphasize that we are addressing only the application in this case of the common-law right of access to judicial records. We do not presume to decide any issues as to the proper exercise of the Administrator's independent duty under the statutory standards. He remains free, subject to congressional disapproval, to design such procedures for public access as he believes will advance the policies of the Act.[18] Questions con-

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supported by the facts. It is true that Judge Gesell declared that respondents eventually should be permitted to copy the tapes at issue here, but he imposed stringent standards to safeguard against overcommercialization and administrative inconvenience. 386 F. Supp., at 643. Respondents failed to satisfy those standards. *Id.*, at 643–644. When the matter returned to Judge Sirica, he framed the crucial issue as that of "the timing of the release, *if ever,* of certain tapes received in evidence" in the Mitchell trial. 397 F. Supp., at 187 (emphasis added). Thus, even if the defendants' appeals had not been pending, it is entirely speculative whether Judge Sirica would have exercised his discretion so as to permit release. In light of the appeals, Judge Sirica actually denied respondents' applications without prejudice. Consequently, this case is not correctly characterized as one in which the District Court and the Court of Appeals "have concurred," *post,* at 614, as to the proper exercise of discretion. Moreover, neither court gave appropriate consideration to the factor we deem controlling—the alternative means of public access provided by the Act.

[18] Section 105–63.404 (c) of the Administrator's final regulations provides in part that "[r]esearchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States* v. *Mitchell, et al.; In re National Broadcasting Company, Inc., et al.,* D. C. Miscellaneous 74–128." 42 Fed. Reg. 63629 (1977). In fact, the District Court has not approved any procedures. Hence, this regulation may reflect the belief that the federal judiciary, in delineating the scope of the common-law right of access to the tapes at issue here, would pass on questions of proprietary interest, privacy, and privilege that could affect release under the Act. See §§ 104 (a)(5), (7), 105 (a), (c). Because we decide that the existence of the Act itself obviates exercise of the common-

cerning the constitutionality and statutory validity of any access scheme finally implemented are for future consideration in appropriate proceedings. See *Nixon* v. *Administrator of General Services,* 433 U. S., at 438–439, 444–446, 450, 455, 462, 464–465, 467; *id.,* at 503–504 (POWELL, J., concurring).

Considering all the circumstances of this concededly singular case, we hold that the common-law right of access to judicial records does not authorize release of the tapes in question from the custody of the District Court. We next consider whether, as respondents claim, the Constitution impels us to reach a different result.

III

Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion.

A

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), this Court held that the First Amendment prevented a State from prohibiting the press from publishing the name of a rape victim where that information had been placed "in the public domain on official court records." *Id.,* at 495. Respondents

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law right in this case, we have not found it necessary to pass on any such questions.

Moreover, this lawsuit arose independently of the Act, the Administrator is not a party, and any procedures that might have arisen from it would not necessarily have been developed with reference to the statutory standards the Administrator must consider. Further, there may be persons other than petitioner who may wish to assert private or public interests in the tapes themselves or in the manner of dissemination. We cannot accept respondents as necessarily representing the interests of the public generally or of the Administrator.

In sum, this litigation cannot be utilized as a substitute for the procedures and safeguards set forth in the Act, upon which we relied in *Nixon* v. *Administrator of General Services,* 433 U. S. 425 (1977).

claim that *Cox Broadcasting* guarantees the press "access" to—meaning the right to copy and publish—exhibits and materials displayed in open court.

This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public. Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know. *Id.*, at 491–492. In the instant case, however, there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions upon press access to, or publication of, any information in the public domain. Indeed, the press—including reporters of the electronic media—was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. Our decision in *Cox Broadcasting* simply is not applicable.

The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." *Estes* v. *Texas,* 381 U. S. 532, 589 (1965)

(Harlan, J., concurring). Cf. *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Pell* v. *Procunier*, 417 U. S. 817 (1974). See also *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965).

B

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial.[19] They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis.

In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. *Estes* v. *Texas*, *supra*, at 539–542. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U. S. 257, 270 (1948), it confers no special benefit on the press. *Estes* v. *Texas*, 381 U. S., at 583 (Warren, C. J., concurring); *id.*, at 588–589 (Harlan, J., concurring). Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. *Ibid.* That opportunity abundantly existed here.

IV

We hold that the Court of Appeals erred in reversing the District Court's decision not to release the tapes in its custody.

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[19] We assume, *arguendo*, that respondents have standing to object to an alleged deprivation of a defendant's right to a public trial. But see *Estes* v. *Texas*, 381 U. S. 532, 538 (1965); *id.*, at 583 (Warren, C. J., concurring); *id.*, at 588–589 (Harlan, J., concurring).

We remand the case with directions that an order be entered denying respondents' application with prejudice.[20]

So ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

Although I agree with the Court that the Presidential Recordings and Materials Preservation Act is dispositive of this case and that the judgment of the Court of Appeals should be reversed, my reasons are somewhat different, for I do not agree that the Act does not itself reach the tapes at issue here. It is true that § 101 (a) of the Act requires delivery to the Administrator and his retention of only original tape recordings and hence does not reach the tapes involved here. But § 101 (b) is differently cast:

> "(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.
>
> "(2) For purposes of this subsection, the term 'his-

[20] The task of balancing the various elements we have identified as part of the common-law right of access to judicial records should have been undertaken by the courts below in the first instance. "We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above." *Bigelow* v. *Virginia*, 421 U. S. 809, 826–827 (1975).

According to the Manual for Clerks of the United States District Courts § 207.1 (1966), clerks of the District Courts should "obtain a direction, standing order or rule that exhibits be returned [to their owners] or destroyed within a stated time after the time for appeal has expired." Because we have not addressed the issue of ownership of the copies at stake in this case, we do not speak to the disposition of them after remand.

torical materials' has the meaning given it by section 2101 of title 44, United States Code."

"Historical materials" is defined in 44 U. S. C. § 2101 as "including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

Obviously, § 101 (b) has a far broader sweep than § 101 (a). It is not limited to originals but would reach copies as well. Nor is there any question that the tapes sought to be released here contain conversations that occurred during the critical period covered by § 101 (b)—January 20, 1969, to August 9, 1974. That the tapes at issue are copies made at a later time does not remove the critical fact that the conversations on these copies, like the conversations on the originals, occurred during the relevant period. Furthermore, if the originals are of historical value, the copies are of equal significance. Otherwise, it is unlikely that there would be such an effort to obtain them.

Of course, the Administrator under the Presidential Recordings Act is not compelled to seek out every copy of every document or recording that was itself produced during the specified period of time. But surely he is authorized to receive the tapes at issue in this case and to deal with them under the terms of the statute.

It is my view, therefore, that the judgment of the Court of Appeals should be reversed, but that the case should be remanded to the District Court with instructions to deliver the tapes in question to the Administrator forthwith.

MR. JUSTICE MARSHALL, dissenting.

As the court below found, respondents here are "seek[ing] to vindicate a precious common law right, one that predates the Constitution itself." *United States* v. *Mitchell*, 179 U. S. App. D. C. 293, 301, 551 F. 2d 1252, 1260 (1976). The Court today recognizes this right and assumes that it is applicable

here. *Ante,* at 598–599, and n. 11. It also recognizes that the court with custody of the records must have substantial discretion in making the decision regarding access. *Ante,* at 599.

The Court nevertheless holds that, contrary to the rulings below, respondents should be denied access to significant materials in which there is wide public interest. The Court finds "decisive" the existence of the Presidential Recordings and Materials Preservation Act. *Ante,* at 607. The Act, however, by its express terms covers only "original tape recordings," § 101 (a), and it is undisputed that the tapes at issue here are copies, see *ante,* at 593–594, n. 3, 603–604, n. 15. Indeed, in a commendable display of candor, petitioner has conceded that the Act does not apply. Supplemental Brief for Petitioner 2.

Nothing in the Act's history suggests that Congress intended the courts to defer to the Executive Branch with regard to these tapes. To the contrary, the Administrator of General Services had to defer to the District Court's "expertise" in order to secure congressional approval of regulations promulgated under the Act. See *post,* at 616, and n. 5 (STEVENS, J., dissenting). It is clear, moreover, that Congress intended the Act to ensure "the American people . . . full access to all facts about the Watergate affair." S. Rep. No. 93–1181, p. 4 (1974).

Hence the Presidential Recordings Act, to the extent that it provides any assistance in deciding this case, strongly indicates that the tapes should be released to the public as directed by the Court of Appeals. While petitioner may well be "a legitimate class of one," *Nixon* v. *Administrator of General Services,* 433 U. S. 425, 472 (1977), we are obligated to adhere to the historic role of the Judiciary on this matter that both sides concede should be ours to resolve. I dissent.

MR. JUSTICE STEVENS, dissenting.

The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by refer-

ence to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court [1] and the Court of Appeals [2] have concurred,

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[1] District Judge Gesell explained the normal practice in the trial court:

"As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh,* 2 App. D. C. 404, 407 (1894). . . .

"The Court stated in *Drawbaugh,*

"[A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice.

. . . . . .

"The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon,* [418 U. S. 683, 715 (1974)]. His words cannot be retrieved; they are public property and his opposition is accordingly rejected." *United States* v. *Mitchell,* 386 F. Supp. 639, 641–642 (DC 1974).

Like the Court of Appeals, see n. 2, *infra,* and unlike the majority, *ante,* at 606–608, n. 17, I read this passage as a discretionary rejection of petitioner's claim that the tapes should be suppressed.

[2] Explaining its concurrence in Judge Gesell's views, the Court of Appeals stated:

"Beyond this, there are a number of factors unique to this case that

the burden of justifying review by this Court should be virtually insurmountable. Today's decision represents a dramatic departure from the practice appellate courts should observe with respect to a trial court's exercise of discretion concerning its own housekeeping practices.

There is, of course, an important and legitimate public interest in protecting the dignity of the Presidency, and petitioner has a real interest in avoiding the harm associated with further publication of his taped conversations. These interests are largely eviscerated, however, by the fact that these trial exhibits are already entirely in the public domain. Moreover, the normal presumption in favor of access is

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militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency and thus they are both impressed with the 'public trust,' and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential [R]ecordings and Material[s] Preservation Act, the words and sounds at issue here will find a further entry way into the public domain. For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy.

. . . . . .

"In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights." *United States* v. *Mitchell,* 179 U. S. App. D. C. 293, 305–306, 551 F. 2d 1252, 1264–1265 (1976) (footnotes omitted).

It is true that Judge Sirica refused to order release of the tapes before the appeals were concluded, but he expressed no disagreement with any aspect of Judge Gesell's opinion.

It should also be noted that although Circuit Judge MacKinnon dissented from the Court of Appeals decision that the tapes should be released forthwith, he also expressed no disagreement with Judge Gesell's views. *Id.,* at 306–307, 551 F. 2d, at 1265–1266.

strongly reinforced by the special characteristics of this litigation. The conduct of the trial itself, as well as the conduct disclosed by the evidence, is a subject of great historical interest. Full understanding of this matter may affect the future operation of our institutions. The distinguished trial judge, who was intimately familiar with the ramifications of this case and its place in history, surely struck the correct balance.

Today the Court overturns the decisions of the District Court and the Court of Appeals by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695.[3] That Act, far from requiring the District Court to suppress these tapes, manifests Congress' settled resolve "to provide as much public access to the materials as is physically possible as quickly as possible." [4] It is therefore not surprising that petitioner responded to the Court's post-argument request for supplemental briefs by expressly disavowing any reliance on the Presidential Recordings Act. Nor is there any reason to require the District Court to defer to the expertise of the Administrator of General Services, for the Administrator gained congressional approval of his regulations only by deferring to the expertise displayed by the District Court in this case.[5] For this Court now to rely on the Act as a basis for

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[3] It is, of course, true that the Act's effect on this litigation "was neither advanced by the parties nor given appropriate consideration by the courts below." *Ante,* at 603. But this is a reason for rejecting, not embracing, petitioner's claim.

[4] S. Rep. No. 94–368, p. 13 (1975); H. R. Rep. No. 94–560, p. 16 (1975).

[5] The Administrator of General Services first planned to forbid private copying of the tapes in his control, but the Senate emphatically rejected this initial proposal. S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609–28614 (1975). The Senate's Committee Report condemned the Administrator's proposed regulation as "at best, unnecessary, and at worst, inconsistent with the spirit if not the letter of the act." S. Rep. No. 94–368, *supra,* at 13. The Report elaborated:

"In evaluating this regulation, it is also necessary to consider the basic intent of the Act. This legislation was designed, within certain limitations, to provide as much public access to the materials as is physically possible

reversing the trial judge's considered judgment is ironic, to put it mildly.

I respectfully dissent.

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as quickly as possible. To that end, GSA recognizes that legitimate research requires the reproduction of printed materials; reproduction is no less necessary when the material is a tape recording." *Ibid.*

A House Report also disapproved the proposal, rejecting the Administrator's fears of undue commercialization:

"There is of course a risk that some people will reproduce the recordings and exploit them for commercial purposes. That is the risk of a free society. Moreover, it is a risk the Founding Fathers accepted in adopting the free speech protections of the first amendment, any researcher can announce to the world the findings of his research." H. R. Rep. No. 94–560, *supra,* at 16.

The Administrator then revised his regulations, proposing that private reproduction of the tapes be prohibited for two years and that the ban be reviewed at the end of that period. This proposal was rejected twice. S. Res. 428, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 10159–10160 (1976); H. R. Res. 1505, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 30251 (1976). See also S. Rep. No. 94–748, pp. 23–24 (1976); H. R. Rep. No. 94–1485, p. 26 (1976).

The Administrator finally obtained congressional approval only by adopting the approach of the District Court in this case. His latest regulation, as approved, states:

"Researchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States* v. *Mitchell* . . . ." 42 Fed. Reg. 63629 (1977).

Congress and the Administrator expected that the District Court would soon approve private copying of the tapes. The first congressional Reports on the Administrator's proposed regulations, after noting that reproduction of the court's tapes had been forbidden pending the appeals in *United States* v. *Mitchell,* expressed the belief that copying might begin when the prosecutions were completed. H. R. Rep. No. 94–560, *supra,* at 16 n. 4; S. Rep. No. 94–368, *supra,* at 13 n. 1. The Administrator, in explaining his latest regulations, said that "once the Court approves a plan for reproduction of the Nixon tape recordings," the Administrator would adopt "similar procedures." General Services Administration, Legal Explanation of Public Access Regulations—Presidential Recordings and Materials Preservation Act, P. L. 93–526, p. G–54 (1977).

McDANIEL *v.* PATY ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

No. 76–1427. Argued December 5, 1977—Decided April 19, 1978

Appellee Paty, a candidate for delegate to a Tennessee constitutional convention, sued in the State Chancery Court for a declaratory judgment that appellant, an opponent who was a Baptist minister, was disqualified from serving as delegate by a Tennessee statutory provision establishing the qualifications of constitutional convention delegates to be the same as those for membership in the State House of Representatives, thus invoking a Tennessee constitutional provision barring "[m]inister[s] of the Gospel, or priest[s] of any denomination whatever." That court held that the statutory provision violated the First and Fourteenth Amendments. The Tennessee Supreme Court reversed, holding that the clergy disqualification imposed no burden on "religious belief" and restricted "religious action . . . [only] in the law making process of government—where religious action is absolutely prohibited by the establishment clause . . . ." *Held:* The judgment is reversed, and the case is remanded. Pp. 625–629; 629–642; 642–643; 643–646.

547 S. W. 2d 897, reversed and remanded.

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

1. The Tennessee disqualification is directed primarily, not at religious belief, but at the status, acts, and conduct of the clergy. Therefore, the Free Exercise Clause's absolute prohibition against infringements on the "freedom to believe" is inapposite here. *Torcaso* v. *Watkins,* 367 U. S. 488 (which invalidated a state requirement that an appointee to public office declare his belief in the existence of God), distinguished. Pp. 626–627.

2. Nevertheless, the challenged provision violates appellant's First Amendment right to the free exercise of his religion made applicable to the States by the Fourteenth Amendment, because it conditions his right to the free exercise of his religion on the surrender of his right to seek office. *Sherbert* v. *Verner,* 374 U. S. 398, 406. Though justification is asserted under the Establishment Clause for the statutory restriction on the ground that if elected to public office members of the clergy will necessarily promote the interests of one sect or thwart those of another contrary to the anti-establishment principle of neutrality, Tennessee has failed to demonstrate that its views of the dangers of

clergy participation in the political process have not lost whatever validity they may once have enjoyed. Accordingly, there is no need to inquire whether the State's legislative goal is permissible. Pp. 626; 627–629.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded:

1. The Free Exercise Clause is violated by the challenged provision. Pp. 630–635.

(a) Freedom of belief protected by that Clause embraces freedom to profess or practice that belief, even including doing so for a livelihood. The Tennessee disqualification establishes as a condition of office the willingness to eschew certain protected religious practices. The provision therefore establishes a religious classification governing eligibility for office that is absolutely prohibited. *Torcaso* v. *Watkins, supra.* Pp. 631–633.

(b) The fact that the law does not directly prohibit religious exercise but merely conditions eligibility for office on its abandonment does not alter the protection afforded by the Free Exercise Clause. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine . . . ," *Sherbert* v. *Verner, supra,* at 404, and Tennessee's disqualification provision therefore imposed an unconstitutional penalty on appellant's free exercise. Moreover, "[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Sherbert* v. *Verner, supra,* at 495–496. Pp. 633–634.

2. The Tennessee disqualification also violates the Establishment Clause. Government generally may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits. Specifically, government may not fence out from political participation, people such as ministers whom it regards as overinvolved in religion. The disqualification provision employed by Tennessee here establishes a religious classification that has the primary effect of inhibiting religion. Pp. 636–642.

MR. JUSTICE STEWART concluded that *Torcaso* v. *Watkins, supra,* controls this case. Except for the fact that Tennessee bases its disqualification, not on a person's statement of belief, but on his decision to pursue a religious vocation as directed by his belief, the situation in *Torcaso* is indistinguishable from the one here. Pp. 642–643.

MR. JUSTICE WHITE concluded that the Tennessee disqualification, while not interfering with appellant's right to exercise his religion as he desires, denies him equal protection. Though that disqualification is based on the State's asserted interest in maintaining the required separa-

tion of church and state, it is not reasonably necessary for that objective, which all States except Tennessee have been able to realize without burdening ministers' rights to candidacy. In addition, the statute is both underinclusive and overinclusive. Pp. 643–646.

BURGER, C. J., announced the Court's judgment, and delivered an opinion, in which POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 629. STEWART, J., *post*, p. 642, and WHITE, J., *post*, p. 643, filed opinions concurring in the judgment. BLACKMUN, J., took no part in the consideration or decision of the case.

Frederic S. Le Clercq argued the cause and filed a brief for appellant.

Kenneth R. Herrell, Assistant Attorney General of Tennessee, argued the cause for appellees. With him on the brief for appellees Hassler et al. were *Brooks McLemore,* Attorney General, and *C. Hayes Cooney,* Chief Deputy Attorney General. *Phillip C. Lawrence* filed a brief for appellee Paty.*

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS joined.

The question presented by this appeal is whether a Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the State's limited constitutional convention deprived appellant McDaniel, an ordained minister, of the right to the free exercise of religion guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment. The First Amendment forbids all laws "prohibiting the free exercise" of religion.

**Leo Pfeffer, Abraham S. Goldstein, Joel Gora, George W. McKeag, John T. Redmond, James W. Respess,* and *Thomas A. Shaw* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

I

In its first Constitution, in 1796, Tennessee disqualified ministers from serving as legislators.[1] That disqualifying provision has continued unchanged since its adoption; it is now Art. 9, § 1, of the State Constitution. The state legislature applied this provision to candidates for delegate to the State's 1977 limited constitutional convention when it enacted ch. 848, § 4, of 1976 Tenn. Pub. Acts: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention . . . ."

McDaniel, an ordained minister of a Baptist Church in Chattanooga, Tenn., filed as a candidate for delegate to the constitutional convention. An opposing candidate, appellee Selma Cash Paty, sued in the Chancery Court for a declaratory judgment that McDaniel was disqualified from serving as a delegate and for a judgment striking his name from the ballot. Chancellor Franks of the Chancery Court held that § 4 of ch. 848 violated the First and Fourteenth Amendments to the Federal Constitution and declared McDaniel eligible for the office of delegate. Accordingly, McDaniel's name remained on the ballot and in the ensuing election he was elected by a vote almost equal to that of three opposing candidates.

After the election, the Tennessee Supreme Court reversed the Chancery Court, holding that the disqualification of clergy imposed no burden upon "religious belief" and restricted "religious action . . . [only] in the lawmaking process of government—where religious action is absolutely prohibited by the establishment clause . . . ." 547 S. W. 2d 897, 903 (1977).

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[1] "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature." Tenn. Const., Art. VIII, § 1 (1796).

The state interests in preventing the establishment of religion and in avoiding the divisiveness and tendency to channel political activity along religious lines, resulting from clergy participation in political affairs, were deemed by that court sufficiently weighty to justify the disqualification, notwithstanding the guarantee of the Free Exercise Clause.

We noted probable jurisdiction.[2] 432 U. S. 905 (1977).

II

A

The disqualification of ministers from legislative office was a practice carried from England by seven of the original States; [3] later six new States similarly excluded clergymen from some political offices. 1 A. Stokes, Church and State in the United States 622 (1950) (hereafter Stokes). In England the practice of excluding clergy from the House of Commons was justified on a variety of grounds: to prevent dual officeholding, that is, membership by a minister in both Parliament and Convocation; to insure that the priest or deacon devoted himself to his "sacred calling" rather than to "such mundane activities as were appropriate to a member of the House of Commons"; and to prevent ministers, who after 1533 were subject to the Crown's powers over the benefices of the clergy, from using membership in Commons to diminish its independence by increasing the influence of the King and the nobility. *In re MacManaway*, [1951] A. C. 161, 164, 170–171.

The purpose of the several States in providing for disqualification was primarily to assure the success of a new political experiment, the separation of church and state. Stokes 622.

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[2] The judgment of the Tennessee Supreme Court was stayed until final disposition of this appeal. McDaniel is currently serving as a delegate.

[3] Maryland, Virginia, North Carolina, South Carolina, Georgia, New York, and Delaware. L. Pfeffer, Church, State, and Freedom 118 (Rev. ed. 1967). Three of these—New York, Delaware, and South Carolina—barred clergymen from holding any political office. *Ibid.*

Prior to 1776, most of the 13 Colonies had some form of an established, or government-sponsored, church. *Id.*, at 364–446. Even after ratification of the First Amendment, which prohibited the Federal Government from following such a course, some States continued pro-establishment provisions. See *id.*, at 408, 418–427, 444. Massachusetts, the last State to accept disestablishment, did so in 1833. *Id.*, at 426–427.

In light of this history and a widespread awareness during that period of undue and often dominant clerical influence in public and political affairs here, in England, and on the Continent, it is not surprising that strong views were held by some that one way to assure disestablishment was to keep clergymen out of public office. Indeed, some of the foremost political philosophers and statesmen of that period held such views regarding the clergy. Earlier, John Locke argued for confining the authority of the English clergy "within the bounds of the church, nor can it in any manner be extended to civil affairs; because the church itself is a thing absolutely separate and distinct from the commonwealth." 5 Works of John Locke 21 (C. Baldwin ed. 1824). Thomas Jefferson initially advocated such a position in his 1783 draft of a constitution for Virginia.[4] James Madison, however, disagreed and vigorously

[4] 6 Papers of Thomas Jefferson 297 (J. Boyd ed. 1952). Jefferson later concluded that experience demonstrated there was no need to exclude clergy from elected office. In a letter to Jeremiah Moor in 1800, he stated: "[I]n the same scheme of a constitution [for Virginia which I prepared in 1783, I observe] an abridgment of the right of being elected, which after 17 years more of experience & reflection, I do not approve. It is the incapacitation of a clergyman from being elected. The clergy, by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries & even in some of these United States. Even in 1783 we doubted the stability of our recent measures for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with

urged the position which in our view accurately reflects the spirit and purpose of the Religion Clauses of the First Amendment. Madison's response to Jefferson's position was:

> "Does not The exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other." 5 Writings of James Madison 288 (G. Hunt ed. 1904).

Madison was not the only articulate opponent of clergy disqualification. When proposals were made earlier to prevent clergymen from holding public office, John Witherspoon, a Presbyterian minister, president of Princeton University, and the only clergyman to sign the Declaration of Independence, made a cogent protest and, with tongue in cheek, offered an amendment to a provision much like that challenged here:

> " 'No clergyman, of any denomination, shall be capable of being elected a member of the Senate or House of Representatives, because (here insert the grounds of offensive disqualification, which I have not been able to discover) Provided always, and it is the true intent and meaning of this part of the constitution, that if at any time he shall be completely deprived of the clerical character by those by whom he was invested with it, as by deposition for cursing and swearing, drunkenness or uncleanness, he shall then be fully restored to all the privileges of a free

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lawyers, physicians, &c. They ought therefore to possess the same rights." 9 Works of Jefferson 143 (P. Ford ed. 1905).

> citizen; his offense [of being a clergyman] shall no more be remembered against him; but he may be chosen either to the Senate or House of Representatives, and shall be treated with all the respect due to his *brethren,* the other members of Assembly.' " Stokes 624–625.

As the value of the disestablishment experiment was perceived, 11 of the 13 States disqualifying the clergy from some types of public office gradually abandoned that limitation. New York, for example, took that step in 1846 after delegates to the State's constitutional convention argued that the exclusion of clergymen from the legislature was an "odious distinction." 2 C. Lincoln, The Constitutional History of New York 111–112 (1906). Only Maryland and Tennessee continued their clergy-disqualification provisions into this century and, in 1974, a District Court held Maryland's provision violative of the First and Fourteenth Amendments' guarantees of the free exercise of religion. *Kirkley* v. *Maryland,* 381 F. Supp. 327. Today Tennessee remains the only State excluding ministers from certain public offices.

The essence of this aspect of our national history is that in all but a few States the selection or rejection of clergymen for public office soon came to be viewed as something safely left to the good sense and desires of the people.

B

This brief review of the history of clergy-disqualification provisions also amply demonstrates, however, that, at least during the early segment of our national life, those provisions enjoyed the support of responsible American statesmen and were accepted as having a rational basis. Against this background we do not lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court. The challenged provision came to the Tennessee Supreme Court clothed with the presumption of validity to which that court was bound to give deference.

However, the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention. Tenn. Const., Art. 2, §§ 9, 25, 26; Tenn. Code Ann. §§ 8–1801, 8–1803 (Supp. 1977). Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." 5 Writings of James Madison, *supra,* at 288. In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963).

If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such. *Id.,* at 402; *Cantwell* v. *Connecticut, supra,* at 304. In *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), the Court reviewed the Maryland constitutional requirement that all holders of "any office of profit or trust in this State" declare their belief in the existence of God. In striking down the Maryland requirement, the Court did not evaluate the interests assertedly justifying it but rather held that it violated freedom of religious belief.

In our view, however, *Torcaso* does not govern. By its

terms, the Tennessee disqualification operates against McDaniel because of his *status* as a "minister" or "priest." The meaning of those words is, of course, a question of state law.[5] And although the question has not been examined extensively in state-law sources, such authority as is available indicates that ministerial status is defined in terms of conduct and activity rather than in terms of belief.[6] Because the Tennessee disqualification is directed primarily at status, acts, and conduct it is unlike the requirement in *Torcaso,* which focused on *belief.* Hence, the Free Exercise Clause's absolute prohibition of infringements on the "freedom to believe" is inapposite here.[7]

This does not mean, of course, that the disqualification escapes judicial scrutiny or that McDaniel's activity does not enjoy significant First Amendment protection. The Court

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[5] In this case, the Tennessee Supreme Court concluded that the disqualification of McDaniel did not interfere with his religious *belief.* 547 S. W. 2d 897, 903, 904, 907 (1977). But whether the ministerial status, as defined by state law, implicates the "freedom to act" or the absolute "freedom to believe," *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940), must be resolved under the Free Exercise Clause. Thus, although we consider the Tennessee court's resolution of that issue, we are not bound by it.

[6] The Tennessee constitutional provision embodying the disqualification inferentially defines the ministerial profession in terms of its "duties," which include the "care of souls." Tenn. Const., Art. 9, § 1. In this case, the Tennessee Supreme Court stated that the disqualification reaches those filling a "leadership role in religion," and those "dedicated to the full time *promotion* of the religious objectives of a particular religious sect." 547 S. W. 2d, at 903 (emphasis added). The Tennessee court, in defining "priest," also referred to the dictionary definition as "one who *performs* sacrificial, ritualistic, mediatorial, interpretative, or ministerial functions . . . ." *Id.,* at 908 (quoting Webster's Third New International Dictionary 1799–1800 (1971)) (emphasis added).

[7] The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to vindicate compelling state interests.

recently declared in *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972):

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." [8]

Tennessee asserts that its interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus of the highest order. The constitutional history of the several States reveals that generally the interest in preventing establishment prompted the adoption of clergy disqualification provisions, see Stokes 622; Tennessee does not appear to be an exception to this pattern. Cf. *post,* at 636 n. 9 (BRENNAN, J., concurring in judgment). There is no occasion to inquire whether promoting such an interest is a permissible legislative goal, however, see *post,* at 636–642, for Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise

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[8] Thus, the courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony, *State ex rel. Swann* v. *Pack,* 527 S. W. 2d 99 (Tenn. 1975), cert. denied, 424 U. S. 954 (1976); *State* v. *Massey,* 229 N. C. 734, 51 S. E. 2d 179, appeal dismissed for want of substantial federal question *sub nom. Bunn* v. *North Carolina,* 336 U. S. 942 (1949), but have precluded the application of criminal sanctions to the religious use of peyote, *People* v. *Woody,* 61 Cal. 2d 716, 394 P. 2d 813 (1964); cf. *Oliver* v. *Udall,* 113 U. S. App. D. C. 212, 306 F. 2d 819 (1962) (not reaching constitutional issue), or the religiously impelled refusal to comply with mandatory education laws past the eighth grade, *Wisconsin* v. *Yoder.*

We need not pass on the conclusions reached in *Pack* and *Woody,* which were not reviewed by this Court. Those cases are illustrative of the general nature of free exercise protections and the delicate balancing required by our decisions in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), and *Wisconsin* v. *Yoder,* when an important state interest is shown.

their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. See *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970). However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.[9]

We hold that § 4 of ch. 848 violates McDaniel's First Amendment right to the free exercise of his religion made applicable to the States by the Fourteenth Amendment. Accordingly, the judgment of the Tennessee Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I would hold that § 4 of the legislative call to the Tennessee constitutional convention,[1] to the extent that it incorporates

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[9] The struggle for separation of church and state in Virginia, which influenced developments in other States—and in the Federal Government—was waged by others in addition to such secular leaders as Jefferson, Madison, and George Mason; many clergymen vigorously opposed any established church. See Stokes 366–379. This suggests the imprecision of any assumption that, even in the early days of the Republic, most ministers, as legislators, would support measures antithetical to the separation of church and state.

[1] Section 4, ch. 848, 1976 Tenn. Pub. Acts, provides, *inter alia:*

"Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for

Art. 9, § 1, of the Tennessee Constitution, see *ante,* at 621 n. 1, violates both the Free Exercise and Establishment Clauses of the First Amendment as applied to the States through the Fourteenth Amendment. I therefore concur in the reversal of the judgment of the Tennessee Supreme Court.

I

The Tennessee Supreme Court sustained Tennessee's exclusion on the ground that it "does not infringe upon religious belief or religious action within the protection of the free exercise clause[, and] that such indirect burden as may be imposed upon ministers and priests by excluding them from the lawmaking process of government is justified by the compelling state interest in maintaining the wall of separation between church and state." 547 S. W. 2d 897, 907 (1977). In reaching this conclusion, the state court relied on two interrelated propositions which are inconsistent with decisions of this Court. The first is that a distinction may be made between "religious belief or religious action" on the one hand, and the "career or calling" of the ministry on the other. The court stated that "[i]t is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies." *Id.,* at 903. The second is that the disqualification provision does not interfere with the free exercise of religion because the practice of the ministry is left unimpaired; only candidacy for legislative office is proscribed.

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delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district."

The characterization of the exclusion as one burdening appellant's "career or calling" and not religious belief cannot withstand analysis. Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief,[2] even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.[3]

Whether or not the provision discriminates among religions (and I accept for purposes of discussion the State Supreme

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[2] That for purposes of defining the protection afforded by the Free Exercise Clause a sharp distinction cannot be made between religious belief and religiously motivated action is demonstrated by Oliver Cromwell's directive regarding religious liberty to the Catholics in Ireland:

"'As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.'" Quoted in S. Hook, Paradoxes of Freedom 23 (1962).

See P. Kurland, Religion and the Law 22 (1962).

This does not mean that the right to participate in religious exercises is absolute, or that the State may never prohibit or regulate religious practices. We have recognized that "'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' . . . The conduct or actions so regulated[, however,] have invariably posed some substantial threat to public safety, peace or order." *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963) (citations omitted), in part quoting *Braunfeld* v. *Brown,* 366 U. S. 599, 603 (1961). But the State does not suggest that the "career or calling" of minister or priest itself poses "some substantial threat to public safety, peace or order"; it is the political participation of those impelled by religious belief to engage in the ministry which the State wishes to proscribe.

[3] The preaching and proselyting activities in which appellant is engaged as a minister, of course, constitute religious activity protected by the Free Exercise Clause. *Kunz* v. *New York,* 340 U. S. 290 (1951) (public worship); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943) (distribution of religious literature).

Court's construction that it does not,[4] *id.*, at 908), it establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is absolutely prohibited. The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants. *Wieman* v. *Updegraff,* 344 U. S. 183, 191–192 (1952).[5] Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), compels the conclusion that it violates the Free Exercise Clause. *Torcaso* struck down Maryland's requirement that an appointee to the office of notary public declare his belief in the existence of God, expressly disavowing "the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind

[4] It is arguable that the provision not only discriminates between religion and nonreligion, but may, as well, discriminate among religions by depriving ministers of faiths with established, clearly recognizable ministries from holding elective office, while permitting the members of nonorthodox humanistic faiths having no "counterpart" to ministers, 547 S. W. 2d 897, 908 (1977), similarly engaged to do so. Madison warned that disqualification provisions would have precisely such an effect:

"[D]oes it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other." 5 Writings of James Madison 288 (G. Hunt ed. 1904).

[5] ". . . Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " 344 U. S., at 191–192, quoting *United Public Workers* v. *Mitchell,* 330 U. S 75, 100 (1947).

of religious concept." *Id.*, at 494 (footnote omitted). That principle equally condemns the religious qualification for elective office imposed by Tennessee.

The second proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is also squarely rejected by precedent. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a state statute disqualifying from unemployment compensation benefits persons unwilling to work on Saturdays was held to violate the Free Exercise Clause as applied to a Sabbatarian whose religious faith forbade Saturday work. That decision turned upon the fact that "[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*, at 404.[6] Similarly, in "prohibiting legislative service because of a person's leadership role in a religious faith," 547 S. W. 2d, at 903, Tennessee's disqualification provision imposed an unconstitutional penalty upon appellant's exercise of his religious faith.[7]

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[6] *Sherbert* did not state a new principle in this regard. See 374 U. S., at 404–405, n. 6 (collecting authorities); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The Tennessee Supreme Court relied on *Braunfeld* v. *Brown*, *supra*, at 603–606. Candor compels the acknowledgment that to the extent that *Braunfeld* conflicts with *Sherbert* in this regard, it was overruled.

[7] The "language of the [first] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) (emphasis in original).

Nor can Tennessee's political exclusion be distinguished from *Sherbert*'s welfare disqualification as the Tennessee court thought, by suggesting that the unemployment compensation involved in *Sherbert* was necessary to sustain life while participation in the constitutional convention is a voluntary activity not itself compelled by religious belief. *Torcaso* answers that contention. There we held that "[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." 367 U. S., at 495–496.

The opinion of the Tennessee Supreme Court makes clear that the statute requires appellant's disqualification solely because he is a minister of a religious faith. If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy. *Sherbert* and *Torcaso* compel the conclusion that because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.

The plurality recognizes that *Torcaso* held "categorically prohibit[ed]," a provision disqualifying from political office on the basis of religious belief, but draws what I respectfully suggest is a sophistic distinction between that holding and Tennessee's disqualification provision. The purpose of the Tennessee provision is not to regulate activities associated with a ministry, such as dangerous snake handling or human sacrifice, which the State validly could prohibit, but to bar from political office persons regarded as deeply committed to religious participation because of that participation—participation itself not regarded as harmful by the State and which therefore must be conceded to be protected. As the plurality recognizes, appellant was disqualified because he "fill[ed] a 'leadership role in religion,' and . . . 'dedicated

[himself] to the full time *promotion* of the religious objectives of a particular religious sect.' 547 S. W. 2d, at 903 (emphasis added)," *ante,* at 627 n. 6. According to the plurality, McDaniel could not be and was not in fact barred for *his* belief in religion, but was barred because of his commitment to persuade or lead others to accept that belief. I simply cannot fathom why the Free Exercise Clause "categorically prohibits" hinging qualification for office on the *act* of declaring a belief in religion, but not on the act of discussing that belief with others.[8] *Ante,* at 626.

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[8] The plurality's reliance on *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), is misplaced. The governmental action interfering with the free exercise of religion here differs significantly from that in *Yoder.* There Amish parents challenged a state statute requiring all children within the State to attend school until the age of 16. The parents' claim was that this compulsion interfered with Amish religious teachings requiring the de-emphasis of intellectual training and avoidance of materialistic goals. In sustaining the parents' claim under the Free Exercise Clause, the Court found it necessary to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand. In *Yoder,* the statute implemented by religiously neutral means an avowedly secular purpose which nevertheless burdened respondent's religious exercise. Cases of that nature require a sensitive and difficult accommodation of the competing interests involved.

By contrast, the determination of the validity of the statute involved here requires no balancing of interests. Since, "[b]y its terms, the Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest,'" *ante,* at 626–627 (emphasis in original), it runs afoul of the Free Exercise Clause simply as establishing a religious classification as a basis for qualification for a political office. Nevertheless, although my view—that because the prohibition establishes a religious qualification for political office it is void without more—does not require consideration of any compelling state interest, I agree with the plurality that the State did not establish a compelling interest.

II

The State Supreme Court's justification of the prohibition, echoed here by the State, as intended to prevent those most intensely involved in religion from injecting sectarian goals and policies into the lawmaking process, and thus to avoid fomenting religious strife or the fusing of church with state affairs, itself raises the question whether the exclusion violates the Establishment Clause.[9] As construed, the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion. See *Everson* v. *Board of Education,* 330 U. S. 1, 15–16 (1947); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 210 (1948); *Torcaso* v. *Watkins,* 367 U. S., at 492–494; *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Meek* v. *Pittenger,* 421 U. S. 349, 358 (1975).

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[9] Appellant has raised doubt that the purpose ascribed to the provision by the State is, in fact, its actual purpose. He argues that the actual purpose was to enact as law the religious belief of the dominant Presbyterian sect that it is sinful for a minister to become involved in worldly affairs such as politics, Brief for Appellant 58–59, and that the statute therefore violates the Establishment Clause. Although the State's ascribed purpose is conceivable, especially in light of the reasons for disqualification advanced by statesmen at the time the provision was adopted, see *ante,* at 622–625, if it were necessary to address appellant's contention we would determine whether that purpose was, in fact, what the provision's framers sought to achieve. In contrast to the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute, see *Arizona* v. *California,* 283 U. S. 423, 455 (1931) (collecting cases), our cases under the Religion Clauses have uniformly held such an inquiry necessary because under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion. *Epperson* v. *Arkansas,* 393 U. S. 97, 109 (1968); *McGowan* v. *Maryland,* 366 U. S. 420, 431–445, 453 (1961); cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250–251 (1936). In view of the disposition of this case, it is unnecessary to explore the validity of appellant's contention, however.

The fact that responsible statesmen of the day, including some of the United States Constitution's Framers, were attracted by the concept of clergy disqualification, see *ante,* at 622–625, does not provide historical support for concluding that those provisions are harmonious with the Establishment Clause. Notwithstanding the presence of such provisions in seven state constitutions when the Constitution was being written,[10] the Framers refused to follow suit. That the disqualification provisions contained in state constitutions contemporaneous with the United States Constitution and the Bill of Rights cannot furnish a guide concerning the understanding of the harmony of such provisions with the Establishment Clause is evident from the presence in state constitutions, side by side with disqualification clauses, of provisions which would have clearly contravened the First Amendment had it applied to the States, such as those creating an official church,[11] and limiting political office to Protestants [12] or theistic believers generally.[13] In short, the regime of religious liberty embodied in state constitutions was very different from that established by the Constitution of the United States. When, with the adoption of the Fourteenth Amendment, the strictures of the First Amendment became wholly applicable to the States, see *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940); *Everson* v. *Board of Education, supra,* at 8, earlier conceptions of permissible state action with respect to religion—including those regarding clergy disqualification—were superseded.

Our decisions interpreting the Establishment Clause have aimed at maintaining erect the wall between church and state.

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[10] See L. Pfeffer, Church, State and Freedom 118 (Rev. ed. 1967); 1 A. Stokes, Church and State in the United States 622 (1950).

[11] S. C. Const., Art. XXXVIII (1778); see generally Md. Declaration of Rights, Art. XXXIII (1776) (authorizing taxation for support of Christian religion).

[12] N. C. Const. § XXXII (1776).

[13] Tenn. Const., Art. VIII, § 2 (1796). The current Tennessee Constitution continues this disqualification. Tenn. Const., Art. 9, § 2 (1870).

State governments, like the Federal Government, have been required to refrain from favoring the tenets or adherents of any religion or of religion over nonreligion,[14] from insinuating themselves in ecclesiastical affairs or disputes,[15] and from establishing programs which unnecessarily or excessively entangle government with religion.[16] On the other hand, the Court's decisions have indicated that the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause.[17] Thus, we have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a "strict no-aid" theory [18] or as stating a unitary principle, that "religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obliga-

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[14] *Epperson* v. *Arkansas, supra; Abington School Dist.* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948).

[15] *Serbian Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696 (1976); *Presbyterian Church* v. *Hull Presbyterian Church,* 393 U. S. 440 (1969); *Kedroff* v. *Saint Nicholas Cathedral,* 344 U. S. 94 (1952); *United States* v. *Ballard,* 322 U. S. 78, 86 (1944); see *Watson* v. *Jones,* 13 Wall. 679, 727 (1872).

[16] *New York* v. *Cathedral Academy,* 434 U. S. 125 (1977); *Meek* v. *Pittenger,* 421 U. S. 349 (1975); *Levitt* v. *Committee for Public Education,* 413 U. S. 472 (1973); *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973); *Lemon* v. *Kurtzman,* 411 U. S. 192 (1973) (*Lemon II*); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) (*Lemon I*).

[17] *E. g., Abington School Dist.* v. *Schempp,* 374 U. S., at 212–214; *id.,* at 295 (BRENNAN, J., concurring); *id.,* at 306 (Goldberg, J., concurring); *id.,* at 311–318 (STEWART, J., dissenting); *Everson* v. *Board of Education,* 330 U. S., at 8.

[18] Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part II, 81 Harv. L. Rev. 513, 514 (1968).

tions." P. Kurland, Religion and the Law 18 (1962); accord, *id.*, at 112. Such rigid conceptions of neutrality have been tempered by constructions upholding religious classifications where necessary to avoid "[a] manifestation of . . . hostility [toward religion] at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Illinois ex rel. McCollum* v. *Board of Education, supra,* at 211–212. This understanding of the interrelationship of the Religion Clauses has permitted government to take religion into account when necessary to further secular purposes unrelated to the advancement of religion,[19] and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed,[20] or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.[21]

Beyond these limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.[22] "State power is no more to be used so as to handicap religions than it is to favor them." *Everson* v. *Board of Education,* 330 U. S., at 18.

Tennessee nevertheless invokes the Establishment Clause to excuse the imposition of a civil disability upon those deemed

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[19] See, *e. g., Everson* v. *Board of Education, supra; McGowan* v. *Maryland, supra;* Giannella, *supra* n. 18, at 527–528, 532, 538–560 (discussion of "secularly relevant religious factor").

[20] *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972); *Sherbert* v. *Verner,* 374 U. S., at 409; *id.*, at 414–417 (STEWART, J., concurring in result); L. Tribe, American Constitutional Law § 14–4 (1978); Katz, Freedom of Religion and State Neutrality, 20 U. Chi. L. Rev. 426 (1953).

[21] *Zorach* v. *Clauson,* 343 U. S. 306, 313 (1952); *Quick Bear* v. *Leupp,* 210 U. S. 50 (1908). See generally *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970).

[22] Accord, Giannella, *supra* n. 18, at 527.

to be deeply involved in religion. In my view, that Clause will not permit, much less excuse or condone, the deprivation of religious liberty here involved.

Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations,[23] and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson,* 343 U. S. 306, 313 (1952). Accordingly, religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open . . . ." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). Government may not interfere with efforts to proselyte or worship in public places. *Kunz* v. *New York,* 340 U. S. 290 (1951). It may not tax the dissemination of religious ideas. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943). It may not seek to shield its citizens from those who would solicit them with their religious beliefs. *Martin* v. *City of Struthers,* 319 U. S. 141 (1943).

That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection.[24] *Cantwell* v. *Connecticut,* 310 U. S., at 309–310; cf. *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5 (1949). The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public

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[23] *Id.,* at 516–522.

[24] "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth." *Gitlow* v. *New York,* 268 U. S. 652, 673 (1925) (Holmes, J., dissenting).

issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz* v. *Tax Comm'n,* 397 U. S. 664, 670 (1970).

The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. Cf. *Wieman* v. *Updegraff,* 344 U. S. 183 (1952). Government may not inquire into the religious beliefs and motivations of officeholders—it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction. Cf. *Bond* v. *Floyd,* 385 U. S. 116 (1966).

In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 222 (1963). It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[25]

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[25] "In much the same spirit, American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be incon-

Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes.[26] These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

MR. JUSTICE STEWART, concurring in the judgment.

Like MR. JUSTICE BRENNAN, I believe that *Torcaso* v. *Watkins*, 367 U. S. 488, controls this case. There, the Court held that Maryland's refusal to commission Torcaso as a notary public because he would not declare his belief in God violated the First Amendment, as incorporated by the Fourteenth. The offense against the First and Fourteenth Amendments lay not simply in requiring an oath, but in "limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Id.*, at 494. As the Court noted: "The fact . . . that a person is not compelled to hold public office cannot possibly be

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sistent with first amendment freedoms of religious and political expression—and might not even succeed in keeping religious controversy out of public life, given the 'political ruptures caused by the alienation of segments of the religious community.' " L. Tribe, *supra* n. 20, § 14–12, pp. 866–867 (footnotes omitted).

[26] See authorities cited nn. 14–16, *supra*.

an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.*, at 495–496. Except for the fact that Tennessee bases its disqualification not on a person's statement of belief, but on his decision to pursue a religious vocation as directed by his belief, that case is indistinguishable from this one—and that sole distinction is without constitutional consequence.*

MR. JUSTICE WHITE, concurring in the judgment.

While I share the view of my Brothers that Tennessee's disqualification of ministers from serving as delegates to the State's constitutional convention is constitutionally impermissible, I disagree as to the basis for this invalidity. Rather than relying on the Free Exercise Clause, as do the other Members of the Court, I would hold ch. 848, § 4, of 1976 Tenn. Pub. Acts unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The plurality states that § 4 "has encroached upon McDaniel's right to the free exercise of religion," *ante,* at 626, but fails to explain in what way McDaniel has been deterred in the observance of his religious beliefs. Certainly he has not felt compelled to abandon the ministry as a result of the challenged statute, nor has he been required to disavow any of his

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*In *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304, this Court recognized that "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." This distinction reflects the judgment that, on the one hand, government has no business prying into people's minds or dispensing benefits according to people's religious beliefs, and, on the other, that acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired. The disability imposed on McDaniel, like the one imposed on Torcaso, implicates the "freedom to believe" more than the less absolute "freedom to act." As did Maryland in *Torcaso,* Tennessee here has penalized an individual for his religious status—for what he is and believes in—rather than for any particular act generally deemed harmful to society.

religious beliefs. Because I am not persuaded that the Tennessee statute in any way interferes with McDaniel's ability to exercise his religion as he desires, I would not rest the decision on the Free Exercise Clause, but instead would turn to McDaniel's argument that the statute denies him equal protection of the laws.

Our cases have recognized the importance of the right of an individual to seek elective office and accordingly have afforded careful scrutiny to state regulations burdening that right. In *Lubin* v. *Panish,* 415 U. S. 709, 716 (1974), for example, we noted:

> "This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."

Recognizing that "the rights of voters and the rights of candidates do not lend themselves to neat separation . . . ," *Bullock* v. *Carter,* 405 U. S. 134, 143 (1972), the Court has required States to provide substantial justification for any requirement that prevents a class of citizens from gaining ballot access and has held unconstitutional state laws requiring the payment of prohibitively large filing fees,[1] requiring the payment of even moderate fees by indigent candidates,[2] and

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[1] *Bullock* v. *Carter,* 405 U. S. 134 (1972).

[2] *Lubin* v. *Panish,* 415 U. S. 709 (1974).

having the effect of excluding independent and minority party candidates from the ballot.[3]

The restriction in this case, unlike the ones challenged in the previous cases, is absolute on its face: There is no way in which a Tennessee minister can qualify as a candidate for the State's constitutional convention. The State's asserted interest in this absolute disqualification is its desire to maintain the required separation between church and state. While the State recognizes that not all ministers would necessarily allow their religious commitments to interfere with their duties to the State and to their constituents, it asserts that the potential for such conflict is sufficiently great to justify § 4's candidacy disqualification.

Although the State's interest is a legitimate one, close scrutiny reveals that the challenged law is not "reasonably necessary to the accomplishment of . . ." that objective. *Bullock, supra,* at 144. All 50 States are required by the First and Fourteenth Amendments to maintain a separation between church and state, and yet all of the States other than Tennessee are able to achieve this objective without burdening ministers' rights to candidacy. This suggests that the underlying assumption on which the Tennessee statute is based—that a minister's duty to the superiors of his church will interfere with his governmental service—is unfounded. Moreover, the rationale of the Tennessee statute is undermined by the fact that it is both underinclusive and overinclusive. While the State asserts an interest in keeping religious and governmental interests separate, the disqualification of ministers applies only to legislative positions, and not to executive and judicial offices. On the other hand, the statute's sweep is also overly broad, for it applies with equal force to those ministers whose religious beliefs would not prevent them from properly discharging their duties as constitutional convention delegates.

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[3] *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

The facts of this case show that the voters of McDaniel's district desired to have him represent them at the limited constitutional convention. Because I conclude that the State's justification for frustrating the desires of these voters and for depriving McDaniel and all other ministers of the right to seek this position is insufficient, I would hold § 4 unconstitutional as a violation of the Equal Protection Clause.

Syllabus

ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND *v.* MORENO ET AL.

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

No. 77–154. Argued February 22, 1978—Decided April 19, 1978

It is the policy of the University of Maryland to grant "in-state" status for admission, tuition, and charge-differential purposes only to students who are domiciled in Maryland or, if a student is financially dependent on his parents, whose parents are domiciled in Maryland. In addition, the University may in some cases deny in-state status to students who do not pay the full spectrum of Maryland state taxes. Pursuant to this policy the University refused to grant in-state status to respondent nonimmigrant alien students, each of whom was dependent on a parent who held a "G–4 visa" (a nonimmigrant visa granted to officers or employees of international treaty organizations and members of their immediate families) and each of whom was named in that visa, on the ground that the holder of a G–4 visa cannot acquire Maryland domicile because such a visa holder is incapable of demonstrating an essential element of domicile—the intent to live permanently or indefinitely in Maryland. After unsuccessful appeals through University channels, respondents brought a class action in the Federal District Court for declaratory and injunctive relief against the University and its President (petitioner), alleging that the University's refusal to grant them in-state status violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court granted relief, but limited it to a declaration and injunction restraining the President from denying respondents the opportunity to establish in-state status solely because of an "irrebuttable presumption of non-domicile." The court held that such an irrebuttable presumption violated the Due Process Clause, finding that reasonable alternative procedures were available to make the crucial domicile determination and rejecting the University's claim that the Immigration and Nationality Act of 1952 and Maryland common law precluded G–4 aliens from forming the intent necessary to acquire domicile. The Court of Appeals affirmed. *Held:*

1. Although the University may consider factors other than domicile in granting in-state status, the record shows that respondents were denied such status because of the University's determination that G–4

aliens could not form the intent needed to acquire Maryland domicile. Therefore, this case is controlled by principles announced in *Vlandis* v. *Kline*, 412 U. S. 441, as limited by *Weinberger* v. *Salfi*, 422 U. S. 749, 771, to those situations in which a State "purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue." Pp. 658–660.

2. Before considering whether *Vlandis, supra,* should be overruled or further limited, proper concern for *stare decisis* as well as the Court's longstanding policy of avoiding unnecessary constitutional decisions requires that the necessity of a constitutional decision be shown, and no such showing has been made here because a potentially dispositive issue, the determination whether the University's irrebuttable presumption is universally true, turns on federal statutory law and state common law as to which there are no controlling precedents. Pp. 660–662.

3. Under federal law, G–4 aliens have the legal capacity to change domicile. Pp. 663–668.

(a) In the Immigration and Nationality Act, which was intended to be a comprehensive and complete code governing all aspects of admission of aliens to the United States, Congress expressly required that an immigrant seeking admission under certain nonimmigrant classifications maintain a permanent residence abroad which he has no intention of abandoning. Congress did not impose this restriction on G–4 aliens, and, given the comprehensive nature of the Act, the conclusion is inescapable that Congress' failure to impose such restrictions was deliberate and manifests a willingness to allow G–4 aliens to adopt the United States as their domicile (a willingness confirmed by Immigration and Naturalization Service regulations). But whether such an adoption would confer domicile in a State is a question to be decided by the State. Pp. 663–666.

(b) Under present federal law, therefore, a G–4 alien will not violate the Act, INS regulations, or the terms of his visa if he develops a subjective intent to stay in the United States indefinitely. Moreover, although a G–4 visa lapses on termination of employment with an international treaty organization, a G–4 alien would not necessarily have to leave the United States. There being no indication that the named respondents are subject to any adverse factor, such as fraudulent entry into, or commission of crime in, the United States, and given each named respondent's alleged length of residence (ranging from 5 to 15 years) in the country, it would appear that the status of each of them

could be adjusted to that of a permanent resident without difficulty. Pp. 666–668.

4. Because of the Court's conclusions with respect to federal law, the question whether G–4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and, since such question is purely a matter of state law on which there is no controlling precedent, the question is certified to the Maryland Court of Appeals for determination. Pp. 668–669.

556 F. 2d 573, question certified.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 669.

David H. Feldman, Assistant Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Francis B. Burch,* Attorney General, *George A. Nilson,* Deputy Attorney General, and *Robert A. Zarnoch,* Assistant Attorney General.

Alfred L. Scanlan argued the cause for respondents. With him on the brief was *James R. Bieke.**

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*A brief for the American Council on Education et al. as *amici curiae* urging reversal was filed by *Sheldon Elliot Steinbach* and by the Attorneys General of their respective States as follows: *Robert F. Stephens* of Kentucky, *Francis X. Bellotti* of Massachusetts, *Anthony F. Troy* of Virginia, *Avrum Gross* of Alaska, *Carl R. Ajello* of Connecticut, *Richard R. Wier, Jr.,* of Delaware, *Arthur K. Bolton* of Georgia, *Wayne L. Kidwell* of Idaho, *Theodore L. Sendak* of Indiana, *William J. Guste, Jr.,* of Louisiana, *Joseph E. Brennan* of Maine, *A. F. Summer* of Mississippi, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *David H. Souter* of New Hampshire, *William F. Hyland* of New Jersey, *Toney Anaya* of New Mexico, *Louis J. Lefkowitz* of New York, *Rufus L. Edmisten* of North Carolina, *Allen I. Olson* of North Dakota, *James A. Redden* of Oregon, *Daniel R. McLeod* of South Carolina, *William Janklow* of South Dakota, *Robert B. Hansen* of Utah, *M. Jerome Diamond* of Vermont, *Chauncey H. Browning, Jr.,* of West Virginia, and *V. Frank Mendicino* of Wyoming.

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, representing a class of nonimmigrant alien residents of Maryland,[1] brought this action against the University of Maryland[2] and its President, petitioner Elkins, alleging that the University's failure to grant respondents "in-state" status for tuition purposes violated various federal laws,[3] the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the University's procedures for determining in-state status violated principles established in *Vlandis* v. *Kline,* 412 U. S. 441 (1973), and the Court of Appeals affirmed. *Moreno* v. *University of Maryland,* 420 F. Supp. 541 (Md. 1976), affirmance order, 556 F. 2d 573 (CA4 1977). We granted certiorari to consider whether this decision was in conflict with *Weinberger* v. *Salfi,* 422 U. S. 749 (1975). 434 U. S. 888 (1977).

Because we find that the federal constitutional issues in this case cannot be resolved without deciding an important issue

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[1] The class certified by the District Court differs from that alleged in the complaint. As certified, the class is defined as:

"All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who

"(a) hold or are named within a visa under 8 U. S. C. § 1101 (a) (15) (G) (iv) or are financially dependent upon a person holding or named within such a visa." *Moreno* v. *University of Maryland,* 420 F. Supp. 541, 564 (Md. 1976).

[2] The University was dismissed from the suit on the authority of *Monroe* v. *Pape,* 365 U. S. 167 (1961). See 420 F. Supp., at 548–550.

[3] The complaint alleged that petitioner's conduct violated 42 U. S. C. §§ 1981, 1983, 2000a, 2000a–1, 2000a–3, 2000d. App. 3A. Jurisdiction was predicated on 28 U. S. C. §§ 1343 (3), 1343 (4). The District Court proceeded on the premise that 42 U. S. C. § 1983 and the cited sections of Title 28 gave jurisdiction and a cause of action. See 420 F. Supp., at 548. Neither of these rulings is now in dispute.

of Maryland law "as to which it appears . . . there is no controlling precedent in the Court of Appeals of [Maryland]," Md. Cts. & Jud. Proc. Code Ann. § 12–601 (1974), we first decide some preliminary issues of federal law and then certify the question of state law set out *infra,* at 668–669, to the Maryland Court of Appeals.

I

In 1973 the University of Maryland adopted a general policy statement with respect to "In-State Status for Admission, Tuition, and Charge-Differential Purposes." In relevant part, this statement provides:

> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:
>
> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> "b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7.

The term "domicile" is defined as "a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland." *Id.,* at 8. The policy statement also sets out eight factors to be considered in determining domicile, of which one is whether a student, or the persons on whom he is dependent, pays "Maryland income tax on all earned income including all taxable income earned outside the State." *Id.,* at 9.

In addition to establishing criteria for conferring in-state status, the general policy statement establishes an administrative regime in which a person seeking in-state status initially files documentary information setting out the basis for his claim of domicile. See *id.*, at 8–9. If the claim is denied, the person seeking in-state status may appeal, first through a personal interview with a "campus classification officer," then to an "Intercampus Review Committee (IRC)," and finally to petitioner Elkins, as President of the University. See *id.*, at 9–10.

II

In 1974, respondents Juan C. Moreno and Juan P. Otero applied for in-state status under the general policy statement. Each respondent was a student at the University of Maryland and each was dependent on a parent who held a "G–4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U. S. C. § 1101.(a)(15)(G)(iv) (1976 ed.).[4] Initially, respondent Moreno was denied in-state status because "neither Mr. Manuel Moreno nor his son, Juan Carlos, are Maryland domiciliaries." Record 41. Respondent Otero was denied in-state status because he was

[4] "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

. . . . . .

"(G) . . . (iv) officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act, 59 Stat. 669, 22 U. S. C. § 288 *et seq.*], and the members of their immediate families."

Respondents Moreno and Otero are dependents of employees of the Inter-American Development Bank. App. 6A, 7A. Respondent Hogg is the dependent of an employee of the International Bank for Reconstruction and Development. *Id.*, at 9A. The complaint states that respondent Moreno has resided in Maryland for 15 years, Otero for 10 years, and Hogg for 5 years. *Id.*, at 4A.

neither a United States citizen nor an alien admitted for permanent residence. *Id.*, at 80.

These respondents took a "consolidated appeal" to the IRC, which also denied them in-state status in a letter which stated:

> "The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e. g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.
>
> "You have raised the question of domicile. It is our opinion that a holder of a G–4 visa cannot acquire the requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile." *Id.*, at 51, 86.

A final appeal was made to President Elkins, who advised Moreno and Otero as follows:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Mary-

land income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as 'out-of-state.'

"The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G–4 nonimmigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland, and because of the underlying principle of cost equalization, I am denying the requests for reclassification." App. 12A.

Respondent Clare B. Hogg's experience was similar. Her application for in-state status was initially rejected because:

"[T]he policy for the determination of in-state status limits the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G–4 visa, and as you hold a G–4 visa, in my judgment you are not eligible for an in-state classification.

"Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria [*sic*] in determination of domicile." Record 106.

However, the IRC stated on appeal:

"It is the opinion of the IRC that a holder of a nonimmigrant visa, including the G–4 visa you hold, cannot acquire the requisite intent to reside permanently in

> Maryland, such intent being necessary to establish domicile." *Id.*, at 111.

No mention was made of failure to pay taxes or of respondents' nonimmigrant status. See *ibid.* Yet on final appeal to President Elkins, these reasons, as well as respondent Hogg's lack of domicile, were recited in a letter virtually identical to those sent respondents Moreno and Otero as grounds for denying in-state status. See App. 13A.

Unable to obtain in-state status through the University's administrative machinery, respondents filed a class action against the University and petitioner Elkins, seeking a declaration that the class should be granted in-state status and seeking permanently to enjoin the University from denying in-state status to any present or future class member on the ground that such class member or a parent on whom such class member might be financially dependent

> "(a) is the holder of a G–4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty." *Id.*, at 11A.

The District Court, on cross-motions for summary judgment, limited the relief granted to a declaration and enforcing injunction restraining petitioner Elkins from denying respondents "the opportunity to establish 'in-state' status" solely because of an "irrebuttable presumption of non-domicile." 420 F. Supp., at 565. The court specifically refused to grant respondents in-state status, holding that the facts with respect to the respondents' fathers, on whom each respondent was dependent, were in dispute. *Id.*, at 564–565. Similarly, the court did not indicate whether the University could or could

not exclude respondents because their fathers paid no Maryland state income taxes.[5]

With respect to the "irrebuttable presumption" issue, the

[5] The District Court did not set out reasons for denying this relief. However, it must have believed that the University would not exclude respondents from in-state status solely for cost-equalization reasons if they otherwise qualified for Maryland domicile. If this was not the case, the District Court could not, as it did, see 420 F. Supp., at 560, have found it unnecessary to pass on respondents' argument that the Supremacy Clause prohibits the States from penalizing those who seek to avail themselves of tax exemptions granted by federal treaties. Moreover, an examination of the pleadings before the District Court strongly suggests that, notwithstanding the correspondence set out above, the University has disavowed any intention to exclude respondents from in-state status solely because they, or the persons on whom they are dependent, paid no state income taxes. Thus, the University unequivocally denied respondents' allegation that

"(b) students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty . . . may not be granted in-state status because of the 'principle of cost equalization' and because the University's 'policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not' . . . ." App. 5A (Complaint ¶ 13 (b)).

See App. 16A (Answer ¶ 13). The University similarly disavowed any intent to exclude respondents solely on the basis of failure to pay state income taxes in its responses to respondents' requests for admission. See Record 134 (¶ 2 (d)) (denying that tax exemption given some G–4 visa holders is "relevant to the determination made pursuant to the . . . University of Maryland policy"); *id.*, at 135 (¶ 3 (d)) (same); *id.*, at 139 (¶ 6 (d)) (same); *id.*, at 136 (¶ 4 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on less than 50% of his earned income); *id.*, at 141 (¶ 8 (d)) (same); *id.*, at 142 (¶ 9 (d)) (same); *id.*, at 140 (¶ 7 (d)) (denying the relevance for in-state tuition purposes of the fact that a person may pay Maryland state taxes on only "unearned" income). Finally, the University admitted as fact that

"an 'immigrant student' who is financially dependent upon a parent who is an immigrant lawfully admitted for permanent residence . . . may be

District Court first held that, although each respondent had been allowed to submit a complete statement of facts supporting his or her claim of domicile to University authorities, there had been no individualized hearing because the University had a "predetermined conclusion concerning the domicile of a G–4 alien," *id.*, at 555, namely, that a G–4 could not have the requisite intent to establish domicile. It then ruled that aliens holding G–4 visas could *as a matter of Maryland common law* become Maryland domiciliaries so long as such aliens were legally capable of changing domicile as a matter of *federal* law. See *id.*, at 555–556. An examination of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, demonstrated that G–4 aliens, as distinguished from some other classes of aliens, had the legal capacity to change domicile as a matter of federal law. See 420 F. Supp., at 556–559. Accordingly, the University's irrebuttable presumption that G–4 aliens could not become Maryland domiciliaries was not universally true. Since "reasonable alternative means of making the crucial [domicile] determination," *Vlandis* v. *Kline*, 412 U. S., at 452, were readily at hand, the University's policy violated the Due Process Clause of the Fourteenth Amendment. See 420 F. Supp., at 559–560. These conclusions were affirmed by the Court of Appeals for the Fourth Circuit, which adopted the reasoning of the District Court. App. to Pet. for Cert. 54a–55a.

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granted in-state status, whether or not the parent on whom such student is financially dependent currently pays Maryland income tax, provided that such parent can exhibit all of the other relevant domiciliary criteria . . . ." *Id.*, at 142.

Since no party has suggested a difference between immigrant and nonimmigrant aliens other than the possibility that the latter cannot become domiciliaries, the University's admission tends to confirm that the tax issue is not determinative of in-state status for any group of aliens.

For the reasons set out above, we, like the District Court, do not now decide whether the University would be barred by the Supremacy Clause from denying in-state status on tax grounds.

III

A

In this Court, petitioner argues that the University's in-state policy should have been tested under standards set out in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), and its progeny, since in petitioner's view these cases have effectively overruled *Vlandis*. As an alternative argument, petitioner asserts that the District Court should be reversed because its conclusions on points of Maryland and federal law were erroneous and in fact it is universally true that a G–4 visa holder cannot become a Maryland domiciliary.

Respondents reply that *Vlandis* was distinguished, not overruled, by *Salfi*, and, as distinguished, *Vlandis* covers this case. Moreover, they assert that the District Court correctly interpreted federal and Maryland law. Because the University's policy would on this view discriminate against a class of aliens who could become Maryland domiciliaries, they also argue, as they did in the District Court,[6] that they should prevail on equal protection grounds even if they cannot prevail under *Vlandis*.[7] Cf. *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977).

Although the parties argue this case in terms of due process, equal protection, and *Vlandis* versus *Salfi*, the gravamen of their dispute is unquestionably whether, as a matter of federal and Maryland law, G–4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland. The University has consistently maintained throughout this litigation that, notwithstanding other possible interpretations of

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[6] The District Court did not pass on the equal protection argument. See 420 F. Supp., at 560.

[7] The respondents also argue that the University's policy is invalid under the Supremacy Clause since control over aliens and over foreign relations is vested exclusively in the Federal Government. We have no need to reach this argument at this time.

its policy statement, its "paramount" and controlling concern is with domicile as defined by the courts of Maryland.[8] It has eschewed any interest in creating a classwide exclusion based

[8] Petitioner will be surprised to learn from the dissent, see *post,* at 672–676, that the University's treatment of respondents is not really determined by the Maryland common law of domicile and therefore that this case is governed by *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), not *Vlandis* v. *Kline,* 412 U. S. 441 (1973). For petitioner's view of the University's policy, contrary to that suggested by the dissent, has consistently been: "The Defendant University distinguishes between *domiciliaries* and *non-domiciliaries* of the State of Maryland . . . . This represents a policy decision of the Board of Regents of the University, which has been implemented in the rules and guidelines of the Policy Statement . . . ." Record 215 (emphasis added). And again: "The wording of the 'In-State' policy is structured so as to initially deny 'in-state' status to non-immigrant aliens. This structure incorporates the determination that under the law and definition of *domicile as established and applied by Maryland courts,* non-immigrant aliens cannot display the intent to permanently reside within the State which is requisite to establishing Maryland domicile." *Id.,* at 217 (emphasis added). And again: "[The University's] actions and policy *rest upon a definition, not a presumption.* Defendants have denied Plaintiffs 'in-state' status based on an evaluation of their domicile under Maryland law: the existence of a G–4 visa is merely a single operative fact, *albeit paramount, which is placed in the context of what Defendants have determined to be the definition of domicile established by the Maryland courts.*" *Id.,* at 231 (second emphasis added). And again: "This distinction [between immigrant and nonimmigrant aliens] was based upon a reading of the Maryland law of domicile in conjunction with the terms and conditions of the non-immigrant visas described in 28 [*sic*] U. S. C. § 1101 (a)(15)(A) through (L), a determination thereby having been made that non-immigrants do not have the intent requisite for establishing Maryland domicile. . . . That State University's [*sic*] can establish such . . . 'domicile' policies and make distinctions between domiciliaries and non-domiciliaries is well established . . . ." *Id.,* at 233.

Indeed, respondents argued below against abstention, see n. 15, *infra,* on the same grounds now argued by our Brother REHNQUIST against certification, namely: "[T]he Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed. Such common law principles, standing alone, do not set the tuition charged by the University of Maryland." Record 272. And peti-

solely on nonimmigrant status [9] or, apparently, on the fact that many G–4 aliens receive earned income that is exempt from Maryland taxation.[10] Because petitioner makes domicile the "paramount" policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State "purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue." *Weinberger* v. *Salfi*, 422 U. S., at 771.[11]

If we are to reverse the courts below, therefore, we must overrule or further limit *Vlandis* as, of course, petitioner has asked us to do. Before embarking on a review of the consti-

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tioner countered: "What [respondents] apparently fail to understand is that the [University's] 'In-State Policy' is structured upon and reflects [the University's] understanding of the Maryland common law of domicile." *Id.*, at 340.

[9] There can be no doubt that, notwithstanding the policy statement's express reservation of in-state status to United States citizens and immigrant aliens, see *supra*, at 651, the University has no policy of excluding nonimmigrant aliens simply because they lack immigrant status under federal law. Petitioner's answer unequivocally states that the University has not "denied" nor does it "continu[e] to deny in-state status to all students who neither are United States citizens nor hold immigrant visas," App. 16A, although such an across-the-board denial would be required by the University's policy if it placed independent significance on immigrant status. Moreover, petitioner tells us that "the fact of alienage is completely irrelevant in itself to the issues controlling a determination of domicile." Record 232.

[10] See n. 5, *supra*. Indeed, although the dissent suggests that petitioner might bar respondents on cost-equalization grounds, see *post*, at 672–673, it is clear that petitioner has not done this although nothing in the District Court's injunction prohibits petitioner from doing so. See *supra*, at 655–656, and n. 5.

[11] In fact, the University allows evidence to be submitted bearing on respondents' claims of domicile—it simply does not evaluate that evidence.

tutional principles underlying *Vlandis,* however, proper concern for *stare decisis* joins with our longstanding policy of avoiding unnecessary constitutional decisions to counsel that a decision on the continuing vitality of *Vlandis* be avoided unless it is really necessary. See, *e. g., Bellotti* v. *Baird,* 428 U. S. 132, 146–151 (1976); *Reetz* v. *Bozanich,* 397 U. S. 82 (1970); *Harman* v. *Forssenius,* 380 U. S. 528, 534 (1965); *Harrison* v. *NAACP,* 360 U. S. 167, 177 (1959); *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941); cf. *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). So far, no such showing of necessity has been made out: [12] If G–4 aliens cannot become domiciliaries, then respondents have no due process claim under either *Vlandis* or *Salfi* for any "irrebuttable presumption" would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G–4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G–4 aliens were the Maryland courts to hold that G–4 aliens can have the requisite intent.[13]

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[12] Moreover, respondents' equal protection claim turns on whether it is in fact true that G–4 aliens can become domiciliaries of Maryland. If they cannot, the constitutional issues that would be raised are materially different from those briefed or argued here. For this reason, we also think certification proper. See, *e. g., Bellotti* v. *Baird,* 428 U. S. 132, 146–151 (1976).

[13] "The core of Plaintiffs' cause of action is their belief that under Maryland law a G–4 non-immigrant alien can be domiciled in this State. A judicial determination in the negative would foreclose their Constitutional and statutory arguments; *a determination in the affirmative would require the University's Board of Regents to rewrite the In-State policy to accommodate this category of domiciliaries.*" Record 239–240 (emphasis added).

Similar sentiments are expressed in petitioner's brief in this Court. See Brief, at 11, 12, 28, 30, 34, and 35 n. 20. And petitioner's counsel stated at oral argument that if the Court of Appeals of Maryland determined that a person with a G–4 visa is capable of forming the requisite intent to

Accordingly, the question whether G–4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents,[14] we first set out the correct meaning of federal law in this area and then *sua sponte* certify [15] this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question.[16]

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establish domicile, "the odds are reasonably high that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents . . . ." Tr. of Oral Arg. 14–15.

[14] No recent Maryland case has been cited in the briefs either here or below. In addition, petitioner's counsel, an Assistant Attorney General of Maryland, stated at oral argument that there "are no Maryland decisions one way or the other." *Id.*, at 10.

[15] Although petitioner asked the District Court to abstain, Record 211, he did not ask that court to certify the state-law question of domicile to the Maryland Court of Appeals. We need not decide whether the District Court's failure to abstain was erroneous, for, as we noted in *Bellotti* v. *Baird*, *supra*, at 150–151:

"This Court often has remarked that the equitable practice of abstention is limited by considerations of ' "the delay and expense to which application of the abstention doctrine inevitably gives rise." ' . . . As we have also noted, however, the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.' . . .

". . . [T]he availability of certification greatly simplifies [*Pullman* abstention] analysis." (Footnotes omitted.)

[16] Although it is our frequent practice to defer to a construction of state law made by a district court and affirmed by a court of appeals whose jurisdiction includes the State whose law is construed, see, *e. g.*, *Bishop* v. *Wood*, 426 U. S. 341, 345–346, and 346–347, n. 10 (1976) (collecting cases), we do not do so here for two reasons. First, the question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged

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Petitioner has argued, and respondents do not appear to disagree, that, if as a matter of federal law a nonimmigrant alien is required to maintain a permanent residence abroad or must state that he will leave the United States at a certain future date, then such an alien's subjective intent to reside permanently or indefinitely in a State would not create the sort of intent needed to acquire domicile. It is not clear whether this argument is based on an understanding of the common law of Maryland defining intent or whether it is based on an argument that federal law creates a "legal disability," see Restatement (Second) of Conflict of Laws § 15 (1) (1971), which States are bound to recognize under the Supremacy Clause. See *Nyquist* v. *Mauclet,* 432 U. S., at 4; *id.,* at 20 n. 3 (REHNQUIST, J., dissenting); *Seren* v. *Douglas,* 30 Colo. App. 110, 114–115, 489 P. 2d 601, 603 (1971) (semble); *Gosschalk* v. *Gosschalk,* 48 N. J. Super. 566, 574–575, 138 A. 2d 774, 779 (semble), aff'd, 28 N. J. 73, 145 A. 2d 327 (1958); *Gosschalk* v. *Gosschalk,* 28 N. J. 73, 75–82, 145 A. 2d 327, 328–331 (1958) (dissenting opinion). But cf. *Williams* v. *Williams,* 328 F. Supp. 1380, 1383 (V. I. 1971). In any case, we need not decide the effect of a federal law restricting nonimmigrant aliens

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member of the polity of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens) fully in its governance. Second, the status of the many foreign nationals living in Maryland is of great importance to Maryland because it potentially affects Maryland's relations with the Federal Government, other state and local governments in the greater District of Columbia area, and foreign nations. In a federal system, it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it. In so doing, we emphasize that we do not in any way suggest that the District Court's determination of Maryland law was incorrect.

postulated above, since it is clear that Congress did not require G–4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain.

After extensive study, Congress passed the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1976 ed.), as a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents. See H. R. Rep. No. 1365, 82d Cong., 2d Sess., 27 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess., 1–2 (1952). As amended in 1976, the Act establishes two immigration quotas, one for the Eastern and one for the Western Hemisphere.[17] The object of the quotas is to limit the number of aliens who can be admitted to the United States for permanent residence. To this end, the Act divides aliens into two classes. The first class, immigrant aliens, includes every alien who does not fall into an exclusion established by § 101 (a)(15) of the Act, 66 Stat. 167, as amended, 8 U. S. C. § 1101 (a)(15) (1976 ed.). Except for immigrant aliens who are "immediate relatives of United States citizens" or "special immigrants defined in section 101 (a)(27)," [18] each alien admitted for permanent residence or who later becomes eligible for permanent residence is chargeable against a quota and no alien can be granted permanent residence status unless a quota allocation is available.[19] However, it is important to note that there is no requirement in the Act that an immigrant alien have an intent to stay permanently in the United States.

The second class of aliens, nonimmigrant aliens, is established by § 101 (a)(15) of the Act. This section creates 12 subcategories of aliens who may come to the United States without need for a quota allocation. See §§ 101 (a)(15)(A)–(L).

[17] Immigration and Nationality Act Amendments of 1976, § 2, 90 Stat. 2703, amending § 201 of the 1952 Act, as amended, 8 U. S. C. § 1151 (1976 ed.).

[18] § 201 of the 1952 Act, as amended, 8 U. S. C. § 1151 (1976 ed.).

[19] 8 U. S. C. § 1151 (1976 ed.).

Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be admitted to the United States from time to time and all of which would be hampered if every alien entering the United States were subject to a quota and to the more strict entry conditions placed on immigrant aliens.[20]

Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus, the 1952 Act defines a visitor to the United States as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. § 101 (a)(15)(B). Similarly, a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . ." § 101 (a)(15)(F). See also § 101 (a)(15)(C) (aliens in "immediate and continuous transit"); § 101 (a)(15)(D) (vessel crewman "who intends to land temporarily"); § 101 (a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning").

By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Moreover,

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[20] See S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 1, p. 13 (1952); H. R. Rep. No. 1365, 82d Cong., 2d Sess., 52 (1952); H. R. Rep. No. 91–851, pp. 5–7 (1970).

since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported, see § 241 (a)(9) of the 1952 Act, 66 Stat. 206, 8 U. S. C. § 1251 (a)(9) (1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of status (discussed below), nonimmigrants in restricted classes who sought to establish domicile would be deported.

But Congress did *not* restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under § 101 (a)(15)(G)(iv).[21] Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G–4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile. Congress' intent is confirmed by the regulations of the Immigration and Naturalization Service, which provide that G–4 aliens are admitted for an indefinite period—so long as they are recognized by the Secretary of State to be employees or officers (or immediate family members of such employees or officers) of an international treaty organization. See 8 CFR § 214.2 (g) (1977); 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.13b, p. 2–101 (rev. ed. 1977). Whether such an adoption would confer domicile in a State would, of course, be a question to be decided by the State.

Under present law, therefore, were a G–4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G–4 alien terminate his employment with an international treaty organization, both he and his family would lose

[21] See n. 4, *supra*.

their G–4 status. *Ibid.* Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant.

Beginning with the 1952 Act, Congress created a mechanism, "adjustment of status," through which an alien already in the United States could apply for permanent residence status. See § 245 of the 1952 Act, 66 Stat. 217, as amended, 8 U. S. C. § 1255 (1976 ed.).[22] Prior to that time, aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad. See 2 Gordon & Rosenfield, *supra,* at § 7.7. Although adjustment of status is a matter of grace, not right, the most recent binding decision [23] of the Board of Immigration Appeals states:

> "Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, *etc.,* will be considered as countervailing factors meriting favorable exercise of administrative discretion. *In the absence of adverse factors, adjustment will ordinarily be granted,* still as a matter of discretion." *Matter of Arai,* 13 I. & N. Dec. 494, 496 (1970) (emphasis added), modifying *Matter of Ortiz-Prieto,* 11 I. & N. Dec. 317 (BIA 1965).

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[22] Until the Immigration and Nationality Act Amendments of 1976, n. 17, *supra,* nonimmigrant aliens whose country of origin was in the Western Hemisphere were excluded from adjustment of status. Section 6 of the 1976 Amendments, 90 Stat. 2705, removed this restriction. See 8 U. S. C. § 1255 (1976 ed.).

[23] Opinions of the Attorney General, the Board of Immigration Appeals, and of Immigration and Naturalization Service officers published in Administrative Decisions Under Immigration and Nationality Laws of the United States are "binding on all officers and employees of the Service in the administration of the [1952] Act." 8 CFR §§ 3.1 (g), 103.3 (e), and 103.9 (a) (1977).

The adverse factors referred to by the Board include such things as entering the United States under fraudulent circumstances[24] or committing crimes while in the United States.[25] There is no indication that any named respondent is subject to any such adverse factor, and, given each named respondent's alleged length of residence in the United States,[26] it would appear that any respondent could adjust his or her status to that of a permanent resident without difficulty.[27]

C

For the reasons stated above, the question whether G–4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law. Therefore, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code,[28] the following question is certified to the Court of Appeals of Maryland:

"Are persons residing in Maryland who hold or are named

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[24] See, *e. g., Matter of Rubio-Vargas,* 11 I. & N. Dec. 167 (BIA 1965); *Matter of Vega,* 11 I. & N. Dec. 337 (BIA 1965); *Matter of Diaz-Villamil,* 10 I. & N. Dec. 494 (BIA 1964); *Ameeriar* v. *INS,* 438 F. 2d 1028 (CA3), cert. dismissed, 404 U. S. 801 (1971). See also *Matter of Barrios,* 10 I. & N. Dec. 172 (BIA 1963); *Brownell* v. *Carija,* 102 U. S. App. D. C. 379, 254 F. 2d 78 (1957); *Brownell* v. *Gutnayer,* 94 U. S. App. D. C. 90, 212 F. 2d 462 (1954).

[25] See, *e. g., Matter of Marchena,* 12 I. & N. Dec. 355 (Regional Comm'r 1967); *Matter of F——,* 8 I. & N. Dec. 65 (Asst. Comm'r 1958). See generally Annot., 4 ALR Fed. 557 (1970).

[26] See n. 4, *supra.*

[27] Cf. *Matter of Penaherrera,* 13 I. & N. Dec. 334 (Dist. Director 1969). Although this is a class action, see n. 1, *supra,* there is no reason on the present record to believe that G–4 aliens as a class are less qualified for adjustment of status than are the class representatives.

[28] "§ 12–601. Jurisdiction granted to Court of Appeals.

"The Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States . . . when requested by the certifying court if there is involved in any proceeding before the certifying court a question of law of this state which may be determinative of the

> in a visa under 8 U. S. C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" [29]

*So ordered.**

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

The University of Maryland, like all state universities, differentiates in tuition between "in-state" and "out-of-state" students. The two categories of students are delineated in the University's general policy statement on "In-State Status for Admission, Tuition, and Charge-Differential Purposes." Part 1 of the policy statement provides:

> "It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes *to United States citizens, and to immigrant*

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cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the Court of Appeals of this state."

"§ 12–602. Invocation of subtitle.

"This subtitle may be invoked by an order of any court referred to in § 12–601 upon the court's own motion or upon the motion of any party to the cause."

"§ 12–603. Certification order.

"(a) *Form.*—A certification order shall set forth:

"(1) The question of law to be answered; and

"(2) A statement of all facts relevant to the question certified showing fully the nature of the controversy in which the question arose."

[29] The majority rule appears to be that within a single State "the rules of domicil are the same for all purposes." Restatement (Second) of Conflict of Laws, § 11, Comment *o*, p. 47 (1971). Should Maryland not follow this rule, we presume that the Court of Appeals will direct its attention to domicile for the purposes of this case.

*[REPORTER'S NOTE: Subsequently, the Maryland Court of Appeals answered the certified question, and a supplemental decision was rendered in *Toll* v. *Moreno*, 441 U. S. 458 (1979).]

aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester[, or]

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." Brief for Petitioner 7 (emphasis added).

As is clear from the policy statement, domicile is not the sole criterion upon which the University of Maryland determines "in-state" tuition status. The University first looks to see whether the student is either a "United States citizen" or an "immigrant alien lawfully admitted for permanent residence"; if the student satisfies this initial requirement, the University must then determine whether the student (or his parents) are domiciled in Maryland.

Respondents are nonimmigrant aliens who hold G–4 visas. Pursuant to the University's tuition policy, they were denied lower in-state tuition rates despite the fact that they and their parents reside in Maryland. As explained by the Assistant Director of Admissions in a letter to respondent Clare B. Hogg, the principal reason for classifying respondents as out-of-state students for purposes of tuition was nonimmigrant status; as a secondary factor, the Assistant Director of Admissions noted that respondents would probably not be able to pass the second hurdle of domicile: [1]

"[T]he policy for determination of in-state status limits

[1] In rejecting the appeals of respondents Moreno and Otero from tuition

> the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G–4 visa, and as you hold a G–4 visa, in my judgment you are not eligible for an in-state classification.
>
> "Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria in determination of domicile." Record 106.

Respondents brought suit in federal court alleging that the University's in-state tuition policy is, among other things, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court for the District of Maryland held that the University's policy creates an irrebuttable presumption in contravention of *Vlandis* v. *Kline,* 412 U. S. 441 (1973). The Court of Appeals for the Fourth Circuit affirmed. We granted certiorari to decide whether the lower courts were correct in their holding.

The Court, rather than deciding the due process issue upon

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decisions of the Intercampus Review Committee, petitioner President of the University of Maryland also emphasized that the University precludes nonimmigrant aliens from in-state tuition status for reasons other than solely domicile:

"It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. *Furthermore,* such individuals (or their parents) must display Maryland domicile. . . .

"The University's classification policy *also* distinguishes between domiciliaries and non-domiciliaries of Maryland." App. 12A (emphasis added).

See also Record 34, 55, 80, and 115.

which certiorari was granted, today certifies the following question to the Court of Appeals of Maryland: [2]

> "Are persons residing in Maryland who hold or are named in a visa under 8 U. S. C. § 1101 (a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?"

I would unhesitatingly join the Court's certification if I felt that resolution of the question posed to the Court of Appeals of Maryland were necessary to decide the issue before us. But I am convinced that we can decide the due process issue without resolution of Maryland domicile law and thus that certification will only result in needless delay.

The University apparently classifies nonimmigrant aliens as out-of-state students for a number of reasons. All parties agree that a major factor is the University's conclusion that nonimmigrant aliens lack the legal capacity to become Maryland domiciliaries for tuition purposes. But this is not the *only* consideration underlying the classification, as is evidenced by the fact that citizenship or immigrant status is a requirement separate from and preceding domicile. According to

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[2] As the Court notes, *ante*, at 668–669, n. 28, the question certified to the Court of Appeals of Maryland may not be answerable by a simple "yes" or "no." The Court asks as a general matter whether respondents are "incapable as a matter of state law of becoming domiciliaries of Maryland." The answer may be that they are incapable of establishing Maryland domicile for university tuition purposes but are still capable of becoming domiciliaries for other purposes such as divorce and personal jurisdiction. While in *Williamson* v. *Osenton*, 232 U. S. 619, 625 (1914), this Court expressed doubt whether the definition of domicile ever varies depending on the purpose for which domicile is being used, various state-court opinions since 1914 have shown that observation to be incorrect. See, *e. g.*, *In re Estate of Jones*, 192 Iowa 78, 82, 182 N. W. 227, 229 (1921). The relevant issue in this case, of course, is whether respondents may establish Maryland domicile for university purposes, not whether they may become domiciled for purposes of divorce, etc.

the President of the University of Maryland, for example, the classification policy also "reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not." App. 12A. Holders of G–4 nonimmigrant visas are exempt from state income tax. By charging such nonimmigrant aliens higher out-of-state tuition, the University is able to better "equalize" the cost of education.[3]

Because the University's conclusion as to domicile plays a major role in its decision not to award nonimmigrant aliens in-state tuition status, counsel for petitioner admitted at oral argument that "it is entirely possible that the university would change its policy" in the face of a contrary decision by the Maryland Court of Appeals. Tr. of Oral Arg. 9. But a change in the University's in-state tuition policy would be neither automatic nor inescapable. The University might still decide that the other considerations such as cost equalization by themselves dictate continuation of the current policy. According to counsel for petitioner, "that judgment is one that would be made by the regents, and [as] I have suggested previously . . . it is well within the discretion of the regents." *Id.*, at 15.

The above facts clearly establish that the University of Maryland has not created an irrebuttable presumption. The University has not determined that domicile is the sole relevant factor in determining tuition rates and then prevented respondents from presenting proof on the question of domicile.[4]

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[3] As the Court recognizes, *ante*, at 656–657, n. 5, the University of Maryland does not presently preclude students from in-state tuition status *solely* because their parents pay no state income tax. However, the record clearly demonstrates that cost equalization is *one* of the major concerns that have led the University to charge higher tuition rates to nonimmigrant aliens.

[4] The Court does not appear to argue that domicile is the *sole* reason for the University of Maryland's out-of-state classification of nonimmigrant aliens. Instead, the Court concludes that domicile is the "'paramount'

Instead, the University has decided that, for a number of reasons *including* domicile and cost equalization, nonimmigrant aliens should pay a higher tuition rate than citizens and

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and controlling concern" of the University. *Ante*, at 659, and n. 8. The Court supports its conclusions not with citations from the pleadings or affidavits of the parties but with references to briefs and memoranda filed by their counsel. Counsel for petitioner is, of course, charged with the legal defense of the validity of the policy statement promulgated by the Board of Regents and enforced by petitioner, but counsel is not authorized, in the absence of more authority than is shown here, either to rewrite or to predict how the Regents might rewrite its policy. Thus whatever the "surprise" that the Court foresees petitioner will experience from the view taken of the Regents' policy statement, see *ante*, at 659 n. 8, will stem not from this dissent but from the Court's willingness to attribute to ambiguous statements by counsel for a state agency the implied authority to rewrite the agency's regulations or to predict the manner in which the agency might rewrite them. Even the selected statements of counsel do not unequivocally support the Court's conclusion. As noted earlier, *supra*, at 673, while counsel for petitioner suggested that "the odds are reasonably high" that the University will modify its policy if the Court of Appeals of Maryland concludes that G–4 aliens can become domiciled in Maryland, he also emphasized that the University's other concerns, such as cost equalization, might lead the Regents to continue out-of-state classification of nonimmigrant aliens. Domicile, in other words, is not the sole concern of the University and may well not even be a "controlling concern." See also Brief for Petitioner 29–32; Tr. of Oral Arg. 19–21 (out-of-state classification of nonimmigrant aliens "serve[s] many purposes other than measuring domicile"; "the policy . . . is clearly intended to serve other purposes").

Even if the University declined to accord in-state tuition status to nonimmigrant aliens *solely* because of the University's conclusion that nonimmigrant aliens cannot be domiciled in Maryland for tuition purposes, no irrebuttable presumption would be presented. In *Vlandis* v. *Kline*, 412 U. S. 441 (1973), the University *presumed* that a student who was not domiciled in Connecticut at the time he first enrolled at the University of Connecticut could not become a Connecticut resident while attending the University, even though all the normal indicia of residence might be acquired during this period. Here, on the other hand, the University of Maryland merely reads Maryland law as holding that nonimmigrant G–4 aliens cannot satisfy the requirement for Maryland domicile for tuition purposes. This is purely and simply a question of state law. Respondents

immigrant aliens who are domiciled in the State. A student is allowed to present any and all evidence relevant to his or her status as a citizen or immigrant alien. In *Vlandis* v. *Kline,* this Court held only that where a State *"purport[s] to be concerned with residency,* it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. 412 U. S., at 452." *Weinberger* v. *Salfi,* 422 U. S. 749, 771 (1975) (emphasis added).[5] Here, the University of Maryland's classification policy

> "does not purport to speak in terms of the bona fides of [domicile], but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U. S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns,* [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." *Id.,* at 772.

Because it is clear that the University of Maryland has not created an irrebuttable presumption of non-Maryland domicile, it is unnecessary to decide, as the Court apparently believes

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do not accuse petitioner of employing a nonuniversal, yet irrebuttable, presumption, but rather of misinterpreting Maryland domicile law. If the University of Maryland has misinterpreted state law, this is an error to be resolved by state, not federal, courts; no issue of federal constitutional law is presented.

[5] Because the tuition policy of the University of Maryland is controlled by *Weinberger* v. *Salfi* and not *Vlandis* v. *Kline,* the Court need not decide, as *amici* 29 States urge us to do, whether *Vlandis* should be overruled.

it is, whether "any 'irrebuttable presumption' would be universally true." *Ante,* at 661. And while the case *may* become moot *if* the Court of Appeals of Maryland decides that holders of G–4 visas can establish Maryland domicile and *if* the University changes its policy in light of that decision, the case is *not* moot *now* and there is no certainty that it will become moot in the future. There is, in summary, nothing today that prevents the Court from deciding the question presented.[6]

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[6] Some Members of the Court may believe that resolution of the state domicile issue would be helpful in resolving respondents' equal protection claim. If the Court of Appeals of Maryland decides that nonimmigrant aliens holding G–4 visas cannot establish Maryland domicile for tuition purposes, *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U. S. 985 (1971), clearly establishes that the University of Maryland can deny such nondomiciliaries lower in-state tuition rates without violating the Equal Protection Clause of the Fourteenth Amendment. If the Court of Appeals decides that holders of G–4 visas can establish Maryland domicile, on the other hand, resolution of respondents' equal protection claim may rest on the proper interpretation of *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977).

The only question presented by the petition for certiorari, however, is: "Whether the decisions below should have applied Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), and erroneously concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to non-immigrants holding G–4 visas establishes an irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?" Consideration of respondents' equal protection claim, which was never addressed below, may best be left initially to the lower courts on remand. Even if the Court ultimately decides to consider respondents' equal protection arguments, resolution of Maryland domicile law would seem irrelevant. Unlike the situation in *Nyquist,* the University of Maryland does not discriminate against *resident* aliens. Cf. 432 U. S., at 2, 4, 5–6, and n. 6, and 12. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. See *Starns* v. *Malkerson, supra.*

While I cannot join in what I view as a needless and time-consuming certification, I do join in the Court's implied disapproval of the District Court's refusal to refer to Maryland courts the question of whether holders of G–4 visas can establish Maryland domicile. Upon concluding that the University's policy creates an irrebuttable presumption, the District Court was faced with the question of whether the presumption is universally true. The District Court proceeded to answer the question in the negative and enjoin the University's policy, even though petitioner had asked the District Court either to abstain or, apparently, to certify the question of domicile to the Court of Appeals of Maryland.[7] Because the Court of Appeals of Maryland had never addressed the question of domicile, petitioner's request should have been granted. By

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[7] According to petitioner, he "urged both the district court and the court of appeals to defer to Maryland courts the question of whether the state law precluded G–4's from establishing Maryland domicile." Brief for Petitioner 35 n. 20. The record indicates that petitioner, in his answer to respondents' complaint, urged the District Court to "abstain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland." Record 117. Petitioner renewed the request in his motion for summary judgment and memorandum in support thereof. *Id.*, at 211, and 239–243. In reply, respondents urged the District Court, "should [it] elect to abstain, . . . to use the certification procedure provided by the Uniform Certification of Questions of Law Act, Ann. Code of Md., Courts and Judicial Proceedings, §§ 12–601–609 (1974). Under that Act the Court of Appeals of Maryland is empowered to answer questions of state law certified to it by the United States District Court which may be determinative and as to which it appears there is no controlling precedent." *Id.*, at 274. Respondents also went on to argue, however, that the District Court need neither abstain outright nor certify the question of domicile to the Court of Appeals of Maryland, since "the Maryland common law of domicile is not at issue in this case. No 'clarification' of the Maryland common law of domicile is needed." *Id.*, at 272. The District Court, although concluding that the Maryland law of domicile *is* relevant, declined to either abstain outright or certify the question of domicile to the Court of Appeals of Maryland.

deciding the question itself, the District Court risked invalidating a state policy that a later decision of the Maryland state courts might establish was clearly valid. Furthermore, as the Court emphasizes, "it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." *Ante,* at 663 n. 16.

In summary, I agree with the Court that important and controlling issues of state law should initially be decided by state, not federal, courts. But because I do not believe that resolution of the Maryland law of domicile is necessary to decide the due process question before us, I dissent from today's certification.[8]

[8] While I agree with the Court's conclusion that holders of G–4 visas are not prevented *as a matter of federal law* from establishing Maryland domicile, I find it unnecessary to address the five pages of dicta that accompany that conclusion. I am nonetheless troubled by the Court's unsupported dictum that the United States may not be able to deport, under certain unspecified circumstances, a G–4 alien who terminates his employment with an international treaty organization. *Ante,* at 667.

Syllabus

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES

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

No. 76–1767. Argued January 18, 1978—Decided April 25, 1978

The United States brought this civil antitrust suit against petitioner, the National Society of Professional Engineers, alleging that petitioner's canon of ethics prohibiting its members from submitting competitive bids for engineering services suppressed competition in violation of § 1 of the Sherman Act. Petitioner defended on the ground, *inter alia*, that under the Rule of Reason the canon was justified because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court, granting an injunction against the canon, rejected this justification, holding that the canon on its face violated § 1 of the Sherman Act, thus making it unnecessary to make findings on the likelihood that competition would produce the dire consequences envisaged by petitioner. The Court of Appeals affirmed, although modifying the District Court's injunction in certain respects so that, as modified, it prohibits petitioner from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical. *Held:*

1. On its face, the canon in question restrains trade within the meaning of § 1 of the Sherman Act, and the Rule of Reason, under which the proper inquiry is whether the challenged agreement is one that promotes, or one that suppresses, competition, does not support a defense based on the assumption that competition itself is unreasonable. Pp. 686–696.

(a) The canon amounts to an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer, and, while it is not price fixing as such, it operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. Pp. 692–693.

(b) Petitioner's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its canon, and its attempt to justify, under the Rule of Reason, the restraint on competition imposed by the canon on the basis of the potential threat that competition poses

to the public safety and the ethics of the engineering profession is nothing less than a frontal assault on the basic policy of the Sherman Act. Pp. 693–695.

(c) That engineers are often involved in large-scale projects significantly affecting the public safety does not justify any exception to the Sherman Act. Pp. 695–696.

(d) While ethical norms may serve to regulate and promote competition in professional services and thus fall within the Rule of Reason, petitioner's argument here is a far cry from such a position; and, although competition may not be entirely conducive to ethical behavior, that is not a reason, cognizable under the Sherman Act, for doing away with competition. P. 696.

2. The District Court's injunction, as modified by the Court of Appeals, does not abridge First Amendment rights. Pp. 696–699.

(a) The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade," *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502, and, although the District Court may consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, those protections do not prevent it from remedying the antitrust violations. Pp. 697–698.

(b) The standard against which the injunction must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct, and the injunction meets this standard. P. 698.

(c) If petitioner wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the District Court to modify its injunction. Pp. 698–699.

181 U. S. App. D. C. 41, 555 F. 2d 978, affirmed.

STEVENS, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and POWELL, JJ., joined, and in Parts I and III of which BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 699. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 701. BRENNAN, J., took no part in the consideration or decision of the case.

Lee Loevinger argued the cause for petitioner. With him on the briefs was *Martin Michaelson*.

Howard E. Shapiro argued the cause for the United States.

With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield,* and *Robert B. Nicholson.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.* (1976 ed.), because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association.[1] The Court of Appeals affirmed.[2] We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it. 434 U. S. 815. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

I

Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom about 325,000 are registered as professional engineers. Registration requirements vary from State to State, but usually require the applicant to be a graduate engineer with at least

[1] 389 F. Supp. 1193 (DC 1974).

[2] 181 U. S. App. D. C. 41, 555 F. 2d 978 (1977). When the District Court's original judgment was entered, petitioner was entitled to appeal directly to this Court. We vacated the District Court's judgment for reconsideration in the light of our then recent decision in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773. 422 U. S. 1031. After reconsideration, the District Court re-entered its original judgment, 404 F. Supp. 457 (DC 1975), and petitioner then appealed to the Court of Appeals.

four years of practical experience and to pass a written examination. About half of those who are registered engage in consulting engineering on a fee basis. They perform services in connection with the study, design, and construction of all types of improvements to real property—bridges, office buildings, airports, and factories are examples. Engineering fees, amounting to well over $2 billion each year, constitute about 5% of total construction costs. In any given facility, approximately 50% to 80% of the cost of construction is the direct result of work performed by an engineer concerning the systems and equipment to be incorporated in the structure.

The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some foreign countries. Approximately 12,000 members are consulting engineers who offer their services to governmental, industrial, and private clients. Some Society members are principals or chief executive officers of some of the largest engineering firms in the country.

The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the

engineer for a particular project. Evidence of this agreement is found in § 11 (c) of the Society's Code of Ethics, adopted in July 1964.[3]

The District Court found that the Society's Board of Ethical Review has uniformly interpreted the "ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services." [4] If the client requires that such information be provided, then § 11 (c) imposes an

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[3] That section, which remained in effect at the time of trial, provided: "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . . .

"c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions." App. 9951.

[4] 389 F. Supp., at 1206. In addition to § 11 (c) of the Society's Code of Ethics, see n. 3, *supra,* the Society's Board of Directors has adopted various "Professional Policy" statements. Policy statement 10–F was issued to "make it clear beyond all doubt" that the Society opposed competitive bidding for all engineering projects. 389 F. Supp., at 1206. This policy statement was replaced in 1972 by Policy 10–G which permits price quotations for certain types of engineering work—in particular, research and development projects.

obligation upon the engineering firm to withdraw from consideration for that job. The Society's Code of Ethics thus "prohibits engineers from both soliciting and submitting such price information," 389 F. Supp. 1193, 1206 (DC 1974),[5] and seeks to preserve the profession's "traditional" method of selecting professional engineers. Under the traditional method, the client initially selects an engineer on the basis of background and reputation, not price.[6]

In 1972 the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits of free and open competition. The complaint prayed for an injunction terminating the unlawful agreement.

In its answer the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and

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[5] Although the Society argues that it has never "enforced" its ban on competitive bidding, Reply Brief for Petitioner 15–18, the District Court specifically found that the record "support[s] a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients." 389 F. Supp., at 1200. This finding has not been challenged as clearly erroneous.

[6] Having been selected, the engineer may then, in accordance with the Society's canons of ethics, negotiate a satisfactory fee arrangement with the client. If the negotiations are unsuccessful, then the client may withdraw his selection and approach a new engineer. *Id.*, at 1215.

methods of construction." [7] Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an "unreasonable restraint of interstate trade or commerce."

The parties compiled a voluminous discovery and trial record. The District Court made detailed findings about the

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[7] The entire defense pleaded in the answer reads as follows:

"18. (a) The principles and standards contained in the NSPE Code of Ethics, particularly those contained in that part of the NSPE Code of Ethics set out above, are reasonable, necessary to the public health, safety and welfare insofar as they are affected by the work of professional engineers, and serve the public interest.

"(b) Experience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures. Testing, calculating and designing the most economical and efficient structures and methods of construction is complex, difficult and expensive. It is cheaper and easier to design and specify inefficient and unnecessarily expensive structures and methods of construction. Consequently, if professional engineers are required by competitive pressures to submit bids in order to obtain employment of their services, the inevitable tendency will be to offer professional engineering services at the lowest possible price. Although this may result in some lowering of the cost of professional engineering services it will inevitably result in increasing the overall cost and decreasing the efficiency of those structures and projects which require professional engineering design and specification work.

"(c) Experience has also demonstrated that competitive bidding in most instances and situations results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability, experience, expertise, skill, capability, learning and the like, and that such awards in the case of professional engineers endanger the public health, welfare and safety.

"(d) For the aforesaid reasons, the provisions of the NSPE Code of Ethics set out above are not, in any event, in unreasonable restraint of interstate trade or commerce." App. 21–22.

engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary because the court was convinced that the ethical prohibition against competitive bidding was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act." 389 F. Supp., at 1200.

Although it modified the injunction entered by the District Court,[8] the Court of Appeals affirmed its conclusion that the agreement was unlawful on its face and therefore "illegal without regard to claimed or possible benefits." 181 U. S. App. D. C. 41, 47, 555 F. 2d 978, 984.

II

In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, the Court held that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act. In that opinion the Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. The Court said:

> "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the

[8] The Court of Appeals struck down the portion of the District Court's decree that ordered the Society to state that it did not consider competitive bidding to be unethical. 181 U. S. App. D. C., at 47, 555 F. 2d, at 984. The court reasoned that this provision was "more intrusive than necessary to achieve fulfillment of the governmental interest." *Ibid.* The Government has not petitioned for review of that decision.

> Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U. S., at 788–789, n. 17.

Relying heavily on this footnote, and on some of the major cases applying a Rule of Reason—principally *Mitchel* v. *Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; and *Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36—petitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner.

A. The Rule of Reason.

One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful.[9] But, as Mr. Justice Brandeis perceptively noted, restraint is the very

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[9] Section 1 of the Sherman Act, as set forth in 15 U. S. C. § 1 (1976 ed.), provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

essence of every contract; [10] read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[11] The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

This principle is apparent in even the earliest of cases applying the Rule of Reason, *Mitchel* v. *Reynolds, supra.* *Mitchel* involved the enforceability of a promise by the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable, even though it deprived the

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[10] "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

See also *United States* v. *Topco Associates,* 405 U. S. 596, 606:

"Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it."

[11] See 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman); see generally H. Thorelli, Federal Antitrust Policy 228–229 (1955).

public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.[12]

The Rule of Reason suggested by *Mitchel* v. *Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282–283 (CA6 1898), aff'd, 175 U. S. 211. That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.[13]

The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 573–577. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for

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[12] "4thly, The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as . . . in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer." 1 P. Wms., at 191, 24 Eng. Rep., at 350.

[13] 85 F., at 293. See also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 340–342.

specific industries,[14] but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co.* v. *United States,* 221 U. S., at 65, "restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."

The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.[15] Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.[16]

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[14] Congress has exempted certain industries from the full reach of the Sherman Act. See, *e. g.,* 7 U. S. C. §§ 291–292 (1976 ed.) (Capper-Volstead Act, agricultural cooperatives); 15 U. S. C. §§ 1011–1013 (1976 ed.) (McCarran-Ferguson Act, insurance); 49 U. S. C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U. S. C. § 1801 (1976 ed.) (newspaper joint operating agreements).

[15] "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 221 U. S., at 58.

[16] Throughout the Court's opinion the emphasis is on economic con-

In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by MR. JUSTICE POWELL in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 246 U. S., at 238, quoted in 433 U. S., at 49 n. 15.[17]

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ceptions. For instance, the Court's description of the common-law treatment of engrossing and forestalling statutes noted that contracts which had been illegal on their face were later recognized as reasonable because they tended to promote competition. *Id.*, at 55. As was pointed out in the Report of the Attorney General's National Committee To Study the Antitrust Laws 11 (1955):

"While *Standard Oil* gave the courts discretion in interpreting the word 'every' in Section 1, such discretion is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry, because, for example, of high fixed costs or the risks of 'cut-throat' competition or other similar unusual conditions."

[17] In *Continental T. V., Inc.*, the Court explained the Rule of Reason standard as follows:

"Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." 433 U. S., at 49.

The Court then analyzed the "market impact" of vertical restraints, noting their complexity because of the potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. *Id.*, at 50–51. "Competitive impact" and "economic analysis" were emphasized throughout the opinion.

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.[18]

B. The Ban on Competitive Bidding.

Price is the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States* v. *Container Corp.*, 393 U. S. 333, 337. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize

[18] See generally Attorney General's Report, *supra* n. 16, at 10–11; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L. J. 775 (1965); L. Sullivan, Law of Antitrust 165–197 (1977).

and compare prices in selecting engineering services." 404 F. Supp. 457, 460. On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health.[19] The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the

[19] The Society also points out that competition, in the form of bargaining between the engineer and customer, is allowed under its canon of ethics once an engineer has been initially selected. See n. 6, *supra*. It then contends that its prohibition of competitive bidding regulates only the *timing* of competition, thus making this case analogous to *Chicago Board of Trade*, where the Court upheld an exchange rule which forbade exchange members from making purchases after the close of the day's session at any price other than the closing bid price. Indeed, petitioner has reprinted the Government's brief in that case to demonstrate that the Solicitor General regarded the exchange's rule as a form of price fixing. Reply Brief for Petitioner A1–A28. We find this reliance on *Chicago Board of Trade* misplaced for two reasons. First, petitioner's claim mistakenly treats negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers. Second, even if we were to accept the Society's equation of bargaining with price competition, our concern with *Chicago Board of Trade* is in its formulation of the proper test to be used in judging the legality of an agreement; that formulation unquestionably stresses impact on competition. Whatever one's view of the application of the Rule of Reason in that case, see Sullivan, *supra* n. 18, at 175–182, the Court considered the exchange's regulation of price information as having a positive effect on competition. 246 U. S., at 240–241. The District Court's findings preclude a similar conclusion concerning the effect of the Society's "regulation."

production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.

It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project.[20] Based on these considerations, a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack.

The Sherman Act does not require competitive bidding; [21]

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[20] We, of course, express no view on the truth of this assertion, although it might be noted that the Society has allowed competitive bidding for some types of engineering projects in this country, see n. 4, *supra*, and, at one time, allowed competitive bidding for all engineering work in foreign countries "as required by the laws, regulations or practices of the foreign country." App. 6487. This rule, called the "When-in-Rome" clause, was abolished in 1968. *Id.*, at 6344.

[21] Indeed, Congress has decided not to require competitive bidding for Government purchases of engineering services. The Brooks Act, 40 U. S. C. §§ 541–544 (1970 ed., Supp. V), requires the Government to use a method of selecting engineers similar to the Society's "traditional method." See n. 6, *supra*. The Society relies heavily on the Brooks Act as evidence that its ban on competitive bidding is reasonable. The argument is without merit. The Brooks Act does not even purport to exempt engineering services from the antitrust laws, and the reasonableness of an

it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot

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individual purchaser's decision not to seek lower prices through competition does not authorize the vendors to conspire to impose that same decision on all other purchasers.

indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

By the same token, the cautionary footnote in *Goldfarb,* 421 U. S., at 788–789, n. 17, quoted *supra,* cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[22] But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston,* 85 F., at 284, and which this Court has firmly avoided ever since.

III

The judgment entered by the District Court, as modified by

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[22] Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. See, *e. g., Tripoli Co.* v. *Wella Corp.,* 425 F. 2d 932 (CA3 1970) (en banc); cf. *Continental T. V.,* 433 U. S., at 55 n. 23.

the Court of Appeals,[23] prohibits the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.[24] Petitioner argues that this judgment abridges its First Amendment rights.[25] We find no merit in this contention.

Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. See, *e. g., International Salt Co.* v. *United States,* 332 U. S. 392, 400–401; *United States* v. *Glaxo Group, Ltd.,* 410 U. S. 52, 64. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.[26] The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 502. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally

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[23] See n. 8, *supra.*

[24] See App. 9974–9980.

[25] Petitioner contends the judgment is both an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association.

[26] Thus, in *Goldfarb,* although the bar association believed that its fee schedule accurately reflected ethical price levels, it was nonetheless enjoined "from adopting, publishing, or distributing any future schedules of minimum or suggested fees." *Goldfarb* v. *Virginia State Bar,* 355 F. Supp. 491, 495–496 (ED Va. 1973). See also *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485.

protected, but those protections do not prevent it from remedying the antitrust violations.

The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. We agree with the Court of Appeals that the injunction, as modified, meets this standard. While it goes beyond a simple proscription against the precise conduct previously pursued, that is entirely appropriate.

> "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co., supra,* at 400.

The Society apparently fears that the District Court's injunction, if broadly read, will block legitimate paths of expression on all ethical matters relating to bidding.[27] But the answer to these fears is, as the Court held in *International Salt,* that the burden is upon the proved transgressor "to bring any proper claims for relief to the court's attention." *Ibid.* In

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[27] For instance, the Society argues that the injunction can be read as prohibiting it from opposing repeal of statutes such as the Brooks Act, see n. 21, *supra,* and that such a prohibition would violate the principles of the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127; *Mine Workers* v. *Pennington,* 381 U. S. 657. By its terms the injunction contains no such prohibition, and indeed the Government contends that "[n]othing in the judgment prevents NSPE and its members from attempting to influence governmental action . . . ." Brief for United States 60.

this case, the Court of Appeals specifically stated that "[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree." 181 U. S. App. D. C., at 46, 555 F. 2d, at 983. This is, we believe, a proper approach, adequately protecting the Society's interests. We therefore reject petitioner's attack on the District Court's order.

The judgment of the Court of Appeals is

Affirmed.

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

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante,* at 696, and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 788–789, n. 17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49–50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral

Arg. 47–48, § 11 (c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11 (c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. Then, too, the Society's rule is overbroad in the aspect noted by Judge Leventhal, when it prevents any dissemination of competitive price information in regard to real property improvements prior to the engagement of a single engineer regardless of "the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information." 181 U. S. App. D. C. 41, 45, 555 F. 2d 978, 982 (1977).

My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last as does the majority,* arises from the fact that there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of

*This Court has not always applied the Rule of Reason with such rigor even to commercial businesses. See *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933); *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918); L. Sullivan, Law of Antitrust 175–182 (1977); R. Bork, The Antitrust Paradox 41–47, 56 (1978). I intimate no view as to the correctness of those decisions.

entrants. A bar association's regulation of the permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation, see *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), may also have the effect of reducing price competition. In acknowledging that "professional services may differ significantly from other business services" and that the "nature of the competition in such services may vary," *ante,* at 696, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I concur in the Court's judgment to the extent it sustains the finding of a violation of the Sherman Act but dissent from that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical. The First Amendment guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action.

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER ET AL. *v.* MANHART ET AL.

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

No. 76–1810. Argued January 18, 1978—Decided April 25, 1978

This suit was filed as a class action on behalf of present or former female employees of petitioner Los Angeles Department of Water and Power, alleging that the Department's requirement that female employees make larger contributions to its pension fund than male employees violated § 703 (a) (1) of Title VII of the Civil Rights Act of 1964, which, *inter alia,* makes it unlawful for an employer to discriminate against any individual because of such individual's sex. The Department's pension plan was based on mortality tables and its own experience showing that female employees had greater longevity than male employees and that the cost of a pension for the average female retiree was greater than for the average male retiree because more monthly payments had to be made to the female. The District Court held that the contribution differential violated § 703 (a) (1), and ordered a refund of all excess contributions antedating an amendment to the Department's pension plan, made while this suit was pending, that eliminated sexual distinctions in the plan's contributions and benefits. The Court of Appeals affirmed. *Held:*

1. The challenged differential in the Department's former pension plan violated § 703 (a) (1). Pp. 707–718.

(a) The differential was discriminatory in its "treatment of a person in a manner which but for that person's sex would be different." The statute, which focuses on fairness to individuals rather than fairness to classes, precludes treating individuals as simply components of a group such as the sexual class here. Even though it is true that women as a class outlive men, that generalization cannot justify disqualifying an individual to whom it does not apply. There is no reason, moreover, to believe that Congress intended a special definition of discrimination in the context of employee group insurance, since in that context it is common and not considered unfair to treat different classes of risks as though they were the same. Pp. 707–711.

(b) Though the Department contends that the different contributions exacted from men and women were based on the factor of longevity rather than sex and thus constituted a statutory exemption authorized for a "differential based on any other factor other than sex," there is no

evidence that any factor other than the employee's sex accounted for the differential here. Pp. 711–713.

(c) This case is readily distinguishable from *General Electric Co.* v. *Gilbert,* 429 U. S. 125, for here the pension plan discriminates on the basis of sex, whereas the plan in *Gilbert* discriminated on the basis of a special physical disability. Pp. 714–717.

2. It was inappropriate for the District Court to allow a retroactive monetary recovery in this case. Pp. 718–723.

(a) Though a presumption favors retroactive relief where a Title VII violation has been committed, *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, the appropriateness of such relief in an individual case must be assessed. Here the District Court gave insufficient attention to the equitable nature of Title VII remedies. This was the first litigation challenging pension fund contribution differences based on valid actuarial tables, which the fund administrators may well have assumed justified the differential, and the resulting prohibition against sex-differentiated employee contributions constituted a marked departure from past practice. Pp. 719–721.

(b) In view of the grave consequences that drastic changes in legal rules can have on pension funds, such rules should not be given retroactive effect unless plainly commanded by legislative action. Pp. 721–723.

553 F. 2d 581, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which STEWART, WHITE, and POWELL, JJ., joined, in all but Part IV of which MARSHALL, J., joined, and in Part IV of which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 723. BURGER, C. J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post,* p. 725. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post,* p. 728. BRENNAN, J., took no part in the consideration or decision of the case.

David J. Oliphant argued the cause for petitioners. With him on the briefs were *Burt Pines* and *J. David Hanson.*

Robert M. Dohrmann argued the cause for respondents. With him on the brief were *Kenneth M. Schwartz, Laurence D. Steinsapir, Howard M. Knee,* and *Katherine Stoll Burns.**

*Briefs of *amici curiae* urging reversal were filed by *James A. Redden,* Attorney General, *Al J. Laue,* Solicitor General, and *William F. Hoelscher,*

MR. JUSTICE STEVENS delivered the opinion of the Court.

As a class, women live longer than men. For this reason, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. We granted certiorari to decide whether this practice discriminated against individual female employees because of their sex in violation of § 703 (a)(1) of the Civil Rights Act of 1964, as amended.[1]

For many years the Department[2] has administered retire-

Assistant Attorney General, for the State of Oregon; and by *Harry L. Du Brin, Jr.*, for the New York State Teachers' Retirement System.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Thomas S. Martin, Brian K. Landsberg, Cynthia L. Attwood, Abner W. Sibal, Joseph T. Eddins, Beatrice Rosenberg,* and *Mary-Helen Mautner* for the United States et al.; by *Ruth Bader Ginsburg, Marjorie Mazen Smith,* and *Matthew W. Finkin* for the American Civil Liberties Union et al.; by *Michael Evan Gold* and *Fred Okrand* for the ACLU Foundation of Southern California; by *Jonathan R. Harkavy* for the American Nurses' Assn.; by *Marguerite Rawalt* and *Margaret Young* for the Association for Women in Mathematics et al.; and by *John A. Fillion, Stephen P. Berzon, Fred H. Altshuler, J. Albert Woll,* and *Laurence Gold* for the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America et al.

Briefs of *amici curiae* were filed by *W. Bernard Richland* and *L. Kevin Sheridan* for the city of New York; by *Edward Silver, Larry M. Lavinsky, Stephen E. Tisman,* and *William B. Harman, Jr.*, for the American Council of Life Insurance; by *Lawrence J. Latto* for the Society of Actuaries et al.; and by *William R. Glendon, James B. Weidner,* and *James W. Paul* for the Teachers Insurance and Annuity Association of America et al.

[1] The section provides:

"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 . . . ." 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(1).

[2] In addition to the Department itself, the petitioners include members

ment, disability, and death-benefit programs for its employees. Upon retirement each employee is eligible for a monthly retirement benefit computed as a fraction of his or her salary multiplied by years of service.[3] The monthly benefits for men and women of the same age, seniority, and salary are equal. Benefits are funded entirely by contributions from the employees and the Department, augmented by the income earned on those contributions. No private insurance company is involved in the administration or payment of benefits.

Based on a study of mortality tables and its own experience, the Department determined that its 2,000 female employees, on the average, will live a few years longer than its 10,000 male employees. The cost of a pension for the average retired female is greater than for the average male retiree because more monthly payments must be made to the average woman. The Department therefore required female employees to make monthly contributions to the fund which were 14.84% higher than the contributions required of comparable male employees.[4] Because employee contributions were withheld from paychecks, a female employee took home less pay than a male employee earning the same salary.[5]

Since the effective date of the Equal Employment Opportu-

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of the Board of Commissioners of the Department and members of the plan's Board of Administration.

[3] The plan itself is not in the record. In its brief the Department states that the plan provides for several kinds of pension benefits at the employee's option, and that the most common is a formula pension equal to 2% of the average monthly salary paid during the last year of employment times the number of years of employment. The benefit is guaranteed for life.

[4] The Department contributes an amount equal to 110% of all employee contributions.

[5] The significance of the disparity is illustrated by the record of one woman whose contributions to the fund (including interest on the amount withheld each month) amounted to $18,171.40; a similarly situated male would have contributed only $12,843.53.

nity Act of 1972,[6] the Department has been an employer within the meaning of Title VII of the Civil Rights Act of 1964. See 42 U. S. C. § 2000e (1970 ed., Supp. V). In 1973, respondents [7] brought this suit in the United States District Court for the Central District of California on behalf of a class of women employed or formerly employed by the Department. They prayed for an injunction and restitution of excess contributions.

While this action was pending, the California Legislature enacted a law prohibiting certain municipal agencies from requiring female employees to make higher pension fund contributions than males.[8] The Department therefore amended its plan, effective January 1, 1975. The current plan draws no distinction, either in contributions or in benefits, on the basis of sex. On a motion for summary judgment, the District Court held that the contribution differential violated § 703 (a)(1) and ordered a refund of all excess contributions made before the amendment of the plan.[9] The United States Court of Appeals for the Ninth Circuit affirmed.[10]

The Department and various *amici curiae* contend that: (1) the differential in take-home pay between men and women was not discrimination within the meaning of § 703 (a)(1) because it was offset by a difference in the value of the pension benefits provided to the two classes of employees; (2) the differential was based on a factor "other than sex"

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[6] 86 Stat. 103 (effective Mar. 24, 1972).

[7] In addition to five individual plaintiffs, respondents include the individuals' union, the International Brotherhood of Electrical Workers, Local Union No. 18.

[8] See Cal. Govt. Code Ann. § 7500 (West Supp. 1978).

[9] The court had earlier granted a preliminary injunction. 387 F. Supp. 980 (1975).

[10] 553 F. 2d 581 (1976). Two weeks after the Ninth Circuit decision, this Court decided *General Electric Co.* v. *Gilbert,* 429 U. S. 125. In response to a petition for rehearing, a majority of the Ninth Circuit panel concluded that its original decision did not conflict with *Gilbert.* 553 F. 2d, at 592 (1977). Judge Kilkenny dissented. *Id.,* at 594.

within the meaning of the Equal Pay Act of 1963 and was therefore protected by the so-called Bennett Amendment; [11] (3) the rationale of *General Electric Co.* v. *Gilbert,* 429 U. S. 125, requires reversal; and (4) in any event, the retroactive monetary recovery is unjustified. We consider these contentions in turn.

I

There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man.[12] Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females.[13] Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two

[11] See nn. 22 and 23, *infra.*

[12] See Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1174 (1971).

[13] "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a) (1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194, 1198 (CA7 1971).

classes are in fact different. It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer that the language and purpose of the statute command.

The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2 (a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire.

It is true, of course, that while contributions are being collected from the employees, the Department cannot know which individuals will predecease the average woman. Therefore, unless women as a class are assessed an extra charge, they will be subsidized, to some extent, by the class of male

employees.[14] It follows, according to the Department, that fairness to its class of male employees justifies the extra assessment against all of its female employees.

But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex.[15] But a statute that was designed to make race irrelevant in the employment market, see *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 436, could not reasonably be construed to permit a take-home-pay differential based on a racial classification.[16]

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate differences between the sexes; but a significant part of the longevity

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[14] The size of the subsidy involved in this case is open to doubt, because the Department's plan provides for survivors' benefits. Since female spouses of male employees are likely to have greater life expectancies than the male spouses of female employees, whatever benefits men lose in "primary" coverage for themselves, they may regain in "secondary" coverage for their wives.

[15] For example, the life expectancy of a white baby in 1973 was 72.2 years; a nonwhite baby could expect to live 65.9 years, a difference of 6.3 years. See Public Health Service, IIA Vital Statistics of the United States, 1973, Table 5–3.

[16] Fortifying this conclusion is the fact that some States have banned higher life insurance rates for blacks since the 19th century. See generally M. James, The Metropolitan Life—A Study in Business Growth 338–339 (1947).

differential may be explained by the social fact that men are heavier smokers than women.[17]

Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. Indeed, the fact that this case involves a group insurance program highlights a basic flaw in the Department's fairness argument. For when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; [18] persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; [19] but nothing more than habit makes one "subsidy" seem less fair than the other.[20]

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[17] See R. Retherford, The Changing Sex Differential in Mortality 71–82 (1975). Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential.

[18] A study of life expectancy in the United States for 1949–1951 showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced. If married, they could expect to reach 70.9 years of age, a difference of more than 10 years. *Id.*, at 93.

[19] The record indicates, however, that the Department has funded its death-benefit plan by equal contributions from male and female employees. A death benefit—unlike a pension benefit—has less value for persons with longer life expectancies. Under the Department's concept of fairness, then, this neutral funding of death benefits is unfair to women as a class.

[20] A variation on the Department's fairness theme is the suggestion that

An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different." [21] It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification.

II

Shortly before the enactment of Title VII in 1964, Senator Bennett proposed an amendment providing that a compensation differential based on sex would not be unlawful if it was authorized by the Equal Pay Act, which had been passed a year earlier.[22] The Equal Pay Act requires employers to pay

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a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits are ultimately determined by his *actual life span;* any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act, 29 U. S. C § 206 (d); cf. n 24, *infra.* Even under Title VII itself—assuming disparate-impact analysis applies to fringe benefits, cf. *Nashville Gas Co.* v. *Satty,* 434 U. S. 136, 144–145—the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

[21] Developments in the Law, *supra* n. 12, at 1170; see also *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d, at 1205 (Stevens, J., dissenting).

[22] The Bennett Amendment became part of § 703 (h), which provides in part:

"It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section

members of both sexes the same wages for equivalent work, except when the differential is pursuant to one of four specified exceptions.[23] The Department contends that the fourth exception applies here. That exception authorizes a "differential based on any other factor other than sex."

The Department argues that the different contributions exacted from men and women were based on the factor of longevity rather than sex. It is plain, however, that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contributions by men and women. We agree with Judge Duniway's observation that one cannot "say that an

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6 (d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. § 206 (d))." 78 Stat. 257, 42 U. S. C. § 2000e–2 (h).

[23] The Equal Pay Act provides, in part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 77 Stat. 56, 29 U. S. C. § 206 (d).

We need not decide whether retirement benefits or contributions to benefit plans are "wages" under the Act, because the Bennett Amendment extends the Act's four exceptions to all forms of "compensation" covered by Title VII. See n. 22, *supra.* The Department's pension benefits, and the contributions that maintain them, are "compensation" under Title VII. Cf. *Peters* v. *Missouri-Pacific R. Co.,* 483 F. 2d 490, 492 n. 3 (CA5 1973), cert. denied, 414 U. S. 1002.

actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on." 553 F. 2d 581, 588 (1976).[24]

We are also unpersuaded by the Department's reliance on a colloquy between Senator Randolph and Senator Humphrey during the debate on the Civil Rights Act of 1964. Commenting on the Bennett Amendment, Senator Humphrey expressed his understanding that it would allow many differences in the treatment of men and women under industrial benefit plans, including earlier retirement options for women.[25]

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[24] The Department's argument is specious because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees. In contrast, an entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pensioners, because of the difference in their average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize.

[25] "MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.

"I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

"Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

"MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it." 110 Cong. Rec. 13663–13664 (1964).

Though he did not address differences in employee contributions based on sex, Senator Humphrey apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans. His statement cannot, however, fairly be made the sole guide to interpreting the Equal Pay Act, which had been adopted a year earlier; and it is the 1963 statute, with its exceptions, on which the Department ultimately relies. We conclude that Senator Humphrey's isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself.[26]

III

The Department argues that reversal is required by *General Electric Co.* v. *Gilbert,* 429 U. S. 125. We are satisfied,

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[26] The administrative constructions of this provision look in two directions. The Wage and Hour Administrator, who is charged with enforcing the Equal Pay Act, has never expressly approved different *employee* contribution rates, but he has said that either equal employer contributions or equal benefits will satisfy the Act. 29 CFR § 800.116 (d) (1977). At the same time, he has stated that a wage differential based on differences in the average costs of employing men and women is not based on a " 'factor other than sex.' " 29 CFR § 800.151 (1977). The Administrator's reasons for the second ruling are illuminating:

"To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility." *Ibid.*

To the extent that they conflict, we find that the reasoning of § 800.151 has more "power to persuade" than the *ipse dixit* of § 800.116. Cf. *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140.

however, that neither the holding nor the reasoning of *Gilbert* is controlling.

In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig* v. *Aiello,* 417 U. S. 484, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such." [27] The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. " 'While the first group is exclusively female, the second includes members of both sexes.' " 429 U. S., at 135. In contrast, each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.

In *Gilbert* the Court did note that the plan as actually administered had provided more favorable benefits to women as a class than to men as a class.[28] This evidence supported the conclusion that not only had plaintiffs failed to establish a prima facie case by proving that the plan was discriminatory

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[27] Quoting from the *Geduldig* opinion, the Court stated:

" '[T]his case is thus a far cry from cases like *Reed* v. *Reed,* 404 U. S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.' " 429 U. S., at 134.

After further quotation, the Court added:

"The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex." *Id.,* at 135.

[28] See *id.,* at 130–131, n. 9.

on its face, but they had also failed to prove any discriminatory effect.[29]

In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department.[30]

In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost-justification defense comparable to the affirmative defense available in a price dis-

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[29] As the Court recently noted in *Nashville Gas Co.* v. *Satty,* 434 U. S., at 144, the *Gilbert* holding "did not depend on this evidence." Rather, the holding rested on the plaintiff's failure to prove either facial discrimination or discriminatory effect.

[30] Some *amici* suggest that the Department's discrimination is justified by business necessity. They argue that, if no gender distinction is drawn, many male employees will withdraw from the plan, or even the Department, because they can get a better pension plan in the private market. But the Department has long required equal contributions to its death-benefit plan, see n. 19, *supra,* and since 1975 it has required equal contributions to its pension plan. Yet the Department points to no "adverse selection" by the affected employees, presumably because an employee who wants to leave the plan must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market. In short, there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan.

crimination suit.[31] But neither Congress nor the courts have recognized such a defense under Title VII.[32]

Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could com-

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[31] See 15 U. S. C. § 13 (a) (1976 ed.). Under the Robinson-Patman Act, proof of cost differences justifies otherwise illegal price discrimination; it does not negate the existence of the discrimination itself. See *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44–45. So here, even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.

[32] Defenses under Title VII and the Equal Pay Act are considerably narrower. See, *e. g.*, n. 30, *supra*. A broad cost-differential defense was proposed and rejected when the Equal Pay Act became law. Representative Findley offered an amendment to the Equal Pay Act that would have expressly authorized a wage differential tied to the "ascertainable and specific added cost resulting from employment of the opposite sex." 109 Cong. Rec. 9217 (1963). He pointed out that the employment of women might be more costly because of such matters as higher turnover and state laws restricting women's hours. *Id.*, at 9205. The Equal Pay Act's supporters responded that any cost differences could be handled by focusing on the factors other than sex which actually caused the differences, such as absenteeism or number of hours worked. The amendment was rejected as largely redundant for that reason. *Id.*, at 9217.

The Senate Report, on the other hand, does seem to assume that the statute may recognize a very limited cost defense, based on "all of the elements of the employment costs of both men and women." S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963). It is difficult to find language in the statute supporting even this limited defense; in any event, no defense based on the *total* cost of employing men and women was attempted in this case.

mand in the open market.[33] Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.[34] Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief.

IV

The Department challenges the District Court's award of retroactive relief to the entire class of female employees and retirees. Title VII does not require a district court to grant any retroactive relief. A court that finds unlawful discrimination "may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. V).

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[33] Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties. We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to "any agent" of a covered employer, 42 U. S. C. § 2000e (b) (1970 ed., Supp. V), and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U. S. C. § 203 (d). In this case, for example, the Department could not deny that the administrative board was its agent after it successfully argued that the two were so inseparable that both shared the city's immunity from suit under 42 U. S. C. § 1983.

[34] Title VII bans discrimination against an "individual" because of "such individual's" sex. 42 U. S. C. § 2000e–2 (a)(1). The Equal Pay Act prohibits discrimination "within any establishment," and discrimination is defined as "paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex" for equal work. 29 U. S. C. § 206 (d)(1). Neither of these provisions makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering the composition of the entire force.

To the point of redundancy, the statute stresses that retroactive relief "may" be awarded if it is "appropriate."

In *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, the Court reviewed the scope of a district court's discretion to fashion appropriate remedies for a Title VII violation and concluded that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.,* at 421. Applying that standard, the Court ruled that an award of backpay should not be conditioned on a showing of bad faith. *Id.,* at 422–423. But the *Albemarle* Court also held that backpay was not to be awarded automatically in every case.[35]

The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate. For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies.[36] Although we now have no doubt about

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[35] Specifically, the Court held that a defendant prejudiced by his reliance on a plaintiff's initial waiver of any backpay claims could be absolved of backpay liability by a district court. 422 U. S., at 424. The Court reserved the question whether reliance of a different kind—on state "protective" laws requiring sex differentiation—would also save a defendant from liability. *Id.,* at 423 n. 18.

[36] According to the District Court, the defendant's liability for contributions did not begin until April 5, 1972, the day the Equal Employment Opportunity Commission issued an interpretation casting doubt on some varieties of pension fund discrimination. See 37 Fed. Reg. 6835–6837. Even assuming that the EEOC's decision should have put the defendants on notice that they were acting illegally, the date chosen by the District Court was too early. The court should have taken into account the difficulty of amending a major pension plan, a task that cannot be accomplished overnight. Moreover, it should not have given conclusive weight to the EEOC guideline. See *General Electric Co.* v. *Gilbert,* 429 U. S., at 141. The Wage and Hour Administrator, whose rulings also provide a

the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views.[37] The Department's failure to act more swiftly is a sign, not of its recalcitrance, but of the problem's complexity. As commentators have noted, pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their "actuarial share" of the pension burden.[38] There is no

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defense in sex discrimination cases, 29 U. S. C. § 259, refused to follow the EEOC. See n. 37, *infra*.

Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

[37] As noted earlier, n. 26, *supra*, the position of the Wage and Hour Administrator has been somewhat confusing. His general rule rejected differences in average cost as a defense, but his more specific rule lent some support to the Department's view by simply requiring an employer to equalize either his contributions or employee benefits. Compare 29 CFR § 800.151 (1977) with § 800.116 (d). The EEOC requires equal benefits. See 29 CFR §§ 1604.9 (e) and (f) (1977). Two other agencies with responsibility for equal opportunity in employment adhere to the Wage and Hour Administrator's position. See 41 CFR § 60.20.3 (c) (1977) (Office of Federal Contract Compliance); 45 CFR § 86.56 (b)(2) (1976) (Dept. of Health, Education, and Welfare). See also 40 Fed. Reg. 24135 (1975) (HEW).

[38] "If an employer establishes a pension plan, the charges of discrimination will be reversed: if he chooses a money purchase formula, women can complain that they receive less per month. While the employer and the

reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.

Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing—more than $400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost $50 billion a year.[39] These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.[40] The EEOC

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insurance company are quick to point out that women as a group actually receive more when equal contributions are made—because of the long-term effect of compound interest—women employees still complain of discrimination. If the employer chooses the defined benefit formula, his male employees can allege discrimination because he contributes more for women as a group than for men as a group. The employer is in a dilemma: he is damned in the discrimination context no matter what he does." Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B. U. L. Rev. 624, 633–634 (1973) (footnotes omitted).

[39] American Council of Life Insurance, Pension Facts 1977, pp. 20–23.

[40] In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. The bill

itself has recognized that the administrators of retirement plans must be given time to adjust gradually to Title VII's demands.[41] Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field. See *Rosen* v. *Public Serv. Elec. & Gas Co.*, 328 F. Supp. 454, 466–468 (NJ 1971).

There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. Retroactive liability could be devastating for a pension fund.[42] The

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paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted. See, *e. g.*, in 1970 ed., Supp. V of 29 U. S. C., § 1061 (a) (Sept. 2, 1974); § 1031 (b)(1) (Jan. 1, 1975); § 1086 (b) (Dec. 31, 1975); § 1114 (c)(4) (June 30, 1977); § 1381 (c)(1) (Jan. 1, 1978); § 1061 (c) (Dec. 31, 1980); § 1114 (c) (June 30, 1984).

[41] In February 1968, the EEOC issued guidelines disapproving differences in male and female retirement ages. In September of the same year, EEOC's general counsel gave an opinion that retirement plans could set gradual schedules for complying with the guidelines and that the judgment of the parties about how speedily to comply "would carry considerable weight." See *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1045 (CA4 1976).

[42] The plaintiffs assert that the award in this case would not be crippling to these defendants, because it is limited to contributions between 1972 and 1975. But we cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Id.*, at 417. Employers are not liable for improper contributions made more than two years before a charge was filed with the EEOC. 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. V). But it is not unusual for cases to remain within the EEOC for years after a charge is filed, see, *e. g.*, *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355 (3 years, 2 months), and that delay is but a prelude to the time inevitably consumed in civil litigation.

harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund,[43] the administrators of the fund will be forced to meet unchanged obligations with diminished assets.[44] If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

Without qualifying the force of the *Albemarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case. Accordingly, although we agree with the Court of Appeals' analysis of the statute, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

MR. JUSTICE STEWART wrote the opinion for the Court in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), and joined the Court's opinion in *General Electric Co.* v. *Gilbert,* 429 U. S. 125

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[43] The Court of Appeals plainly expected the plan to pay the award, for it noted that imposing retroactive liability "might leave the plan somewhat under-funded." 553 F. 2d, at 592. After making this observation, the Court of Appeals suggested a series of possible solutions to the problem—the benefits of all retired workers could be lowered, the burden on current employees could be increased, or the Department could decide to contribute enough to offset the plan's unexpected loss. *Ibid.*

[44] Two commentators urging the illegality of gender-based pension plans noted the danger of "staggering damage awards," and they proposed as one cure the exercise of judicial "discretion [to] refuse a back-pay award because of the hardship it would work on an employer who had acted in good faith . . . ." Bernstein & Williams, Title VII and the Problem of Sex Classifications in Pension Programs, 74 Colum. L. Rev. 1203, 1226, 1227 (1974).

(1976). MR. JUSTICE WHITE and MR. JUSTICE POWELL joined both *Geduldig* and *General Electric*. MR. JUSTICE STEVENS, who writes the opinion for the Court in the present case, dissented in *General Electric*. 429 U. S., at 160. MR. JUSTICE MARSHALL, who joins the Court's opinion in large part here, joined the dissent in both *Geduldig* and *General Electric*. 417 U. S., at 497; 429 U. S., at 146. My own discomfort with the latter case was apparent, I believe, from my separate concurrence there. *Ibid.*

These "lineups" surely are not without significance. The participation of my Brothers STEWART, WHITE, and POWELL in today's majority opinion *should* be a sign that the decision in this case is not in tension with *Geduldig* and *General Electric* and, indeed, is wholly consistent with them. I am not at all sure that this is so; the votes of MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS would indicate quite the contrary.

Given the decisions in *Geduldig* and *General Electric*—the one constitutional, the other statutory—the present case just cannot be an easy one for the Court. I might have thought that those decisions would have required the Court to conclude that the critical difference in the Department's pension payments was based on life expectancy, a nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis. I might have thought, too, that there is nothing arbitrary, irrational, or "discriminatory" about recognizing the objective and accepted (see *ante,* at 704, 707, and 722) disparity in female-male life expectancies in computing rates for retirement plans. Moreover, it is unrealistic to attempt to force, as the Court does, an individualized analysis upon what is basically an insurance context. Unlike the possibility, for example, of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die.

The Court's rationale, of course, is that Congress, by Title VII of the Civil Rights Act of 1964, as amended, intended to

eliminate, with certain exceptions, "race, color, religion, sex, or national origin," 42 U. S. C. § 2000e–2 (a)(1), as factors upon which employers may act. A program such as the one challenged here does exacerbate gender consciousness. But the program under consideration in *General Electric* did exactly the same thing and yet was upheld against challenge.

The Court's distinction between the present case and *General Electric*—that the permitted classes there were "pregnant women and nonpregnant persons," both female and male, *ante,* at 715—seems to me to be just too easy.* It is probably the only distinction that can be drawn. For me, it does not serve to distinguish the case on any principled basis. I therefore must conclude that today's decision cuts back on *General Electric,* and inferentially on *Geduldig,* the reasoning of which was adopted there, 429 U. S., at 133–136, and, indeed, makes the recognition of those cases as continuing precedent somewhat questionable. I do not say that this is necessarily bad. If that is what Congress has chosen to do by Title VII—as the Court today with such assurance asserts—so be it. I feel, however, that we should meet the posture of the earlier cases head on and not by thin rationalization that seeks to distinguish but fails in its quest.

I therefore join only Part IV of the Court's opinion, and concur in its judgment.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I join Part IV of the Court's opinion; as to Parts I, II, and III, I dissent.

Gender-based actuarial tables have been in use since at least

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*It is of interest that MR. JUSTICE STEVENS, in his dissent in *General Electric,* strongly protested the very distinction he now must make for the Court.

"It is not accurate to describe the program as dividing ' "potential recipients into two groups—pregnant women and nonpregnant persons." ' . . . The classification is between persons who face a risk of pregnancy and those who do not." 429 U. S., at 161–162, n. 5.

1843,[1] and their statistical validity has been repeatedly verified.[2] The vast life insurance, annuity, and pension plan industry is based on these tables. As the Court recognizes, *ante,* at 707, it is a fact that "women, as a class, do live longer than men." It is equally true that employers cannot know in advance when individual members of the classes will die. *Ante,* at 708. Yet, if they are to operate economically workable group pension programs, it is only rational to permit them to rely on statistically sound and proved disparities in longevity between men and women. Indeed, it seems to me irrational to assume Congress intended to outlaw use of the fact that, for whatever reasons or combination of reasons, women as a class outlive men.

The Court's conclusion that the language of the civil rights statute is clear, admitting of no advertence to the legislative history, such as there was, is not soundly based. An effect upon pension plans so revolutionary and discriminatory—this time favorable to women at the expense of men—should not be read into the statute without either a clear statement of that intent in the statute, or some reliable indication in the legislative history that this was Congress' purpose. The Court's casual dismissal of Senator Humphrey's apparent assumption that the "Act would have little, if any, impact on existing pension plans," *ante,* at 714, is to dismiss a significant manifestation of what impact on industrial benefit plans was contemplated. It is reasonably clear there was no intention to abrogate an employer's right, in this narrow and limited context, to treat women differently from men in the face of historical reliance on mortality experience statistics. Cf. *ante,* at 713 n. 25.

The reality of differences in human mortality is what mortality experience tables reflect. The difference is the added

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[1] See H. Moir, Sources and Characteristics of the Principal Mortality Tables 10, 14 (1919).

[2] See, *e. g.,* United Nations, 1970 Demographic Yearbook 710–729 (1971).

longevity of women. All the reasons why women statistically outlive men are not clear. But categorizing people on the basis of sex, the one acknowledged immutable difference between men and women, is to take into account all of the unknown reasons, whether biologically or culturally based, or both, which give women a significantly greater life expectancy than men. It is therefore true as the Court says, "that any individual's life expectancy is based on a number of factors, of which sex is only one." *Ante,* at 712. But it is not true that by seizing upon the only constant, "measurable" factor, no others were taken into account. All other factors, whether known but variable—or unknown—are the elements which automatically account for the actuarial disparity. And all are accounted for when the constant factor is used as a basis for determining the costs and benefits of a group pension plan.

Here, of course, petitioners are discriminating in take-home pay between men and women. Cf. *General Electric Co.* v. *Gilbert,* 429 U. S. 125 (1976); *Nashville Gas Co.* v. *Satty,* 434 U. S. 136 (1977). The practice of petitioners, however, falls squarely under the exemption provided by the Equal Pay Act of 1963, 29 U. S. C. § 206 (d), incorporated into Title VII by the so-called Bennett Amendment, 78 Stat. 257, now 42 U. S. C. § 2000e–2 (h). That exemption tells us that an employer may not discriminate between employees on the basis of sex by paying one sex lesser compensation than the other "except where such payment is made pursuant to . . . a differential based on any other factor other than sex . . . ." The "other factor other than sex" is longevity; sex is the umbrella-constant under which all of the elements leading to differences in longevity are grouped and assimilated, and the only objective feature upon which an employer—or anyone else, including insurance companies—may reliably base a cost differential for the "risk" being insured.

This is in no sense a failure to treat women as "individuals" in violation of the statute, as the Court holds. It is to treat

them as individually as it is possible to do in the face of the unknowable length of each individual life. Individually, every woman has the same statistical possibility of outliving men. This is the essence of basing decisions on reliable statistics when individual determinations are infeasible or, as here, impossible.

Of course, women cannot be disqualified from, for example, heavy labor just because the generality of women are thought not as strong as men—a proposition which perhaps may sometime be statistically demonstrable, but will remain individually refutable. When, however, it is impossible to tailor a program such as a pension plan to the individual, nothing should prevent application of reliable statistical facts to the individual, for whom the facts cannot be disproved until long after planning, funding, and operating the program have been undertaken.

I find it anomalous, if not contradictory, that the Court's opinion tells us, in effect, *ante,* at 717–718, and n. 33, that the holding is not really a barrier to responding to the complaints of men employees, as a group. The Court states that employers may give their employees precisely the same dollar amount and require them to secure their own annuities directly from an insurer, who, of course, is under no compulsion to ignore 135 years of accumulated, recorded longevity experience.[3]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree that Title VII of the Civil Rights Act of 1964, as amended, forbids petitioners' practice of requiring female employees to make larger contributions to a pension fund than

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[3] This case, of course, has nothing to do with discrimination because of race, color, religion, or national origin, cf. *ante,* at 709, and nn. 15 and 16. The qualification the Bennett Amendment permitted by its incorporation of the Equal Pay Act pertained only to claims of discrimination because of sex.

do male employees. I therefore join all of the Court's opinion except Part IV.

I also agree with the Court's statement in Part IV that, once a Title VII violation is found, *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975), establishes a "presumption in favor of retroactive liability" and that this presumption "can seldom be overcome." *Ante,* at 719. But I do not agree that the presumption should be deemed overcome in this case, especially since the relief was granted by the District Court in the exercise of its discretion and was upheld by the Court of Appeals. I would affirm the decision below and therefore cannot join Part IV of the Court's opinion or the Court's judgment.

In *Albemarle Paper Co.* v. *Moody, supra,* this Court made clear that, subject to the presumption in favor of retroactive relief, the District Court retains its "traditional" equitable discretion "to locate 'a just result,' " with appellate review limited to determining "whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its . . . discretion." 422 U. S., at 424. See also Fed. Rule Civ. Proc. 52 (a) (district court findings "shall not be set aside unless clearly erroneous"); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100, 123 (1969). The Court here does not assert that any findings of the District Court were clearly erroneous, nor does it conclude that there was any abuse of discretion. Instead, it states merely that the District Court gave "insufficient attention" to certain factors in striking the equitable balance. *Ante,* at 719.

The first such factor mentioned by the Court relates to the "complexity" of the issue presented here, which may have led some pension fund administrators to assume that "a program like the Department's was entirely lawful," and that the alternative of equal contributions was perhaps unlawful because of a perceived "unfair[ness]" to men. *Ante,* at 720. The District Court found, however, that petitioners "should have been placed on notice" of the illegality of requiring larger

contributions from women on April 5, 1972, when the Equal Employment Opportunity Commission amended its regulations to make this illegality clear.[1] The retroactive relief ordered by the District Court ran from April 5, 1972, through December 31, 1974, after which date petitioners changed to an equal contribution program. See *ante,* at 706. Even if the April 1972 beginning date were too early, as the Court contends, *ante,* at 719 n. 36,[2] during the nearly three-year period involved there surely was some point at which "conscientious and intelligent administrators," *ante,* at 720, should have responded to the EEOC's guidelines. Yet the Court today denies all retroactive relief, without even knowing whether petitioners made any efforts to ascertain their particular plan's legality.

The other major factor relied on by the Court involves "the potential impact . . . on the economy" that might result from

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[1] The District Court quoted the following from EEOC regulations:

"'It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.' 29 CFR § 1604.9 (e)." 387 F. Supp. 980, 981 (CD Cal. 1975).

See also 29 CFR § 1604.9 (b) (1977) (employer may not "discriminate between men and women with regard to fringe benefits") (also adopted Apr. 5, 1972); § 1604.9 (f) (employer's pension plan may not "differentiat[e] in benefits on the basis of sex") (adopted Apr. 5, 1972).

[2] The Court also contends that respondents were not entitled to a refund of the full difference between the contributions that they made and the contributions made by similarly situated men, but rather only to the difference between their contributions "and the contributions they would have made under an actuarially sound and nondiscriminatory plan." *Ante,* at 720 n. 36. This point, like the question of the appropriate date discussed in text, was not raised by petitioners and would in any event argue for some reduction in the retroactive relief awarded, not for a complete denial of such relief. On its merits, moreover, the District Court's decision to place the women employees on an equal footing with their male co-workers surely was not unreasonable; the alternative suggested by the Court would still have left the women with higher pension payments than similarly situated men for the relevant period.

retroactive changes in "the rules" applying to pension and insurance funds. According to the Court, such changes could "jeopardiz[e] [an] insurer's solvency and, ultimately, the insureds' benefits." *Ante,* at 721. As with the first factor, however, little reference is made by the Court to the situation in this case. No claim is made by either petitioners or the Court that the relief granted here would in any way have threatened the plan's solvency, or indeed that risks of this nature were not "foresee[n]" and thus "included in the calculation of liability" and reflected in "the rates or contributions charged," *ibid.*[3] No one has suggested, moreover, that the relatively modest award at issue—involving a small percentage of the amounts withheld from respondents' paychecks for pension purposes over a 33-month period, see 553 F. 2d 581, 592 (CA9 1976)—could in any way be considered "devastating," *ante,* at 722. And if a "devastating" award were made

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[3] When respondents filed their charge with the EEOC in June 1973, petitioners were put on notice of the possibility of retroactive relief being awarded. At that point they could have—and, for all we know, may have—acted to ensure that the outcome of the litigation did not affect the viability of the plan by, for example, escrowing amounts to cover the contingency of losing to respondents. A prudent pension plan administrator, however certain of his legal position, could not reasonably have ignored such a contingency.

Thus, while the Court is correct that years of litigation may ensue after a charge is filed with the EEOC, this fact is largely irrelevant to the Court's concern about "major unforeseen contingencies," such as an award of retroactive relief adversely affecting the financial integrity of the pension plan. *Ante,* at 721, 722 n. 42. And it is hardly likely that a retroactive award for the period prior to the filing of the EEOC charge would be "devastating" for the plan, since, as the Court recognizes, this period could not in any case be longer than two years. *Ante,* at 722, and n. 42; see 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. V). In the instant case the period from when the award began to run until the charge was filed with the EEOC was just over one year, from April 1972 to June 1973. Even the liability for this period, moreover, at most would have involved only a small percentage of the contributions made by women employees, as discussed in text, *infra.*

in some future case, this Court would have ample opportunity to strike it down at that time.

The necessarily speculative character of the Court's analysis in Part IV is underscored by its suggestion that the retroactive relief in this case would have led to a reduction in the benefits paid to retirees or an increase in the contributions paid by current employees. *Ante,* at 722–723. It states that taking the award out of the pension fund was "apparently contemplated" by the courts below, *ante,* at 723, but the District Court gave no indication of where it thought the recovery would come from. The Court of Appeals listed a number of ultimate sources of the money here involved, including increased employer contributions to the fund or one lump-sum payment from the Department. 553 F. 2d, at 592. Indeed, the Department itself contemplated that the money for the award would come from city revenues, Pet. for Cert. 30–31, with the Department thereby paying for this Title VII award in the same way that it would have to pay any ordinary backpay award arising from its discriminatory practices. Hence the possibility of "harm" falling on "innocent" retirees or employees, *ante,* at 723, is here largely chimerical.

There are thus several factors mentioned by the Court that might be important in some other case but that appear to provide little cause for concern in the case presently before us. To the extent that the Court believes that these factors were not adequately considered when the award of retroactive relief was made, moreover, surely the proper course would be a remand to the District Court for further findings and a new equitable assessment of the appropriate remedy. When the District Court was found to have abused its discretion by denying backpay in *Albemarle,* this Court did not take it upon itself to formulate an award; it remanded to the District Court for this purpose. 422 U. S., at 424, 436. There is no more reason for the Court here to deny all retroactive relief on its own; once the relevant legal considerations are established, the

task of finding the facts and applying the law to those facts is best left to the District Court, particularly when an equitable search for a " 'just result' " is involved, *id.*, at 424.

In this case, however, I do not believe that a remand is necessary. The District Court considered the question of when petitioners could be charged with knowledge of the state of the law, see *supra,* at 729–730, and petitioners do not challenge the particular date selected or claim that they needed time to adjust their plan. As discussed above, moreover, no claim is made that the Department's or the plan's solvency would have been threatened, and it appears unlikely that either retirees or employees would have paid any part of the award. There is every indication, in short, that the factors which the Court thinks might be important in some hypothetical case are of no concern to the petitioners who would have had to pay the award in this case.

The Court today reaffirms "the force of the *Albemarle* presumption in favor of retroactive relief," *ante,* at 723, yet fails to give effect to the principal reason why the presumption exists. In *Albemarle* we emphasized that a "central" purpose of Title VII is "making persons whole for injuries suffered through past discrimination." 422 U. S., at 421; see *id.*, at 418, 422. Respondents in this case cannot be "made whole" unless they receive a refund of the money that was illegally withheld from their paychecks by petitioners. Their claim to these funds is more compelling than is the claim in many back-pay situations, where the person discriminated against receives payment for a period when he or she was not working. Here, as the Court of Appeals observed, respondents "actually earned the amount in question, but then had it taken from them in violation of Title VII." 553 F. 2d, at 592. In view of the strength of respondents' "restitution"-like claim, *ibid.*, and in view of the statute's "central" make-whole purpose, *Albemarle,* 422 U. S., at 421, I would affirm the judgment of the Court of Appeals.

DEPARTMENT OF REVENUE OF WASHINGTON *v.* ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 76-1706. Argued January 16-17, 1978—Decided April 26, 1978

1. The State of Washington's business and occupation tax does not violate the Commerce Clause by taxing the interstate commerce activity of stevedoring within the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, followed; *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U. S. 90, and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, overruled. Pp. 743-751.

(a) A State under appropriate conditions may tax directly the privilege of conducting interstate business. *Complete Auto Transit, Inc.* v. *Brady, supra.* P. 745.

(b) When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens on interstate commerce cannot occur. Pp. 746-747.

(c) All state tax burdens do not impermissibly impede interstate commerce, and the Commerce Clause balance tips against the state tax only when it unfairly burdens commerce by exacting from the interstate activity more than its just share of the cost of state government. Pp. 747-748.

(d) State taxes are valid under the Commerce Clause, where they are applied to activity having a substantial nexus with the State, are fairly apportioned, do not discriminate against interstate commerce, and are fairly related to the services provided by the State; and here the Washington tax in question meets this standard, since the stevedoring operations are entirely conducted within the State, the tax is levied solely on the value of the loading and unloading occurring in the State, the tax rate is applied to stevedoring as well as generally to businesses rendering services, and there is nothing in the record to show that the tax is not fairly related to services and protection provided by the State. Pp. 750-751.

2. Nor is the Washington business and occupation tax, as applied to stevedoring so as to reach services provided wholly within the State to imports, exports, and other goods, among the "Imposts or Duties"

prohibited by the Import-Export Clause. *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276. Pp. 751–761.

(a) The application of the tax to stevedoring threatens none of the Import-Export Clause's policies of precluding state disruption of United States foreign policy, protecting federal revenues, and avoiding friction and trade barriers among the States. The tax as so applied does not restrain the Federal Government's ability to conduct foreign policy. Its effect on federal import revenue is merely to compensate the State for services and protection extended to the stevedoring business. The policy against interstate friction and rivalry is vindicated, as is the Commerce Clause's similar policy, if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State. Pp. 751–755.

(b) While, as distinguished from *Michelin Tire Corp.* v. *Wages, supra,* where the goods taxed were no longer in transit, the activity taxed here occurs while imports and exports are in transit, nevertheless the tax does not fall on the goods themselves but reaches only the business of loading and unloading ships, *i. e.,* the business of transporting cargo, within the State, and hence the tax is not a prohibited "Impost or Duty" when it violates none of the policies of the Import-Export Clause. Pp. 755–757.

(c) While here the stevedores load and unload imports and exports, whereas in *Michelin Tire Corp.* v. *Wages, supra,* the state tax in question touched only imports, nevertheless the *Michelin* approach of analyzing the nature of the tax to determine whether it is a prohibited "Impost or Duty" should apply to taxation involving exports as well as imports. Any tax relating to exports can be tested for its conformity to the Import-Export Clause's policies of precluding state disruption of United States foreign policy and avoiding friction and trade barriers among the States, although the tax does not serve the Clause's policy of protecting federal revenues in view of the fact that the Constitution forbids federal taxation of exports. Pp. 757–758.

(d) The Import-Export Clause does not effect an absolute ban on all state taxation of imports and exports, but only on "Imposts or Duties." Pp. 759–760.

(e) To say that the Washington tax violates the Import-Export Clause because it taxes the imports themselves while they remain a part of commerce, would be to resurrect the now rejected "original package" analysis whereby goods enjoyed immunity from state taxation as long as they retained their status as imports by remaining in their import packages. P. 760.

(f) The Washington tax is not invalid under the Import-Export Clause as constituting the imposition of a transit fee upon inland customers, since, as is the case in Commerce Clause jurisprudence, interstate friction will not chafe when commerce pays for the state services it enjoys. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits. Pp. 760–761.

88 Wash. 2d 315, 559 P. 2d 997, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined, and in all but Part III–B of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the result, *post,* p. 761. BRENNAN, J., took no part in the consideration or decision of the case.

Slade Gorton, Attorney General of Washington, argued the cause for petitioner. With him on the briefs were *Richard H. Holmquist,* Senior Assistant Attorney General, and *Matthew J. Coyle,* Assistant Attorney General.

John T. Piper argued the cause for respondents. With him on the brief was *D. Michael Young.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

For the second time in this century, the State of Washington would apply its business and occupation tax to stevedoring. The State's first application of the tax to stevedoring was unsuccessful, for it was held to be unconstitutional as violative of the Commerce Clause [1] of the United States Constitution. *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* 302 U. S. 90 (1937). The Court now faces the question whether Washington's second attempt violates either the Commerce Clause or the Import-Export Clause.[2]

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[1] "The Congress shall have Power . . .

. . . . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U. S. Const., Art. I, § 8, cl. 3.

[2] "No State shall, without the Consent of the Congress, lay any Imposts

I

Stevedoring is the business of loading and unloading cargo from ships.[3] Private stevedoring companies constitute respondent Association of Washington Stevedoring Companies; respondent Washington Public Ports Association is a nonprofit corporation consisting of port authorities that engage in stevedoring activities. App. 3. In 1974 petitioner Department of Revenue of the State of Washington adopted Revised Rule 193, pt. D, Wash. Admin. Code 458–20–193–D, to implement the State's 1% business and occupation tax on

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or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U. S. Const., Art. I, § 10, cl. 2.

[3] The record does not contain a precise definition or description of the business of stevedoring or of the activities of respondents and their respective members. By admitting the factual allegations in the respondents' Petition for Declaratory Judgment on Validity of Rule, App. 3–7, petitioner Department of Revenue accepted paragraph VI of that petition. That paragraph alleged that the private companies that constitute respondent Association of Washington Stevedoring Companies "are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co.*" This Court explained the activities of the appellant stevedoring company in *Puget Sound* as follows:

"What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. . . . True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. . . . The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest," and vice versa.'" 302 U. S., at 93.

services, set forth in Wash. Rev. Code §§ 82.04.220 and 82.04.290 (1976).[4] The Rule applies the tax to stevedoring and reads in pertinent part as set forth in the margin.[5]

Revised Rule 193D restores the original scope of the Washington business and occupation tax. After initial imposition

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[4] Section 82.04.220 reads:

"There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

Section 82.04.290 reads in pertinent part:

"Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . ; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof . . . , persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale.' "

We note, also, that § 82.04.460 reads in part:

"Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state."

A temporary additional tax of 6% of the base tax is now imposed for the period from June 1, 1976, through June 30, 1979. 1977 Wash. Laws, 1st Ex. Sess., ch. 324, § 1, and 1975–1976 Wash. Laws, 2d Ex. Sess., ch. 130, § 3, codified as Wash. Rev. Code § 82.04.2901 (Supp. 1977).

[5] "In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with

of the tax in 1935,[6] the then State Tax Commission [7] adopted Rule 198 of the Rules and Regulations Relating to the Revenue Act of 1935.[8] That Rule permitted taxpayers to deduct certain income received from interstate and foreign commerce. Income from stevedoring, however, was not described as deductible. When, in 1937, this Court in *Puget Sound* invalidated the application of the tax to stevedoring, the Commission complied by adding stevedoring income to the list of

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facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

"EXAMPLES OF EXEMPT INCOME:

"1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.

. . . . .

"EXAMPLES OF TAXABLE INCOME:

. . . . .

"3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable."

[6] 1935 Wash. Laws, ch. 180.

[7] The Tax Commission was abolished in 1967, and, with specified exceptions, its powers, duties, and functions were transferred to the Director of the Department of Revenue. 1967 Wash. Laws, Ex. Sess., ch. 26, § 7.

[8] Rule 198, as it was in effect in 1936 and 1937, that is, prior to the decision in *Puget Sound,* read in part:

"In computing the tax under the classification of 'Service and Other Business Activities' there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above are those activities which involve the actual transportation of goods or commodities in foreign commerce or commerce between the states; the transmission of communications from a point within the state to a point outside the state and vice versa; the solicitation of freight for foreign or interstate shipment; and the selling of tickets for foreign and interstate passage accommodations." Rules and Regulations Relating to the Revenue Act of 1935, Rule 198, p. 122 (1936); *id.,* at 133 (1937).

deductions.[9] The deduction for stevedoring remained in effect until the revision of Rule 193 in 1974.[10]

Seeking to retain their theretofore-enjoyed exemption from the tax, respondents in January 1975 sought from the Superior Court of Thurston County, Wash., a declaratory judgment to the effect that Revised Rule 193D violated both the Commerce Clause and the Import-Export Clause. They urged that the case was controlled by *Puget Sound,* which this Court had reaffirmed in *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422, 433 (1947) (together, the *Stevedoring Cases*). Absent a clear invitation from this Court, respondents submitted that the Superior Court could not avoid the force of the *Stevedoring Cases,* which had never been overruled. Record 9.[11] Petitioner replied that this Court had invited rejection

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[9] Effective May 1, 1939, Rule 198 read in part:

"In computing the tax under the classification of 'Service and Other Business Activities' there may be deducted from gross income of the business the amount thereof derived as compensation for the performance of services which in themselves constitute foreign or interstate commerce to an extent that a tax measured by the compensation received therefrom constitutes a direct burden upon such commerce. Included in the above [is] . . . the compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company . . . ." *Id.,* at 137 (1939).

[10] Rules and Regulations Relating to the Revenue Act of 1935, Rule 193, p. 94 (1943), and *id.,* Rule 193, p. 123 (1970).

[11] In a reply brief, respondents supported the continuing validity of the *Stevedoring Cases.* In particular, they argued:

"Final, and we think conclusive, proof of the continued vitality of the stevedoring cases lies in the language of *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 . . . (1951), decided *after* all four of the 'major' cases relied on by the State. We have previously noted that *Spector* struck down a tax on the activity of moving goods in interstate commerce." Record 69 (emphasis in original).

Spector was overruled last Term in *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 288–289 (1977), decided after respondents advanced the above argument.

of those cases by casting doubt on the Commerce Clause analysis that distinguished between direct and indirect taxation of interstate commerce. *Id.*, at 25–37, citing, *e. g., Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1949); *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (1938). Petitioner also argued that the Rule did not violate the Commerce Clause because it taxed only intrastate activity, namely, the loading and unloading of ships, Record 17–20, and because it levied only a nondiscriminatory tax apportioned to the activity within the State. *Id.*, at 20–22. The Rule did not impose any "Imposts or Duties on Imports or Exports" because it taxed merely the stevedoring services and not the goods themselves, *id.*, at 22–25, citing *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951). The Superior Court, however, not surprisingly, considered itself bound by the *Stevedoring Cases.* It therefore issued a declaratory judgment that Rule 193D was invalid to the extent it related to stevedoring in interstate or foreign commerce. App. 17–18.[12]

Petitioner appealed to the Washington Court of Appeals. Record 77. That court certified the case for direct appeal to the State's Supreme Court, citing Wash. Rev. Code § 2.06.030 (c) (1976), and Wash. Supreme Court Rule on Appeal I–14 (1)(c) (now Rule 4.2 (a)(2), Wash. Rules of Court (1977)).

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[12] In its oral decision the Superior Court noted its doubt about the continued validity of the *Stevedoring Cases:*

"It would seem to the Court . . . that there certainly is a swing away from the Puget Sound and Carter and Weekes cases . . . ." App. 8. "It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years . . . ." *Id.*, at 11. "Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been an invitation to anyone to reverse those cases." *Id.*, at 13–14.

After accepting certification, the Supreme Court, with two justices dissenting, affirmed the judgment of the Superior Court. 88 Wash. 2d 315, 559 P. 2d 997 (1977). The majority considered petitioner's argument that recent cases [13] had eroded the holdings in the *Stevedoring Cases.* It concluded, nonetheless:

> "[W]e must hold the tax invalid; we do so in recognition of our duty to abide by controlling United States Supreme Court decisions construing the federal constitution. Hence, we find it unnecessary to discuss the aforementioned cases beyond the fact that nowhere in them do we find language criticizing, expressly contradicting, or overruling (even impliedly) the stevedoring cases.
>
> . . . . .
>
> "Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*see Washington-Oregon Shippers Cooperative Ass'n* v. *Schumacher,* 59 Wn. 2d 159, 167, 367 P. 2d 112, 115–116 (1961)), we must nevertheless hold the instant tax on stevedoring invalid." 88 Wash. 2d, at 318–320, 559 P. 2d, at 998–999.

The two dissenting justices would have upheld the tax against the Commerce Clause attack on the ground that recent cases had eroded the direct-indirect taxation analysis employed in the *Stevedoring Cases.* They found no violation of the Import-Export Clause because the State had taxed only the activity of stevedoring, not the imports or exports themselves. Even if stevedoring were considered part of interstate or foreign commerce, the Washington tax was valid because it did not discriminate against importing or exporting, did not impair transportation, did not impose multiple burdens, and did not

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[13] The court stated, 88 Wash. 2d, at 318, 559 P. 2d, at 998, that petitioner had cited *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276 (1976); *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100 (1975); *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951); *Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1949); and *Central Greyhound Lines, Inc.* v. *Mealey,* 334 U. S. 653 (1948).

regulate commerce. 88 Wash. 2d, at 320–322, 559 P. 2d, at 999–1000.

Because of the possible impact on the issues made by our intervening decision in *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977), filed after the Washington Supreme Court's ruling, we granted certiorari. 434 U. S. 815 (1977).

II

The Commerce Clause

A

In *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* the Court invalidated the Washington business and occupation tax on stevedoring only because it applied directly to interstate commerce. Stevedoring was interstate commerce, according to the Court, because:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master." 302 U. S., at 92.

Without further analysis, the Court concluded:

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." *Id.,* at 94.

The petitioners (officers of New York City) in *Joseph* v. *Carter & Weekes Stevedoring Co.,* urged the Court to overrule *Puget Sound.* They argued that intervening cases [14] had per-

[14] They cited, among others, four particular cases. The first was *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62 (1941). In that case the Court sustained an Indiana tax on the gross receipts of a foreign corporation from purchase and resale of timber in Indiana. The

mitted local taxation of gross proceeds derived from interstate commerce. They concluded, therefore, that the Commerce Clause did not preclude the application to stevedoring of the New York City business tax on the gross receipts of a stevedoring corporation. The Court disagreed on the theory that the intervening cases permitted taxation only of local activity separate and distinct from interstate commerce. 330 U. S., at 430–433. This separation theory was necessary, said the Court, because it served to diminish the threat of multiple taxation on commerce; if the tax actually fell on intrastate activity, there was less likelihood that other taxing jurisdictions could duplicate the levy. *Id.*, at 429. Stevedoring, however, was not separated from interstate commerce because, as previously enunciated in *Puget Sound*, it *was* interstate commerce:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company.* 'What makes the

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transaction was considered local even though the timber was to be transported, after the resale, to Ohio for creosote treatment by the foreign corporation. The second case was *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940). There a Pennsylvania corporation sold coal to New York City consumers through a city sales office. Even though the coal was shipped from Pennsylvania, the Court permitted the city to tax the sale because the tax was conditioned on local activity, that is, the delivery of goods within New York upon their purchase in New York for consumption in New York. The third case was *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939). There California was permitted to impose a tax on storage and use with respect to the retention and ownership of goods brought into the State by an interstate railroad for its own use. The fourth was *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). There the Court upheld a New Mexico privilege tax upon the gross receipts from the sale of advertising. It concluded that the business was local even though a magazine with interstate circulation and advertising was published.

> tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit* [329 U. S. 249,] 256." 330 U. S., at 433.

Because the tax in the present case is indistinguishable from the taxes at issue in *Puget Sound* and in *Carter & Weekes,* the *Stevedoring Cases* control today's decision on the Commerce Clause issue unless more recent precedent and a new analysis require rejection of their reasoning.

We conclude that *Complete Auto Transit, Inc.* v. *Brady,* where the Court held that a State under appropriate conditions may tax directly the privilege of conducting interstate business, requires such rejection. In *Complete Auto,* Mississippi levied a gross-receipts tax on the privilege of doing business within the State. It applied the tax to the appellant, a Michigan corporation transporting motor vehicles manufactured outside Mississippi. After the vehicles were shipped into Mississippi by railroad, the appellant moved them by truck to Mississippi dealers. This Court assumed that appellant's activity was in interstate commerce. 430 U. S., at 276 n. 4.

The Mississippi tax survived the Commerce Clause attack. Absolute immunity from state tax did not exist for interstate businesses because it "'"was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."'" *Id.,* at 288, quoting *Western Live Stock* v. *Bureau of Revenue,* 303 U. S., at 254, and *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100, 108 (1975). The Court therefore specifically overruled *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951), where a direct gross-receipts tax on the privilege of engaging in interstate commerce had been invalidated. 430 U. S., at 288–289.

The principles of *Complete Auto* also lead us now to question the underpinnings of the *Stevedoring Cases.* First, *Puget Sound* invalidated the Washington tax on stevedoring activity only because it burdened the privilege of engaging in interstate

commerce. Because *Complete Auto* permits a State properly to tax the privilege of engaging in interstate commerce, the basis for the holding in *Puget Sound* is removed completely.[15]

Second, *Carter & Weekes* supported its reaffirmance of *Puget Sound* by arguing that a direct privilege tax would threaten multiple burdens on interstate commerce to a greater extent than would taxes on local activity connected to commerce. But *Complete Auto* recognized that errors of apportionment that may lead to multiple burdens may be corrected when they occur. 430 U. S., at 288–289, n. 15.[16]

The argument of *Carter & Weekes* was an abstraction. No multiple burdens were demonstrated. When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple bur-

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[15] That the holding in *Spector* parallels that in *Puget Sound* is demonstrated by the authorities relied upon or provided by both cases in the past. *Spector* relied on *Carter & Weekes,* which reaffirmed *Puget Sound,* and upon *Freeman* v. *Hewit,* 329 U. S. 249 (1946). 340 U. S., at 609. *Freeman,* in turn, relied upon *Puget Sound,* 329 U. S., at 257, and *Carter & Weekes* relied upon *Freeman,* 330 U. S., at 433. Both *Freeman* and *Puget Sound* relied upon *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217 (1908). 329 U. S., at 257; 302 U. S., at 94.

Respondents, also, have observed the parallel between *Spector* and the *Stevedoring Cases.* In their reply brief to the Superior Court, they argued that *Spector,* which had not then been overruled by *Complete Auto,* was dispositive on the question of the continued vitality of *Puget Sound* and *Carter & Weekes.* See n. 11, *supra.*

[16] Subsequent to *Carter & Weekes,* the Court explained more precisely its concern about multiple burdens on interstate commerce:

"While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. . . . Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. . . . We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do." *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450, 462–463 (1959).

dens logically cannot occur.[17] The reasoning of *Carter & Weekes,* therefore, no longer supports automatic tax immunity for stevedoring from a levy such as the Washington business and occupation tax.

Third, *Carter & Weekes* reaffirmed *Puget Sound* on a basis rejected by *Complete Auto* and previous cases. *Carter & Weekes* considered *any* direct tax on interstate commerce to be unconstitutional because it burdened or interfered with commerce. 330 U. S., at 433. In support of that conclusion, the Court there cited only *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U. S. 761, 767 (1945), the case where Arizona's limitations on the length of trains were invalidated. In *Southern Pacific,* however, the Court had not struck down the legislation merely because it burdened interstate commerce. Instead, it weighed the burden against the State's interests in limiting the size of trains:

> "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free . . . ." *Id.,* at 775–776.

Only after concluding that railroad safety was not advanced by the regulations, did the Court invalidate them. They contravened the Commerce Clause because the burden on interstate commerce outweighed the State's interests.

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[17] *Carter & Weekes* has received criticism from commentators for its reliance on the possibility of the imposition of multiple tax burdens. Professor Hartman argued that the burden on interstate commerce imposed by a privilege tax "is multiple only because the elements of transportation itself are multiple." P. Hartman, State Taxation of Interstate Commerce 204 (1953). Because the loading or unloading of a ship is confined to one State, no other State could tax that particular phase of commerce. "Thus, the Court's basis for the unconstitutionality of the *Weekes* tax assumed the existence of a premise which did not exist, except in the mind of a majority of the Justices." *Id.,* at 205. See Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335 (1976).

Although the balancing of safety interests naturally differs from the balancing of state financial needs, *Complete Auto* recognized that a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. 430 U. S., at 288. Accord, *Colonial Pipeline Co.* v. *Traigle,* 421 U. S., at 108; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S., at 254. All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. Again, then, the analysis of *Carter & Weekes* must be rejected.

B

Respondents' additional arguments do not demonstrate the wisdom of, or need for, preserving the *Stevedoring Cases.* First, respondents attempt to distinguish so-called movement cases, in which tax immunity has been broad, from nonmovement cases, in which the immunity traditionally has been narrower. Brief for Respondents 23–28. Movement cases involve taxation on transport, such as the Texas tax on a natural gas pipeline in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). Nonmovement cases involve taxation on commerce that does not move goods, such as the New Mexico tax on publishing newspapers and magazines in *Western Live Stock* v. *Bureau of Revenue.* This distinction, however, disregards *Complete Auto,* a movement case which held that a state privilege tax on the business of moving goods in interstate commerce is not *per se* unconstitutional.

Second, respondents would distinguish *Complete Auto* on the ground that it concerned only intrastate commerce, that is, the movement of vehicles from a Mississippi railhead to Mississippi dealers. Brief for Respondents 26–28. This purported distinction ignores two facts. In *Complete Auto,* we expressly assumed that the activity was interstate, a segment of the movement of vehicles from the out-of-state manufac-

turer to the in-state dealers. 430 U. S., at 276 n. 4. Moreover, the stevedoring activity of respondents occurs completely within the State of Washington, even though the activity is a part of interstate or foreign commerce. The situation was the same in *Complete Auto,* and that case, thus, is not distinguishable from the present one.

Third, respondents suggest that what they regard as such an important change in Commerce Clause jurisprudence should come from Congress and not from this Court. To begin with, our rejection of the *Stevedoring Cases* does not effect a significant present change in the law. The primary alteration occurred in *Complete Auto.* Even if this case did effect an important change, it would not offend the separation-of-powers principle because it does not restrict the ability of Congress to regulate commerce. The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court. See, *e. g., Cooley* v. *Board of Wardens,* 12 How. 299 (1852); *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824). If Congress prefers less disruption of interstate commerce, it will act.[18]

Consistent with *Complete Auto,* then, we hold that the Washington business and occupation tax does not violate the

[18] Respondents seem to be particularly concerned about the continued validity of *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. The State identified, as a local incident, the transfer of gas from the refinery to the pipeline. This Court declared the tax unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or to the percentage of the taxpayer's business taking place in Texas. Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.

Commerce Clause by taxing the interstate commerce activity of stevedoring. To the extent that *Puget Sound Stevedoring Co.* v. *State Tax Comm'n* and *Joseph* v. *Carter & Weekes Stevedoring Co.* stand to the contrary, each is overruled.

C

With the distinction between direct and indirect taxation of interstate commerce thus discarded, the constitutionality under the Commerce Clause of the application of the Washington business and occupation tax to stevedoring depends upon the practical effect of the exaction. As was recognized in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (1938), interstate commerce must bear its fair share of the state tax burden. The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. *E. g., General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964); *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450 (1959); *Memphis Gas Co.* v. *Stone,* 335 U. S. 80 (1948); *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435 (1940); see *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S., at 279, and n. 8.

Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system. The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington. Although the rate of taxation varies with the type of business activity, respondents have not demonstrated how the 1% rate, which applies to them and generally to businesses rendering services, discriminates against interstate commerce. Finally, nothing in the

record suggests that the tax is not fairly related to services and protection provided by the State. In short, because respondents relied below on the *per se* approach of *Puget Sound* and *Carter & Weekes,* they developed no factual basis on which to declare the Washington tax unconstitutional as applied to their members and their stevedoring activities.

III

The Import-Export Clause

Having decided that the Commerce Clause does not *per se* invalidate the application of the Washington tax to stevedoring, we must face the question whether the tax contravenes the Import-Export Clause. Although the parties dispute the meaning of the prohibition of "Imposts or Duties on Imports or Exports," they agree that it differs from the ban the Commerce Clause erects against burdens and taxation on interstate commerce. Brief for Petitioner 32–33; Brief for Respondents 9–10; Tr. of Oral Arg. 13, 22. The Court has noted before that the Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 75 (1946). On the other hand, the Commerce Clause touches all state taxation and regulation of interstate and foreign commerce, whereas the Import-Export Clause bans only "Imposts or Duties on Imports or Exports." *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276, 279, 290–294 (1976). The resolution of the Commerce Clause issue, therefore, does not dispose of the Import-Export Clause question.

A

In *Michelin* the Court upheld the application of a general ad valorem property tax to imported tires and tubes. The Court surveyed the history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on "Imposts or Duties." *Id.,* at 283–286.

Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. See, *e. g., Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U. S. 341, 343 (1964); *Richfield Oil Corp.* v. *State Board,* 329 U. S., at 76; *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S., at 445 (Douglas, J., dissenting in part); *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 226–227 (1933); *License Cases,* 5 How. 504, 575–576 (1847) (opinion of Taney, C. J.). Before *Michelin,* the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original-package doctrine of *Brown* v. *Maryland,* 12 Wheat. 419 (1827); see, *e. g., Department of Revenue* v. *James B. Beam Distilling Co.; Anglo-Chilean Corp.* v. *Alabama; Low* v. *Austin,* 13 Wall. 29 (1872), overruled in *Michelin Tire Corp.* v. *Wages.* So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. With respect to exports, the dispositive question was whether the goods had entered the "export stream," the final, continuous journey out of the country. *Kosydar* v. *National Cash Register Co.,* 417 U. S. 62, 70–71 (1974); *Empresa Siderurgica* v. *County of Merced,* 337 U. S. 154, 157 (1949); *A. G. Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 69 (1923); *Coe* v. *Errol,* 116 U. S. 517, 526, 527 (1886). As soon as the journey began, tax immunity attached.

Michelin initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an "Impost or Duty." 423 U. S., at 279, 290–294. Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause:

> "The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Govern-

ment must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Id.,* at 285–286 (footnotes omitted).

The ad valorem property tax there at issue offended none of these policies. It did not usurp the Federal Government's authority to regulate foreign relations since it did not "fall on imports as such because of their place of origin." *Id.,* at 286. As a general tax applicable to all property in the State, it could not have been used to create special protective tariffs and could not have been applied selectively to encourage or discourage importation in a manner inconsistent with federal policy. Further, the tax deprived the Federal Government of no revenues to which it was entitled. The exaction merely paid for services, such as fire and police protection, supplied by the local government. Although the tax would increase the cost of the imports to consumers, its effect on the demand for Michelin tubes and tires was insubstantial. The tax, therefore, would not significantly diminish the number of imports on which the Federal Government could levy import duties and would not deprive it of income indirectly. Finally, the tax would not disturb harmony among the States because the coastal jurisdictions would receive compensation only for services and protection extended to the imports. Although intending to prevent coastal States from abusing their geographical positions, the Framers also did not expect residents

of the ports to subsidize commerce headed inland. The Court therefore concluded that the Georgia ad valorem property tax was not an "Impost or Duty," within the meaning of the Import-Export Clause, because it offended none of the policies behind that Clause.

A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax on the imported goods themselves.

Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. See P. Hartman, State Taxation of Interstate Commerce 2–3 (1953).[19] The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a

[19] "Two of the chief weaknesses of the Articles of Confederation were the lack of power in Congress to regulate foreign and interstate commerce, and the presence of power in the States to do so. The almost catastrophic results from this sort of situation were harmful commercial wars and reprisals at home among the States . . . ." P. Hartman, State Taxation of Interstate Commerce 2 (1953), citing, *e. g.*, The Federalist Nos. 7, 11, 22 (Hamilton), No. 42 (Madison).

taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State. As has been explained in Part II–C, *supra,* the record in this case, as presently developed, reveals the presence of all these factors.

Under the analysis of *Michelin,* then, the application of the Washington business and occupation tax to stevedoring violates no Import-Export Clause policy and therefore should not qualify as an "Impost or Duty" subject to the absolute ban of the Clause.

B

The Court in *Michelin* qualified its holding with the observation that Georgia had applied the property tax to goods "no longer in transit." 423 U. S., at 302.[20] Because the goods were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an "Impost or Duty" even if it offended none of the policies behind the Clause. Inasmuch as we now face this inquiry, we note two distinctions between this case and *Michelin.* First, the activity taxed here occurs while imports and exports are in transit. Second, however, the tax does not fall on the goods themselves. The levy reaches only the business of loading and unloading ships or, in other words, the business of transporting cargo within the State of Washington. Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited "Impost or Duty" when it violates none of the policies.

In *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951), the Court upheld a gross-receipts tax on a steam railroad operating

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[20] Commentators have noted the qualification but have questioned its significance. See W. Hellerstein, Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports, 1976 S. Ct. Rev. 99, 122–126; Comment, 30 Rutgers L. Rev. 193, 203 (1976); Note, 12 Wake Forest L. Rev. 1055, 1062 (1976).

exclusively within the Port of Baltimore. The railroad operated a marine terminal and owned rail lines connecting the docks to the trunk lines of major railroads. It switched and pulled cars, stored imports and exports pending transport, supplied wharfage, weighed imports and exports, and rented a stevedoring crane. Somewhat less than half of the company's 1946 gross receipts were derived from the transport of imports or exports. The company contended that this income was immune, under the Import-Export Clause, from the state tax. The Court rejected that argument primarily on the ground that immunity of services incidental to importing and exporting was not so broad as the immunity of the goods themselves: [21]

> "The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.

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[21] The Court distinguished the Maryland tax from others struck down by the Court. 340 U. S., at 513–514, distinguishing *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946); *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19 (1915); and *Fairbank* v. *United States*, 181 U. S. 283 (1901). In these cases the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. In *Richfield*, the tax fell upon the sale of goods and was overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves. See *Brown* v. *Maryland*, 12 Wheat. 419, 439 (1827). The sale had no value or significance apart from the goods. Similarly, the stamp tax on bills of lading in *Fairbank* effectively taxed the goods because the bills represented the goods. The basis for distinguishing *Thames & Mersey* is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.

". . . The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined." *Id.*, at 514–515 (emphasis in original).

In *Canton R. Co.* the Court did not have to reach the question about taxation of stevedoring because the company did not load or unload ships.[22] As implied in the opinion, however, *id.*, at 515, the only distinction between stevedoring and the railroad services was that the loading and unloading of ships crossed the waterline. This is a distinction without economic significance in the present context. The transportation services in both settings are necessary to the import-export process. Taxation in neither setting relates to the value of the goods, and therefore in neither can it be considered taxation upon the goods themselves. The force of *Canton R. Co.* therefore prompts the conclusion that the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value.[23]

C

Another factual distinction between this case and *Michelin* is that here the stevedores load and unload imports and exports

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[22] The Court expressly noted that it did not need to reach the stevedoring issue. 340 U. S., at 515. It was also reserved in the companion case of *Western Maryland R. Co.* v. *Rogan*, 340 U. S. 520, 522 (1951).

[23] We do not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit.

Our Brother POWELL, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do not present a case of a tax on goods in transit. As in *Michelin*, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided.

whereas in *Michelin* the Georgia tax touched only imports. As noted in Part III–A, *supra,* the analysis in the export cases has differed from that in the import cases. In the former, the question was when did the export enter the export stream; in the latter, the question was when did the goods escape their original package. The questions differed, for example, because an export could enter its export package and not secure tax immunity until later when it began its journey out of the country. Until *Michelin,* an import retained its immunity so long as it remained in its original package.

Despite these formal differences, the *Michelin* approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in *Michelin.* It precludes state disruption of the United States foreign policy.[24] It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U. S. Const., Art. I, § 9, cl. 5; [25] see *United States* v. *Hvoslef,* 237 U. S. 1 (1915). But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports. This approach is consistent with *Canton R. Co.,* which permitted taxation of income from services connected to both imports and exports. The respondents' gross receipts from loading exports, therefore, are as subject to the Washington business and occupation tax as are the receipts from unloading imports.

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[24] See Abramson, State Taxation of Exports: The Stream of Constitutionality, 54 N. C. L. Rev. 59 (1975).

[25] "No Tax or Duty shall be laid on Articles exported from any State."

D

None of respondents' additional arguments convinces us that the *Michelin* approach should not be applied in this case to sustain the tax.

First, respondents contend that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports. The ban must be absolute, they argue, in order to give the Clause meaning apart from the Commerce Clause. They support this contention primarily with dicta from *Richfield Oil,* 329 U. S., at 75–78, and with the partial dissent in *Carter & Weekes,* 330 U. S., at 444–445. Neither, however, provides persuasive support because neither recognized that the term "Impost or Duty" is not self-defining and does not necessarily encompass all taxes. The partial dissent in *Carter & Weekes* did not address the term at all. *Richfield Oil*'s discussion was limited to the question whether the tax fell upon the sale or upon the right to retail. 329 U. S., at 83–84. The State apparently conceded that the Clause precluded all taxes on exports and the process of exporting. *Id.,* at 84. The use of these two cases, therefore, ignores the central holding of *Michelin* that the absolute ban is only of "Imposts or Duties" and not of all taxes. Further, an absolute ban of all taxes is not necessary to distinguish the Import-Export Clause from the Commerce Clause. Under the *Michelin* approach, any tax offending either of the first two Import-Export policies becomes suspect regardless of whether it creates interstate friction. Commerce Clause analysis, on the other hand, responds to neither of the first two policies. Finally, to conclude that "Imposts or Duties" encompasses all taxes makes superfluous several of the terms of Art. I, § 8, cl. 1, of the Constitution, which grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." In particular, the Framers apparently did not include "Excises," such as an exaction on the privilege of doing business, within the scope of "Imposts" or "Duties." See *Michelin,* 423 U. S., at 291–292, n. 12, citing

2 M. Farrand, The Records of the Federal Convention of 1787, p. 305 (1911), and 3 *id.*, at 203–204.[26]

Second, respondents would distinguish *Michelin* on the ground that Georgia levied a property tax on the mass of goods in the State, whereas Washington would tax the imports themselves while they remain a part of commerce. This distinction is supported only by citation to the *License Cases,* 5 How., at 576 (opinion of Taney, C. J.). The argument must be rejected, however, because it resurrects the original-package analysis. See *id.,* at 574–575. Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in *Michelin,* 423 U. S., at 279. Nothing in the *License Cases,* in which a fractioned Court produced nine opinions, prompts a return to the exclusive consideration of what constitutes an import or export.

Third, respondents submit that the Washington tax imposes a transit fee upon inland consumers. Regardless of the validity of such a toll under the Commerce Clause, respondents conclude that it violates the Import-Export Clause. The problem with that analysis is that it does not explain how the policy of preserving harmonious commerce among the States and of preventing interstate tariffs, rivalries, and friction, differs as between the two Clauses. After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce pays for the governmental services it enjoys. See Part II, *supra.* Requiring coastal States to subsidize the commerce of inland consumers may well exacerbate, rather than diminish,

[26] But see 1 W. Crosskey, Politics and the Constitution in the History of the United States 296–297 (1953), cited in 423 U. S., at 290–291, in which the author argues that the concept of "Duties" encompassed excises. He does not explain, however, why Art. I, § 8, cl. 1, enumerated "Taxes, Duties, Imposts and Excises" if the Framers intended duties to include excises.

rivalries and hostility. Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits. To the extent that the Import-Export Clause was intended to preserve interstate harmony, the four safeguards will vindicate the policy. To the extent that other policies are protected by the Import-Export Clause, the analysis of an Art. I, § 10, challenge must extend beyond that required by a Commerce Clause dispute. But distinctions not based on differences in constitutional policy are not required. Because respondents identify no such variation in policy, their transit-fee argument must be rejected.

E

The Washington business and occupation tax, as applied to stevedoring, reaches services provided wholly within the State of Washington to imports, exports, and other goods. The application violates none of the constitutional policies identified in *Michelin*. It is, therefore, not among the "Imposts or Duties" within the prohibition of the Import-Export Clause.

IV

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[27]

It is so ordered.

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

MR. JUSTICE POWELL, concurring in part and concurring in the result.

I join the opinion of the Court with the exception of Part III–B. As that section of the Court's opinion appears to

[27] See generally Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich. L. Rev. 1426 (1977).

resurrect the discarded "direct-indirect" test, I cannot join it.

In *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276 (1976), this Court abandoned the traditional, formalistic methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States. The nondiscriminatory ad valorem property tax in *Michelin* was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause.

The question the Court addresses today in Part III–B is whether the business tax at issue here is such a tax upon goods in transit. The Court gives a negative answer, apparently for two reasons. The first is that *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951), indicates that this is a tax "not on the *goods* but on the *handling* of them at the port." *Id.,* at 514 (emphasis in original). While *Canton R. Co.* provides precedential support for the proposition that a tax of this kind is not invalid under the Import-Export Clause, its rather artificial distinction between taxes on the handling of the goods and taxes on the goods themselves harks back to the arid "direct-indirect" distinction that we rejected in *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977), in favor of analysis framed in light of economic reality.

The Court's second reason for holding that the instant tax is not one on goods in transit has the surface appearance of economic-reality analysis, but turns out to be the "direct-indirect" test in another guise. The Court likens this tax to the one at issue in *Canton R. Co.* and declares that since "[t]axation in neither setting relates to the value of the goods, . . . in neither can it be considered taxation upon the goods themselves."

Ante, at 757. That this distinction has no economic significance is apparent from the fact that it is possible to design transit fees that are imposed "directly" upon the goods, even though the amount of the exaction bears no relation to the value of the goods. For example, a State could levy a transit fee of $5 per ton or $10 per cubic yard. These taxes would bear no more relation to the value of the goods than does the tax at issue here, which is based on the volume of the stevedoring companies' business, and, in turn, on the volume of goods passing through the port. Thus, the Court does not explain satisfactorily its pronouncement that Washington's business tax upon stevedoring—in economic terms—is not the type of transit fee that the *Michelin* Court questioned.

In my view, this issue can be resolved only with reference to the analysis adopted in *Michelin.* The Court's initial mention of the validity of transit fees in that decision is found in a discussion concerning the right of the taxing state to seek a *quid pro quo* for benefits conferred by the State:

> "There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. [The tax at issue] obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when

the tax is assessed." 423 U. S., at 289–290. (Footnotes omitted.)

In questioning the validity of "transit fees," the *Michelin* Court was concerned with exactions that bore no relation to services and benefits conferred by the State. Thus, the transit-fee inquiry cannot be answered by determining whether or not the tax relates to the value of the goods; instead, it must be answered by inquiring whether the State is simply making the imported goods pay their own way, as opposed to exacting a fee merely for "the privilege of moving through a State." *Ibid.*

The Court already has answered that question in this case. In Part II–C, the Court observes that "nothing in the record suggests that the tax is not fairly related to services and protection provided by the State." *Ante,* at 750–751. Since the stevedoring companies undoubtedly avail themselves of police and fire protection, as well as other benefits Washington offers its local businesses, this statement cannot be questioned. For that reason, I agree with the Court's conclusion that the business tax at issue here is not a "transit fee" within the prohibition of the Import-Export Clause.

Syllabus

FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 76–1172. Argued November 9, 1977—Decided April 26, 1978

Appellants, national banking associations and business corporations, wanted to spend money to publicize their views opposing a referendum proposal to amend the Massachusetts Constitution to authorize the legislature to enact a graduated personal income tax. They brought this action challenging the constitutionality of a Massachusetts criminal statute that prohibited them and other specified business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute specified that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." On April 26, 1976, the case was submitted to a single Justice of the Supreme Judicial Court of Massachusetts on an expedited basis and upon agreed facts. Judgment was reserved and the case was referred to the full court. On September 22, 1976, the court directed entry of a judgment for appellee and issued its opinion upholding the constitutionality of the statute after the referendum, at which the proposal was rejected. *Held:*

1. The case is not rendered moot by the fact that the 1976 referendum has been held and the proposal for a constitutional amendment defeated. The 18-month interval between legislative authorization of placement of the proposal on the ballot and its submission to the voters was too short for appellants to obtain complete judicial review, and likely would be too short in any future challenge to the statute; and in view of the number of times that such a proposal has been submitted to the electorate, there is reasonable expectation that appellants again will be subjected to the threat of prosecution under the statute. *Weinstein* v. *Bradford*, 423 U. S. 147, 149. Pp. 774–775.

2. The portion of the Massachusetts statute at issue violates the First Amendment as made applicable to the States by the Fourteenth. Pp. 775–795.

(a) The expression proposed by appellants, namely, the expression of views on an issue of public importance, is at the heart of the First Amendment's concern. There is no support in the First or Fourteenth Amendment, or in this Court's decisions, for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation that cannot prove, to a court's satisfaction, a material effect on its business. Although appellee suggests that this Court's decisions generally have extended First Amendment rights only to corporations in the business of communications or which foster the self-expression of individuals, those decisions were not based on the rationale that the challenged communication materially affected the company's business. They were based, at least in part, on the Amendment's protection of public discussion and the dissemination of information and ideas. Similarly, commercial speech is accorded some constitutional protection not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 764. Pp. 776–783.

(b) The asserted justifications for the challenged statute cannot survive the exacting scrutiny required when the legislative prohibition is directed at speech itself and speech on a public issue. This statute cannot be justified by the State's asserted interest in sustaining the active role of the individual citizen in the electoral process and preventing diminution of his confidence in government. Even if it were permissible to silence one segment of society upon a sufficient showing of imminent danger, there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. And the risk of corruption perceived in this Court's decisions involving candidate elections is not present in a popular vote on a public issue. Nor can the statute be justified on the asserted ground that it protects the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. The statute is both underinclusive and overinclusive in serving this purpose, and therefore could not be sustained even if the purpose itself were deemed compelling. Pp. 788–795.

371 Mass. 773, 359 N. E. 2d 1262, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 795. WHITE, J., filed a dissenting opinion, in

which BRENNAN and MARSHALL, JJ., joined, *post,* p. 802. REHNQUIST, J., filed a dissenting opinion, *post,* p. 822.

Francis H. Fox argued the cause for appellants. With him on the briefs was *E. Susan Garsh.*

Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Francis X. Bellotti,* Attorney General, *pro se,* and *Stephen Schultz,* Assistant Attorney General.*

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits. 430 U. S. 964 (1977). We now reverse.

I

The statute at issue, Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977), prohibits appellants, two national banking

*Briefs of *amici curiae* urging reversal were filed by *Henry Paul Monaghan* for the Associated Industries of Massachusetts, Inc., et al., and by *Jerome H. Torshen, Jeffrey Cole, Stanley T. Kaleczyc, Jr.,* and *Lawrence B. Kraus* for the Chamber of Commerce of the United States.

William C. Oldaker filed a brief for the Federal Election Commission as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Mike Greely,* Attorney General, and *Jack Lowe,* Special Assistant Attorney General, for the State of Montana; by *James S. Hostetler* for the New England Council; and by *Ronald A. Zumbrun, Robert K. Best, John H. Findley, Albert Ferri, Jr.,* and *W. Hugh O'Riordan* for the Pacific Legal Foundation.

associations and three business corporations,[1] from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute further specifies that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." A corporation that violates § 8 may receive a maximum fine of $50,000; a corporate officer, director, or agent who violates the section may receive a maximum fine of $10,000 or imprisonment for up to one year, or both.[2]

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[1] Appellants are the First National Bank of Boston, New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co.

[2] Massachusetts Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977), provides (with emphasis supplied):

"*No corporation carrying on the business of a bank,* trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, *no business corporation incorporated under the laws of or doing business in the commonwealth* and no officer or agent acting in behalf of any corporation mentioned in this section, *shall directly or indirectly give, pay, expend or contribute,* or promise to give, pay, expend or contribute, *any money or other valuable thing for the purpose of* aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or *influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.* No person or persons, no political committee, and no person acting under the authority of a political com-

Appellants wanted to spend money to publicize their views on a proposed constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976. The amendment would have permitted the legislature to impose a graduated tax on the income of individuals. After appellee, the Attorney General of Massachusetts, informed appellants that he intended to enforce § 8 against them, they brought this action seeking to have the statute declared unconstitutional. On April 26, 1976, the case was submitted to a single justice of the Supreme Judicial Court on an expedited basis and upon agreed facts, in order to settle the question before the upcoming election.[3] Judgment was reserved and the case referred to the full court that same day.

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mittee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

"Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, . . . shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

[3] This was not the first challenge to § 8. The statute's legislative and judicial history has been a troubled one. Its successive re-enactments have been linked to the legislature's repeated submissions to the voters of a constitutional amendment that would allow the enactment of a graduated tax.

The predecessor of § 8, Mass. Gen. Laws, ch. 55, § 7 (as amended by 1946 Mass. Acts, ch. 537, § 10), was first challenged in *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N. E. 2d 871 (1962). Unlike § 8, § 7 did not dictate that questions concerning the taxation of individuals could not satisfy the "materially affecting" requirement. The Supreme Judicial Court construed § 7 not to prohibit a corporate expenditure urging the voters to reject a proposed constitutional amendment authorizing the legislature to impose a graduated tax on corporate as well as individual income.

After *Lustwerk* the legislature amended § 7 by adding the sentence: "No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially

Appellants argued that § 8 violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution. They prayed that the statute be declared unconstitutional on its face and as it would be applied to their proposed expenditures. The parties' statement of agreed facts reflected their disagreement as to the effect that the adoption of a personal income tax would have on appellants' business; it noted that "[t]here is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations." App. 17. Appellee did not dispute that appellants' management believed that the tax would have a significant effect on their businesses.[4]

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to affect the property, business or assets of the corporation." 1972 Mass. Acts, ch. 458. The statute was challenged in 1972 by four of the present appellants; they wanted to oppose a referendum proposal similar to the one submitted to and rejected by the voters in 1962. Again the expenditure was held to be lawful. *First Nat. Bank of Boston* v. *Attorney General*, 362 Mass. 570, 290 N. E. 2d 526 (1972).

The most recent amendment was enacted on April 28, 1975, when the legislature further refined the second sentence of § 8 to apply only to ballot questions "solely" concerning the taxation of individuals. 1975 Mass. Acts, ch. 151, § 1. Following this amendment, the legislature on May 7, 1975, voted to submit to the voters on November 2, 1976, the proposed constitutional amendment authorizing the imposition of a graduated *personal* income tax. It was this proposal that led to the case now before us.

[4] Appellants believe that the adoption of a graduated personal income tax would materially affect their business in a variety of ways, including, in the words of the court below,

"discouraging highly qualified executives and highly skilled professional personnel from settling, working or remaining in Massachusetts; promoting a tax climate which would be considered unfavorable by business corporations, thereby discouraging them from settling in Massachusetts with 'resultant adverse effects' on the plaintiff banks' loans, deposits, and other services; and tending to shrink the disposable income of individuals avail-

On September 22, 1976, the full bench directed the single justice to enter judgment upholding the constitutionality of § 8. An opinion followed on February 1, 1977. In addressing appellants' constitutional contentions,[5] the court acknowledged that § 8 "operate[s] in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo,* 424 U. S. 1, 14 (1976), and viewed the principal question as "whether business corporations, such as [appellants], have First Amendment rights coextensive with those of natural persons or associations of natural persons." 371 Mass. 773, 783, 359 N. E. 2d 1262, 1269. The court found its answer in the contours of a corporation's constitutional right, as a "person" under the Fourteenth Amendment, not to be deprived of property without due process of law. Distinguishing the First Amendment rights of a natural person from the more limited rights of a corporation, the court concluded that "whether its rights are designated 'liberty' rights or 'property' rights, a corporation's property and business interests are entitled to Fourteenth Amendment protection. . . . [A]s an incident of such protection, corporations also possess certain rights of speech and expression under the First Amendment." *Id.,* at 784, 359 N. E. 2d, at 1270 (citations and footnote omitted). Accordingly, the court held that "only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other

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able for the purchase of the consumer products manufactured by at least one of the plaintiff corporations." 371 Mass., at 777, 359 N. E. 2d, at 1266.

[5] In contrast to its approach in the previous challenges to the predecessor of § 8, see n. 3, *supra,* the court determined that it had to address appellants' constitutional challenge because "[t]he statutory amendment to § 8 makes it clear that the Legislature has specifically proscribed corporate expenditures of moneys relative to this proposed amendment." 371 Mass., at 780, 359 N. E. 2d, at 1268. This was clear from the language of the second sentence of § 8 and from the legislature's synchronized amendment of § 8 and approval of the submission of the ballot question to the voters.

activities entitling it to communicate its position on that issue to the general public." Since this limitation is "identical to the legislative command in the first sentence of [§ 8]," the court concluded that the legislature "has clearly identified in the challenged statute the parameters of corporate free speech." *Id.*, at 785, 359 N. E. 2d, at 1270.

The court also declined to say that there was "no rational basis for [the] legislative determination," embodied in the second sentence of § 8, that a ballot question concerning the taxation of individuals could not materially affect the interests of a corporation. *Id.*, at 786, 359 N. E. 2d, at 1271. In rejecting appellants' argument that this second sentence established a conclusive presumption in violation of the Due Process Clause, the court construed § 8 to embody two distinct crimes: The first prohibits a corporation from spending money to influence the vote on a ballot question not materially affecting its business interests; the second, and more specific, prohibition makes it criminal *per se* for a corporation to spend money to influence the vote on a ballot question solely concerning individual taxation. While acknowledging that the second crime is "related to the general crime" stated in the first sentence of § 8, the court intimated that the second sentence was intended to make criminal an expenditure of the type proposed by appellants without regard to specific proof of the materiality of the question to the corporation's business interests.[6] *Id.*, at 795 n. 19, 790–791, 359 N. E. 2d, at 1276 n. 19,

[6] For purposes of this decision we need not distinguish between the "two crimes" identified by the Supreme Judicial Court. MR. JUSTICE WHITE, dissenting, conveys an incorrect impression of our decision when he states, *post*, at 803, that we have not disapproved the legislative judgment that the personal income tax issue could not have a material effect on any corporation, including appellants. We simply have no occasion either to approve or to disapprove that judgment. If we were to invalidate the second sentence of § 8, thereby putting a ballot question concerning taxation of individuals on the same plane as any other ballot question, we still would have to decide whether the "materially affecting" limitation in the general

1273–1274. The court nevertheless seems to have reintroduced the "materially affecting" concept into its interpretation of the second sentence of § 8, as a limitation on the scope of the so-called "second crime" imposed by the Federal Constitution rather than the Massachusetts Legislature. *Id.*, at 786, 359 N. E. 2d, at 1271. But because the court thought appellants had not made a sufficient showing of material effect, their challenge to the statutory prohibition as applied to them also failed.

Appellants' other arguments fared no better. Adopting a narrowing construction of the statute,[7] the Supreme Judicial Court rejected the contention that § 8 is overbroad. It also found no merit in appellants' vagueness argument because the specific prohibition against corporate expenditures on a referendum solely concerning individual taxation is "both precise and definite." *Id.*, at 791, 359 N. E. 2d, at 1273–1274.

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prohibition of § 8 could be squared with the First Amendment. The court below already has held that appellants' proposed expenditures would not meet that test and therefore would be proscribed. This is a finding of fact which we have no occasion to review. But cf. n. 21, *infra*.

Conversely, we would have to reach the question of the constitutionality of the "second" and more restrictive crime only if we first concluded that it is permissible under the First Amendment to limit corporate speech to matters materially affecting the corporation's business, property, or assets Because the "materially affecting" limitation bars appellants from making their proposed expenditures under either the first or second sentence of § 8, we must decide whether that limitation is constitutional.

[7] The court stated that § 8 would not prohibit the publication of "in-house" newspapers or communications to stockholders containing the corporation's view on a graduated personal income tax; the participation by corporate employees, at corporate expense, in discussions or legislative hearings on the issue; the participation of corporate officers, directors, stockholders, or employees in public discussion of the issue on radio or television, at news conferences, or through statements to the press or "similar means not involving contributions or expenditure of corporate funds"; or speeches or comments by employees or officers, on working hours, to the press or a chamber of commerce. 371 Mass., at 789, 359 N. E. 2d, at 1272.

Finally, the court held that appellants were not denied the equal protection of the laws.[8]

II

Because the 1976 referendum has been held, and the proposed constitutional amendment defeated, we face at the outset a question of mootness. As the case falls within the class of controversies "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911), we conclude that it is not moot. Present here are both elements identified in *Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975), as precluding a finding of mootness in the absence of a class action: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again."

Under no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment. In each of the legislature's four attempts to obtain constitutional authorization to enact a graduated income tax, including this most recent one, the period of time between legislative authorization of the proposal and its submission to the voters was approximately 18 months. This proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long. Furthermore, a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively.

Nor can there be any serious doubt that there is a "reasonable expectation," *Weinstein* v. *Bradford, supra,* that appel-

[8] Because of our disposition of appellants' First Amendment claim, we need not address any of these arguments.

lants again will be subject to the threat of prosecution under § 8. The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters. Appellee's suggestion that the legislature may abandon its quest for a constitutional amendment is purely speculative.[9] Appellants insist that they will continue to oppose the constitutional amendment, and there is no reason to believe that the Attorney General will refrain from prosecuting violations of § 8.[10] Compare *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 546–547 (1976), with *Spomer* v. *Littleton,* 414 U. S. 514, 521 (1974).

Meanwhile, § 8 remains on the books as a complete prohibition of corporate expenditures related to individual tax referenda, and as a restraining influence on corporate expenditures concerning other ballot questions. The criminal penalties of § 8 discourage challenge by violation, and the effect of the statute on arguably protected speech will persist. *Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974); see *American Party of Texas* v. *White,* 415 U. S. 767, 770 n. 1 (1974); *Rosario* v. *Rockefeller,* 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein,* 405 U. S. 330, 333 n. 2 (1972). Accordingly, we conclude that this case is not moot and proceed to address the merits.

III

The court below framed the principal question in this case as whether and to what extent corporations have First Amend-

[9] Most of the States, and the District of Columbia, impose graduated personal income taxes. U. S. Dept. of Commerce, Bureau of the Census, State Government Tax Collections in 1977, Table 9, p. 13 (1977). Several States impose a graduated tax on corporate income. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism, Vol. II, Table 113, pp. 219–222 (1977).

[10] We are informed that the Attorney General also has threatened one of the appellants with prosecution under § 8 for an expenditure in support of a local referendum proposal concerning a civic center. Brief for Appellants 22 n. 7, A–1.

ment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

A

The speech proposed by appellants is at the heart of the First Amendment's protection.

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940).

The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. See n. 4, *supra.* The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement.

As the Court said in *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free

discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy,[11] and this is no less true because the speech comes from a corporation rather than an individual.[12] The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

The court below nevertheless held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests. In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.[13]

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[11] Freedom of expression has particular significance with respect to government because "[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24–26 (1948).

[12] The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge. See G. Gunther, Cases and Materials on Constitutional Law 1044 (9th ed. 1975); T. Emerson, The System of Freedom of Expression 6 (1970). The Court has declared, however, that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75 (1964). And self-govenment suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945), quoted in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964).

[13] Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would

The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection. We turn now to that question.

B

The court below found confirmation of the legislature's definition of the scope of a corporation's First Amendment rights in the language of the Fourteenth Amendment. Noting that the First Amendment is applicable to the States through the Fourteenth, and seizing upon the observation that corporations "cannot claim for themselves the liberty which the Fourteenth Amendment guarantees," *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), the court concluded that a corporation's First Amendment rights must derive from its property rights under the Fourteenth.[14]

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be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities.

[14] The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. See Brief for Appellee 4, 23–25. Cf. MR. JUSTICE WHITE's dissent, *post,* at 809; MR. JUSTICE REHNQUIST's dissent, *post,* p. 822. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, *e. g., Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85 (1977); *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922 (1975); *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975); *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967); *New York Times Co.* v. *Sullivan, supra; Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (1959); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment. *E. g., United States* v. *Martin Linen Supply Co.,* 430 U. S. 564 (1977) (Fifth Amendment double jeopardy); *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 353 (1977) (Fourth Amendment). In any event, appellee's argument is inapplicable to two of the appellants. National banks are creatures of federal law and in-

This is an artificial mode of analysis, untenable under decisions of this Court.

> "In a series of decisions beginning with *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the *liberty* safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 500–501 (1952) (footnote omitted) (emphasis supplied).

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strumentalities of the Federal Government, *Easton* v. *Iowa,* 188 U. S. 220, 229–230 (1903); *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), and their existence is in no way dependent on state law. See 7A Michie, Banks and Banking, ch. 15, §§ 1, 5 (1973 ed.).

In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved. *E. g., Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U. S. 376 (1973); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957). Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, *Wilson* v. *United States,* 221 U. S. 361, 382–386 (1911), or equality with individuals in the enjoyment of a right to privacy, *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 65–67 (1974); *United States* v. *Morton Salt Co.,* 338 U. S. 632, 651–652 (1950), but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. *United States* v. *White,* 322 U. S. 694, 698–701 (1944). Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, see *Gitlow* v. *New York,* 268 U. S. 652, 666 (1925) (opinion of the Court); *id.,* at 672 (Holmes, J., dissenting); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460 (1958); *Stromberg* v. *California,* 283 U. S. 359, 368 (1931); *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (1937); Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926), and the Court has not identified a separate source for the right when it has been asserted by corporations.[15] See, *e. g., Times Film Corp.* v. *Chicago,* 365 U. S. 43, 47 (1961); *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *Joseph Burstyn, supra.* In *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936), the Court rejected the very reasoning adopted by the Supreme Judicial Court and did not rely on the corporation's property rights under the Fourteenth Amendment in sustaining its freedom of speech.[16]

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[15] It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394 (1886); see *Covington & Lexington Turnpike R. Co.* v. *Sandford,* 164 U. S. 578 (1896).

[16] The appellant in *Grosjean* argued that "[t]he liberty guaranteed by the fourteenth amendment against deprivation without due process of law is the liberty of NATURAL not of artificial persons." Brief for Appellant in *Grosjean* v. *American Press Co.,* O. T. 1935, No. 303, p. 42; see 297 U. S., at 235. See also *Hague* v. *CIO,* 307 U. S. 496, 518 (1939) (opinion of Stone, J.). But see *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958); *NAACP* v. *Button,* 371 U. S. 415 (1963).

The semantic reasoning of the court below would lead logically to the conclusion that the protection afforded speech by corporations, or, for that matter, other artificial entities and associations, would differ depending on whether the source of the alleged abridgment was a State or the Federal Government. But the States do not have greater latitude than Congress to abridge freedom of speech. The dissenting opinion of Mr. Justice Rehnquist, *post,* at 823, is predicated on the view that the First Amend-

Yet appellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves, and the court below apparently accepted the "materially affecting" theory as the conceptual common denominator between appellee's position and the precedents of this Court. It is true that the "materially affecting" requirement would have been satisfied in the Court's decisions affording protection to the speech of media corporations and corporations otherwise in the business of communication or entertainment, and to the commercial speech of business corporations. See cases cited in n. 14, *supra.* In such cases, the speech would be connected to the corporation's business almost by definition. But the effect on the business of the corporation was not the governing rationale in any of these decisions. None of them mentions, let alone attributes significance to, the fact that the subject of the challenged communication materially affected the corporation's business.

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.[17] *Mills* v. *Alabama,* 384 U. S., at 219; see

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ment has only a "limited application . . . to the States." See also *Buckley* v. *Valeo,* 424 U. S. 1, 291–292 (1976) (opinion of REHNQUIST, J.). Although advanced forcefully by Mr. Justice Jackson in 1952, *Beauharnais* v. *Illinois,* 343 U. S. 250, 287–295 (1952) (dissenting opinion), and repeated by Mr. Justice Harlan in 1957, *Roth* v. *United States,* 354 U. S. 476, 500–503 (1957) (dissenting opinion), this view has never been accepted by any majority of this Court.

[17] By its terms, § 8 would seem to apply to corporate members of the press. The court below noted, however, that no one "has . . . asserted that [§ 8] bars the press, corporate, institutional or otherwise, from engaging in discussion or debate on the referendum question." 371 Mass., at 785 n. 13, 359 N. E. 2d, at 1270 n. 13. Because none of the appellants claimed to be part of the institutional press, the court did not "venture an opinion on such matters." *Ibid.*

The observation of MR. JUSTICE WHITE, *post,* at 808 n. 8, that media

Saxbe v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten.[18] Cf. *Buckley* v. *Valeo*, 424 U. S., at 51 n. 56;

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corporations cannot be "immunize[d]" from restrictions on electoral expenditures, ignores the fact that those corporations need not make separately identifiable expenditures to communicate their views. They accomplish the same objective each day within the framework of their usual protected communications.

[18] If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment. Certainly there are voters in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new business into the State and to prevent established businesses from leaving, who would be as interested in hearing appellants' views on a graduated tax as the views of media corporations that might be less knowledgeable on the subject. "[P]ublic debate must not only be unfettered; it must also be informed." *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–863 (1974) (POWELL, J., dissenting).

MR. JUSTICE WHITE's dissenting view would empower a State to restrict corporate speech far more narrowly than would the opinion of the Massachusetts court or the statute under consideration. This case involves speech in connection with a referendum. MR. JUSTICE WHITE's rationale would allow a State to proscribe the expenditure of corporate funds at any time for the purpose of expressing views on "political [or] social questions" or in connection with undefined "ideological crusades," unless the expenditures were shown to be "integrally related to corporate business operations." *Post*, at 803, 805, 806, 816, 819, 821. Thus corporate activities that are widely viewed as educational and socially constructive could be prohibited. Corporations no longer would be able safely to support—by contributions or public service advertising—educational, charitable, cultural, or even human rights causes. Similarly, informational advertising on such subjects of national interest as inflation and the worldwide energy problem could be prohibited. Many of these "causes" and subjects could be viewed as "social," "political," or "ideological." No prudent corporate management would incur the risk of criminal penalties, such as those in the Massachusetts Act, that would follow from a failure to prove the materiality to the corporation's "business, property or assets" of such contributions or advertisements. See n. 21, *infra*.

Red Lion Broadcasting Co. v. *FCC,* 395 U. S. 367, 389–390 (1969); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964); *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945). Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.[19] See *Red Lion Broadcasting Co.* v. *FCC, supra; Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Time, Inc.* v. *Hill,* 385 U. S. 374, 389 (1967). Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. *Winters* v. *New York,* 333 U. S. 507, 510 (1948).

Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 764 (1976); see *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 95 (1977).[20]

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[19] The suggestion in MR. JUSTICE WHITE's dissent, *post,* at 807, that the First Amendment affords less protection to ideas that are not the product of "individual choice" would seem to apply to newspaper editorials and every other form of speech created under the auspices of a corporate body. No decision of this Court lends support to such a restrictive notion.

[20] It is somewhat ironic that appellee seeks to reconcile these decisions with the "materially affecting" concept by noting that the commercial speaker would "have a direct financial interest in the speech," Brief for Appellee 19, and n. 12. Until recently, the "purely commercial" nature

C

We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Section 8 permits a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also singles out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public. The legislature has drawn the line between permissible and impermissible speech according to whether there is a sufficient nexus, as defined by the legislature, between the issue presented to the voters and the business interests of the speaker.

In the realm of protected speech, the legislature is consti-

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of an advertisement was thought to undermine and even negate its entitlement to the sanctuary of the First Amendment. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942); see *Bigelow* v. *Virginia,* 421 U. S. 809, 822 (1975); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976). Appellee would invert the debate by giving constitutional significance to a corporation's "hawking of wares" while approving criminal sanctions for a bank's expression of opinion on a tax law of general public interest.

In emphasizing the societal interest and the fact that this Court's decisions have not turned on the effect upon the speaker's business interests, we do not say that such interests may not be relevant or important in a different context.

tutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.[21] Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people,[22] the First Amendment is

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[21] Even assuming that the rationale behind the "materially affecting" requirement itself were unobjectionable, the limitation in § 8 would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in § 8. *New York Times Co.* v. *Sullivan,* 376 U. S., at 279; *Smith* v. *California,* 361 U. S. 147, 151 (1959); *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). As the facts in this case illustrate, management never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. "[T]he free dissemination of ideas [might] be the loser." *Smith* v. *California, supra,* at 151; see *Freedman* v. *Maryland,* 380 U. S. 51, 59–60 (1965).

[22] Cf. *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167, 175–176 (1976).

Our observation about the apparent purpose of the Massachusetts Legislature is not an endorsement of the legislature's factual assumptions about the views of corporations. We know of no documentation of the notion that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax. Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size

plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests.

IV

The constitutionality of § 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself,[23] and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960); see *NAACP* v. *Button,* 371 U. S. 415, 438–439 (1963); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S., at 463; *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945), "and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns,* 427 U. S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . . ." *Buckley* v. *Valeo,* 424 U. S., at 25; see *NAACP* v. *Button, supra,* at 438; *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960).

The Supreme Judicial Court did not subject § 8 to "the critical scrutiny demanded under accepted First Amendment

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public companies and to those that are closely held and controlled by an individual or family. It is arguable that small or medium-size corporations might welcome imposition of a graduated personal income tax that might shift a greater share of the tax burden onto wealthy individuals. See Brief for New England Council as *Amicus Curiae* 23–24.

[23] It is too late to suggest "that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley* v. *Valeo,* 424 U. S., at 16; see *New York Times Co.* v. *Sullivan,* 376 U. S., at 266. Furthermore, § 8 is an "attempt directly to control speech . . . rather [than] to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." *Speiser* v. *Randall,* 357 U. S., at 527. Cf. *United States* v. *O'Brien,* 391 U. S. 367 (1968).

and equal protection principles," *Buckley, supra,* at 11, because of its view that the First Amendment does not apply to appellants' proposed speech.[24] For this reason the court did not even discuss the State's interests in considering appellants' First Amendment argument. The court adverted to the conceivable interests served by § 8 only in rejecting appellants' equal protection claim.[25] Appellee nevertheless advances two principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. However weighty these interests may be in the context of partisan candidate elec-

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[24] The court justified its deferential standard of review more explicitly in its discussion of appellants' equal protection claim:

"We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters. While we agree with the plaintiffs that where free speech is involved strict scrutiny is required . . . , we have already concluded that the plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets." 371 Mass., at 793, 359 N. E. 2d, at 1275 (citations omitted).

[25] The court reasoned that the inclusion of business corporations in § 8, but not entities such as unincorporated associations, partnerships, labor unions, or nonprofit corporations, *might* be attributable to the fact that the latter entities do not have shareholders: "Section 8 could represent a legislative desire to protect such shareholders against ultra vires activities . . . ." *Id.,* at 794, 359 N. E. 2d, at 1275. The court found justification for the noninclusion of other entities that have shareholders, such as business trusts and real estate investment trusts, in the supposition that "the Legislature may justifiably have concluded that such trusts did not present the type of problem in this area presented by general business corporations." *Ibid.* The court did not specify which "type of problem" it meant.

tions,[26] they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition in § 8.

A

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility

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[26] In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribes corporate contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting, or antagonizing the interests of any political party." See n. 2, *supra*. In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections. Cf. *Pipefitters* v. *United States*, 407 U. S. 385 (1972); *United States* v. *Automobile Workers*, 352 U. S. 567 (1957); *United States* v. *CIO*, 335 U. S. 106 (1948). About half of these laws, including the federal law, 2 U. S. C. § 441b (1976 ed.) (originally enacted as the Federal Corrupt Practices Act, 34 Stat. 864), by their terms do not apply to referendum votes. Several of the others proscribe or limit spending for "political" purposes, which may or may not cover referenda. See *Schwartz* v. *Romnes*, 495 F. 2d 844 (CA2 1974).

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. See *United States* v. *Automobile Workers*, *supra*, at 570–575; *Schwartz* v. *Romnes*, *supra*, at 849–851. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley* v. *Valeo*, *supra*, at 46; Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L. Rev. 386, 408–410 (1977).

of the individual citizen in a democracy for the wise conduct of government" [27] are interests of the highest importance. *Buckley, supra; United States* v. *Automobile Workers,* 352 U. S. 567, 570 (1957); *United States* v. *CIO,* 335 U. S. 106, 139 (1948) (Rutledge, J., concurring); *Burroughs* v. *United States,* 290 U. S. 534 (1934). Preservation of the individual citizen's confidence in government is equally important. *Buckley, supra,* at 27; *CSC* v. *Letter Carriers,* 413 U. S. 548, 565 (1973).

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts,[28] or that

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[27] *United States* v. *Automobile Workers, supra,* at 575.

[28] In his dissenting opinion, MR. JUSTICE WHITE relies on incomplete facts with respect to expenditures in the 1972 referendum election, in support of his perception as to the "domination of the electoral process by corporate wealth." *Post,* at 811; see *post,* at 810–811. The record shows only the extent of corporate and individual contributions to the two committees that were organized to support and oppose, respectively, the constitutional amendment. It does show that three of the appellants each contributed $3,000 to the "opposition" committee. The dissenting opinion makes no reference to the fact that amounts of money expended inde-

there has been any threat to the confidence of the citizenry in government. Cf. *Wood* v. *Georgia,* 370 U. S. 375, 388 (1962).

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, *e. g., United States* v. *Automobile Workers, supra; United States* v. *CIO, supra,* simply is not present in a popular vote on a public issue.[29] To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S., at 689. We noted only recently that "the concept that government may restrict the speech of some elements of our society in order

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pendently of organized committees need not be reported under Massachusetts law, and therefore remain unknown.

Even if viewed as material, any inference that corporate contributions "dominated" the electoral process on this issue is refuted by the 1976 election. There the voters again rejected the proposed constitutional amendment even in the absence of any corporate spending, which had been forbidden by the decision below.

[29] See *Schwartz* v. *Romnes, supra,* at 851; *C&C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (Mont. 1976), appeal docketed, No. 76–3118 (CA9, Sept. 21, 1976); *Pacific Gas & Elec. Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *Advisory Opinion on Constitutionality of 1975 Pub. Act 227,* 396 Mich. 465, 491, 493–495, 242 N. W. 2d 3, 13, 14–15 (1976).

Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for " 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times Co.* v. *Sullivan,* 376 U. S., at 266 (quoting *Associated Press* v. *United States,* 326 U. S., at 20).

to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley,* 424 U. S., at 48–49.[30] Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.[31] They may consider, in making their

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[30] MR. JUSTICE WHITE argues, without support in the record, that because corporations are given certain privileges by law they are able to "amass wealth" and then to "dominate" debate on an issue. *Post,* at 809, 821. He concludes from this generalization that the State has a subordinating interest in denying corporations access to debate and, correspondingly, in denying the public access to corporate views. The potential impact of this argument, especially on the news media, is unsettling. One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to "enhance the relative voices" of smaller and less influential members.

Except in the special context of limited access to the channels of communication, see *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), this concept contradicts basic tenets of First Amendment jurisprudence. We rejected a similar notion in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). There we held that the First Amendment prohibits a State from requiring a newspaper to make space available at no cost for a reply from a candidate whom the newspaper has criticized. The state court had held that "free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the 'broad societal interest in the free flow of information to the public.'" *Id.,* at 245. Far more than in the instant case, allegations were there made and substantiated of a concentration in the hands of a few of "the power to inform the American people and shape public opinion," and that "the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues." *Id.,* at 250.

[31] Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves. See *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 S. Ct. Rev. 245, 263. The First Amendment rejects the "highly paternalistic" approach of statutes like § 8 which restrict what the people may hear. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S., at 770; see *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S., at 97; *Whitney* v. *California,* 274 U. S. 357, 377

judgment, the source and credibility of the advocate.[32] But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. *Wood* v. *Georgia, supra.* In sum, "[a] restriction so destructive of the right of public discussion [as § 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment." [33]

B

Finally, appellee argues that § 8 protects corporate shareholders, an interest that is both legitimate and traditionally within the province of state law. *Cort* v. *Ash,* 422 U. S. 66, 82–84 (1975). The statute is said to serve this interest by preventing the use of corporate resources in furtherance of

(1927) (Brandeis, J., concurring); *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co.* v. *Trucking Unlimited,* 404 U. S. 508, 510–511 (1972); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 137–138 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.

[32] Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See *Buckley,* 424 U. S., at 66–67; *United States* v. *Harriss,* 347 U. S. 612, 625–626 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U. S., at 67.

[33] *Thomas* v. *Collins,* 323 U. S. 516, 537 (1945).

views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.

The underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, see n. 31, *supra,* even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates . . . that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduated income tax amendment." Brief for Appellee 6.

Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8.

The overinclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.[34] Acting through their power to elect

[34] Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders. MR. JUSTICE WHITE's repeatedly expressed concern for corporate shareholders who may be "coerced" into supporting "causes with which they disagree" apparently is not shared by appellants' shareholders. Not a single shareholder has joined appellee in defending the Massachusetts statute or, so far as the record shows, has interposed any objection to the right asserted by the corporations to make the proscribed expenditures.

The dissent of MR. JUSTICE WHITE relies heavily on *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), and *Machinists* v. *Street*, 367 U. S. 740 (1961). These decisions involved the First Amendment rights of employees in closed or agency shops not to be compelled, as a condition of employment, to support with financial contributions the political activities of other union members with which the dissenters disagreed.

Street and *Abood* are irrelevant to the question presented in this case. In those cases employees were required, either by state law or by agreement between the employer and the union, to pay dues or a "service fee" to the exclusive bargaining representative. To the extent that these funds were used by the union in furtherance of political goals, unrelated to collective bargaining, they were held to be unconstitutional because they compelled the dissenting union member " 'to furnish contributions of money for the propagation of opinions which he disbelieves . . . .' " *Abood*, *supra*, at 235 n. 31 (Thomas Jefferson as quoted in I. Brant, James Madison: The Nationalist 354 (1948)).

The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact, noted by the dissent, that compulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason. A more relevant analogy, therefore, is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement

the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

Assuming, *arguendo,* that protection of shareholders is a "compelling" interest under the circumstances of this case, we find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit appellants from speaking. *Shelton* v. *Tucker,* 364 U. S., at 485.

V

Because that portion of § 8 challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated. The judgment of the Supreme Judicial Court is

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion and judgment of the Court but write separately to raise some questions likely to arise in this area in the future.

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with its stance on a political issue. The *Street* and *Abood* Courts did not address the question whether, in such a situation, the union or association must refund a portion of the dissenter's dues or, more drastically, refrain from expressing the majority's views. In addition, even apart from the substantive differences between compelled membership in a union and voluntary investment in a corporation or voluntary participation in *any* collective organization, it is by no means an automatic step from the remedy in *Abood,* which honored the interests of the minority without infringing the majority's rights, to the position adopted by the dissent which would completely silence the majority because a hypothetical minority might object.

A disquieting aspect of Massachusetts' position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as most do—to carry on the business of mass communications, particularly the large media conglomerates. This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants in this case.

Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many activities, some directly related—and some not—to their publishing and broadcasting activities. See *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 248–254 (1974). Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or worldwide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timberlands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for the purpose of transporting the newsprint to the presses. Such activities would be logical economic auxiliaries to a publishing conglomerate. Ownership also may extend beyond to business activities unrelated to the task of publishing newspapers and magazines or broadcasting radio and television programs. Obviously, such far-reaching ownership would not be possible without the state-provided corporate form and its "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets . . . ." *Post,* at 809 (WHITE, J., dissenting).

In terms of "unfair advantage in the political process" and "corporate domination of the electoral process," *post,* at 809–810, it could be argued that such media conglomerates as I de-

scribe pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues. See *Miami Herald Publishing Co.* v. *Tornillo, supra; ante,* at 791 n. 30. In *Tornillo,* for example, we noted the serious contentions advanced that a result of the growth of modern media empires "has been to place in a few hands the power to inform the American people and shape public opinion." 418 U. S., at 250.

In terms of Massachusetts' other concern, the interests of minority shareholders, I perceive no basis for saying that the managers and directors of the media conglomerates are more or less sensitive to the views and desires of minority shareholders than are corporate officers generally.[1] Nor can it be said, even if relevant to First Amendment analysis—which it is not—that the former are more virtuous, wise, or restrained in the exercise of corporate power than are the latter. Cf. *Columbia Broadcasting System* v. *Democratic National Comm.,* 412 U. S. 94, 124–125 (1973); 14 The Writings of Thomas Jefferson 46 (A. Libscomb ed. 1904) (letter to Dr. Walter Jones, Jan. 2, 1814). Thus, no factual distinction has been identified as yet that would justify government restraints on the right of appellants to express their views without, at the same time, opening the door to similar restraints on media conglomerates with their vastly greater influence.

Despite these factual similarities between media and nonmedia corporations, those who view the Press Clause as somehow conferring special and extraordinary privileges or status on the "institutional press"—which are not extended to those

[1] It may be that a nonmedia corporation, because of its nature, is subject to more limitations on political expression than a media corporation whose very existence is aimed at political expression. For example, the charter of a nonmedia corporation may be so framed as to render such activity or expression ultra vires; or its shareholders may be much less inclined to permit expenditure for corporate speech. Moreover, a nonmedia corporation may find it more difficult to characterize its expenditures as ordinary and necessary business expenses for tax purposes.

who wish to express ideas other than by publishing a newspaper—might perceive no danger to institutional media corporations flowing from the position asserted by Massachusetts. Under this narrow reading of the Press Clause, government could perhaps impose on nonmedia corporations restrictions not permissible with respect to "media" enterprises. Cf. Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731, 767–770 (1977).[2] The Court has not yet squarely resolved whether the Press Clause confers upon the "institutional press" any freedom from government restraint not enjoyed by all others.[3]

I perceive two fundamental difficulties with a narrow reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege. See Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77, 88–99 (1975). The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman. In defining the nature of the liberty, he did not limit it to a particular group:

> "But, by the *Freedom of the Press,* I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of

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[2] It is open to question whether limitations can be placed on the free expression rights of some without undermining the guarantees of all. Experience with statutory limitations on campaign expenditures on behalf of candidates or parties may shed some light on this issue. Cf. *Buckley* v. *Valeo,* 424 U. S. 1 (1976)

[3] Language in some cases perhaps may be read as assuming or suggesting no independent scope to the Press Clause, see *Pell* v. *Procunier,* 417 U. S. 817, 834 (1974), or the contrary, see *Bigelow* v. *Virginia,* 421 U. S. 809, 828 (1975). The Court, however, has not yet focused on the issue. See Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77 (1975); Nimmer, Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26 Hastings L. J. 639 (1975); cf. Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731 (1977).

> *Religion* and *Government;* of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. . . .
>
> "This is the *Liberty of the Press,* the great *Palladium* of all our other *Liberties,* which I hope the good People of this Province, will forever enjoy . . . ." A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41–42 (1966) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, Apr. 25, 1734).

Indeed most pre-First Amendment commentators "who employed the term 'freedom of speech' with great frequency, used it synonomously with freedom of the press." L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 174 (1960).

Those interpreting the Press Clause as extending protection only to, or creating a special role for, the "institutional press" must either (a) assert such an intention on the part of the Framers for which no supporting evidence is available, cf. Lange, *supra,* at 89–91; (b) argue that events after 1791 somehow operated to "constitutionalize" this interpretation, see Bezanson, *supra* n. 3, at 788; or (c) candidly acknowledging the absence of historical support, suggest that the intent of the Framers is not important today. See Nimmer, *supra* n. 3, at 640–641.

To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs,[4] while the Press Clause

[4] The simplest explanation of the Speech and Press Clauses might be that the former protects oral communications; the latter, written. But the historical evidence does not strongly support this explanation. The

focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938).[5] Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which gen-

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first draft of what became the free expression provisions of the First Amendment, one proposed by Madison on June 8, 1789, as an addition to Art. 1, § 9, read:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Cong. 434 (1789).

The language was changed to its current form, "freedom of speech, or of the press," by the Committee of Eleven to which Madison's amendments were referred. (There is no explanation for the change and the language was not altered thereafter.) It seems likely that the Committee shortened Madison's language preceding the semicolon in his draft to "freedom of speech" without intending to diminish the scope of protection contemplated by Madison's phrase; in short, it was a stylistic change.

Cf. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *Doe* v. *McMillan*, 412 U. S. 306 (1973) (Speech or Debate Clause extends to both spoken and written expressions within the legislative function).

[5] It is not strange that "press," the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience.

Changes wrought by 20th century technology, of course, have rendered the printing press as it existed in 1791 as obsolete as Watt's copying or letter press. It is the core meaning of "press" as used in the constitutional text which must govern.

erally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. See Lange, *supra,* at 100–107. The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell* v. *Griffin, supra,* at 451–452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection.[6] Indeed, the Court has plainly intimated the contrary view:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow

[6] *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931), which examined the meaning of freedom of the press, did not involve a traditional institutionalized newspaper but rather an occasional publication (nine issues) more nearly approximating the product of a pamphleteer than the traditional newspaper.

of information to the public . . . ." *Branzburg* v. *Hayes,* 408 U. S. 665, 704–705 (1972), quoting *Lovell* v. *Griffin, supra,* at 450, 452.

The meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions. The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such. Thus, the tentative probings of this brief inquiry are wholly consistent, I think, with the Court's refusal to sustain § 8's serious and potentially dangerous restriction on the freedom of political speech.

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." *Pennekamp* v. *Florida,* 328 U. S. 331, 364 (1946) (Frankfurter, J., concurring).

In short, the First Amendment does not "belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Massachusetts statute challenged here forbids the use of corporate funds to publish views about referenda issues having no material effect on the business, property, or assets of

the corporation. The legislative judgment that the personal income tax issue, which is the subject of the referendum out of which this case arose, has no such effect was sustained by the Supreme Judicial Court of Massachusetts and is not disapproved by this Court today. Hence, as this case comes to us, the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business. The Court commendably enough squarely faces the issue but unfortunately errs in deciding it. The Court invalidates the Massachusetts statute and holds that the First Amendment guarantees corporate managers the right to use not only their personal funds, but also those of the corporation, to circulate fact and opinion irrelevant to the business placed in their charge and necessarily representing their own personal or collective views about political and social questions. I do not suggest for a moment that the First Amendment requires a State to forbid such use of corporate funds, but I do strongly disagree that the First Amendment forbids state interference with managerial decisions of this kind.

By holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda involving issues having no material connection with the corporate business, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity,[1] as well as upon the Federal Corrupt Practices Act, 2 U. S. C. § 441b (1976 ed.). The Court's fundamental error is its failure to realize that the state regulatory interests in terms of which the alleged curtailment

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[1] Library of Congress, Analysis of Federal and State Campaign Finance Laws—Summaries, prepared for Federal Election Commission (1977). Some 18 of these States prohibit or limit corporate contributions in respect to ballot questions. Reply Brief for Appellants 9–11, n. 6.

of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The question posed by this case, as approached by the Court, is whether the State has struck the best possible balance, *i. e.*, the one which it would have chosen, between competing First Amendment interests. Although in my view the choice made by the State would survive even the most exacting scrutiny, perhaps a rational argument might be made to the contrary. What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the State has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.[2] Moreover, the result reached today in critical respects marks a drastic departure from the Court's prior decisions which have protected against governmental infringement the very First Amendment interests which the Court now deems inadequate to justify the Massachusetts statute.

I

There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all

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[2] See generally Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345 (1977).

furthered by corporate speech.[3] It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." [4] They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see *NAACP* v. *Button,* 371 U. S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. In fact, as discussed *infra,* the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.

Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation's business may be viewed as a means of furthering the desires of individual shareholders.[5] This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed

[3] See T. Emerson, Toward a General Theory of the First Amendment 4–7 (1966); *Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

[4] Emerson, *supra,* at 5.

[5] See *United States* v. *CIO,* 335 U. S. 106, 122–123 (1948).

to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where, as in this case, whatever the belief of the corporate managers may be, they have not been able to demonstrate that the issue involved has any material connection with the corporate business. Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.[6]

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it

[6] This distinguishes the regulation of corporate speech from the limitations upon individual political campaign expenditures invalidated in *Buckley* v. *Valeo,* 424 U. S. 1 (1976). The Court there struck down the limitations upon individual expenditures because they impermissibly restricted the right of individuals to speak their minds and make their views known. *Id.,* at 48, 52. At the same time, however, the Court sustained limitations upon political contributions on the ground that such provisions entail a much lesser restriction upon the individual's ability to engage in free communication than expenditure restrictions. *Id.,* at 20–23. In the case of corporate political activities, we are not at all concerned with the self-expression of the communicator.

can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. In the first place, as discussed *supra,* corporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection. Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed, such individuals could even form associations for the very purpose of promoting political or ideological causes.[7]

I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by cor-

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[7] This is in contrast to the limitations upon individual campaign expenditures in *Buckley* v. *Valeo, supra,* which the Court viewed as heavily burdening the exchange of ideas between individuals and the forming of associations for that purpose. 424 U. S., at 19–20, 47–48.

porations would be significantly impeded. There is also a need for employees, customers, and shareholders of corporations to be able to receive communications about matters relating to the functioning of corporations. Such communications are clearly desired by all investors and may well be viewed as an associational form of self-expression. See *United States* v. *CIO*, 335 U. S. 106, 121–123 (1948). Moreover, it is unlikely that such information would be disseminated by sources other than corporations. It is for such reasons that the Court has extended a certain degree of First Amendment protection to activities of this kind.[8] None of these considerations, however, are implicated by a prohibition upon corporate expenditures relating to referenda concerning questions of general public concern having no connection with corporate business affairs.

It bears emphasis here that the Massachusetts statute forbids the expenditure of corporate funds in connection with referenda but in no way forbids the board of directors of a corporation from formulating and making public what it represents as the views of the corporation even though the subject addressed has no material effect whatsoever on the business of the corporation. These views could be publicized at the indi-

[8] In addition, newspapers and other forms of literature obviously do not lose their First Amendment protection simply because they are produced or distributed by corporations. It is, of course, impermissible to restrict any communication, corporate or otherwise, because of displeasure with its content. I need not decide whether newspapers have a First Amendment right to operate in a corporate form. It may be that for a State which generally permits businesses to operate as corporations to prohibit those engaged in the dissemination of information and opinion from taking advantage of the corporate form would constitute a departure from neutrality prohibited by the free press guarantee of the First Amendment. See Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975); Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731 (1977). There can be no doubt, however, that the First Amendment does not immunize media corporations any more than other types of corporations from restrictions upon electoral contributions and expenditures.

vidual expense of the officers, directors, stockholders, or anyone else interested in circulating the corporate view on matters irrelevant to its business.

The governmental interest in regulating corporate political communications, especially those relating to electoral matters, also raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. Although *Buckley* v. *Valeo,* 424 U. S. 1 (1976), provides support for the position that the desire to equalize the financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails,[9] the interest of Massachusetts and the many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it. Massachusetts could

[9] *Buckley* v. *Valeo,* 424 U. S., at 48–49, 54, 56–57.

permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas. Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held. Corporate political expression, however, is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.[10]

The Court's opinion appears to recognize at least the possibility that fear of corporate domination of the electoral process would justify restrictions upon corporate expenditures and contributions in connection with referenda but brushes this interest aside by asserting that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts," *ante,* at 789, and by suggesting that the statute in issue represents an attempt to give an unfair advantage to those who hold views in opposition to positions which would otherwise be financed by corporations. *Ante,* at 785–786. It fails even to allude to the fact, however, that Massachusetts' most recent experience with unrestrained corporate expenditures in connection

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[10] Congress long ago recognized that the ability to communicate ideas without cost could create an unfair political advantage. See 54 Cong. Rec. 2039–2041 (1917); Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, Conflicts of Interest and Federal Service 54–55 (1960) (franking privilege denied by Congress to part-time employees ("dollar-a-year men") of the Bureau of Education).

with ballot questions establishes precisely the contrary. In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax on both individuals and corporations was put to the voters. The Committee for Jobs and Government Economy, an organized political committee, raised and expended approximately $120,000 to oppose the proposed amendment, the bulk of it raised through large corporate contributions. Three of the present appellant corporations each contributed $3,000 to this committee. In contrast, the Coalition for Tax Reform, Inc., the only political committee organized to support the 1972 amendment, was able to raise and expend only approximately $7,000. App. to Jurisdictional Statement 41; App. to Record 48–84. Perhaps these figures reflect the Court's view of the appropriate role which corporations should play in the Massachusetts electoral process, but it nowhere explains why it is entitled to substitute its judgment for that of Massachusetts and other States,[11] as well as the United States, which have acted to correct or prevent similar domination of the electoral process by corporate wealth.

This Nation has for many years recognized the need for measures designed to prevent corporate domination of the political process. The Corrupt Practices Act, first enacted in 1907, has consistently barred corporate contributions in con-

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[11] California had the same experience in connection with a 1976 referendum measure which would have required legislative approval of nuclear generating plant sites. Two hundred and three corporations contributed approximately $2,530,000 in opposition to the amendment, which was defeated. Supporters of the measure collected altogether only approximately $1,600,000. California Fair Political Practices Comm'n, Campaign Contribution and Spending Report—June 8, 1976, Primary Election 289–298. Later in the same year a similar initiative measure was placed on the ballot in Montana. Corporations contributed approximately $144,000 in opposition to the measure, while its supporters were able to collect only $451. This measure was also defeated. Brief for State of Montana as *Amicus Curiae* 10.

nection with federal elections. This Court has repeatedly recognized that one of the principal purposes of this prohibition is "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *United States* v. *Automobile Workers,* 352 U. S. 567, 585 (1957). See *Pipefitters* v. *United States,* 407 U. S. 385, 415–416 (1972); *United States* v. *CIO,* 335 U. S., at 113. Although this Court has never adjudicated the constitutionality of the Act, there is no suggestion in its cases construing it, cited *supra,* that this purpose is in any sense illegitimate or deserving of other than the utmost respect; indeed, the thrust of its opinions, until today, has been to the contrary. See *Automobile Workers, supra,* at 585; *Pipefitters, supra,* at 415–416.

II

There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business, property, or other affairs of the corporation.[12] The State has not interfered with the prerogatives of corporate management to communicate about matters that have material impact on the business affairs entrusted to them, however much individual stockholders may disagree on economic or ideological grounds. Nor has the State forbidden management from formulating and circulating its views at its own expense or at the expense of others, even where the subject at issue is irrelevant to corporate business affairs. But Massachusetts

[12] This, of course, is an interest that was not present in *Buckley* v. *Valeo, supra,* and would not justify limitations upon the activities of associations, corporate or otherwise, formed for the express purpose of advancing a political or social cause.

has chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issue on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.

This is not only a policy which a State may adopt consistent with the First Amendment but one which protects the very freedoms that this Court has held to be guaranteed by the First Amendment. In *Board of Education* v. *Barnette,* 319 U. S. 624 (1943), the Court struck down a West Virginia statute which compelled children enrolled in public school to salute the flag and pledge allegiance to it on the ground that the First Amendment prohibits public authorities from requiring an individual to express support for or agreement with a cause with which he disagrees or concerning which he prefers to remain silent. Subsequent cases have applied this principle to prohibit organizations to which individuals are compelled to belong as a condition of employment from using compulsory dues to support candidates, political parties, or other forms of political expression which which members disagree or do not wish to support. In *Machinists* v. *Street,* 367 U. S. 740 (1961), the Court was presented with allegations that a union shop authorized by the Railway Labor Act, 45 U. S. C. § 152 Eleventh, had used the union treasury to which all employees were compelled to contribute "to finance the campaigns of candidates for federal and state offices whom [the petitioners] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." 367 U. S., at 744. The Court recognized that compelling contributions for such purposes presented constitutional "questions of the utmost gravity" and consequently construed the Act to prohibit the use of compulsory union dues for political purposes. *Id.,* at 749–750. Last Term,

in *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977), we confronted these constitutional questions and held that a State may not, even indirectly, require an individual to contribute to the support of an ideological cause he may oppose as a condition of employment. At issue were political expenditures made by a public employees' union. Michigan law provided that unions and local government employers might agree to an agency-shop arrangement pursuant to which every employee—even those not union members—must pay to the union, as a condition of employment, union dues or a service fee equivalent in amount to union dues. The legislation itself was not coercive; it did not command that local governments employ only those workers who were willing to pay union dues, but left it to a bargaining representative democratically elected by a majority of the employees to enter or not enter into such a contractual arrangement through collective bargaining. In addition, of course, no one was compelled to work at a job covered by an agency-shop arrangement. Nevertheless, the Court ruled that under such circumstances the use of funds contributed by dissenting employees for political purposes impermissibly infringed their First Amendment right to adhere to their own beliefs and to refuse to defer to or support the beliefs of others.

Presumably, unlike the situations presented by *Street* and *Abood,* the use of funds invested by shareholders with opposing views by Massachusetts corporations in connection with referenda or elections would not constitute state action and, consequently, would not violate the First Amendment. Until now, however, the States have always been free to adopt measures designed to further rights protected by the Constitution even when not compelled to do so. It could hardly be plausibly contended that just because Massachusetts' regulation of corporations is less extensive than Michigan's regulation of labor-management relations, Massachusetts may not constitutionally prohibit the very evil which Michigan may not consti-

tutionally permit. Yet this is precisely what the Court today holds. Although the Court places great stress upon the alleged infringement of the right to receive information produced by Massachusetts' ban on corporate expenditures which, for the reasons stated *supra,* I believe to be misconceived, it fails to explain why such an interest was not sufficient to compel a different weighing of First Amendment interests and, consequently, a different result in *Abood.* After all, even contributions for political causes coerced by labor unions would, under the Court's analysis, increase unions' ability to disseminate their views and, consequently, increase the amount of information available to the general public.

The Court assumes that the interest in preventing the use of corporate resources in furtherance of views which are irrelevant to the corporate business and with which some shareholders may disagree is a compelling one, but concludes that the Massachusetts statute is nevertheless invalid because the State has failed to adopt the means best suited, in its opinion, for achieving this end. *Ante,* at 792–795. It proposes that the aggrieved shareholder assert his interest in preventing the expenditure of funds for nonbusiness causes he finds unconscionable through the channels provided by "corporate democracy" and purports to be mystified as to "why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders." *Ante,* at 794, and n. 34. It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional adjudication is no more able to satisfy the State's interest than a ruling in *Street* and *Abood* leaving aggrieved employees to the remedies provided by union democracy would have satisfied the demands of the First Amendment. The interest which the State wishes to protect here is identical to that which the Court has previously held to be protected by

the First Amendment: the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose. In most contexts, of course, the views of the dissenting shareholder have little, if any, First Amendment significance. By purchasing interests in corporations shareholders accept the fact that corporations are going to make decisions concerning matters such as advertising integrally related to their business operations according to the procedures set forth in their charters and bylaws. Otherwise, corporations could not function. First Amendment concerns of stockholders are directly implicated, however, when a corporation chooses to use its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support. Once again, we are provided no explanation whatsoever by the Court as to why the State's interest is of less constitutional weight than that of corporations to participate financially in the electoral process and as to why the balance between two First Amendment interests should be struck by this Court. Moreover, the Court offers no reason whatsoever for constitutionally imposing its choice of means to achieve a legitimate goal and invalidating those chosen by the State.[13]

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[13] The Court's additional suggestion that the aggrieved shareholder pursue judicial remedies to challenge corporate referenda disbursements, *ante*, at 795, is untenable in light of its holding precluding Massachusetts from defining the powers of corporations active within its borders so as to prohibit the expenditure of funds in connection with referenda campaigns not material to their business functions.

The Court also asserts that Massachusetts' interest in protecting dissenting shareholders is "belied" by its failure to prohibit corporate activity with respect to the passage or defeat of legislation or to include business trusts, real estate investment trusts, and labor unions in its prohibition upon electoral expenditures. *Ante*, at 792–793. It strongly implies that what it views as "underinclusiveness" weakens the consideration to which the interest asserted by Massachusetts is entitled by this Court. Such a

Abood cannot be distinguished, as the present Court attempts to do, *ante,* at 794–795, n. 34, on the ground that the Court there did not constitutionally prohibit expenditures by unions for the election of political candidates or for ideological causes so long as they are financed from assessments paid by employees who are not coerced into doing so against their will. In the first place, the Court did not purport to hold that all political or ideological expenditures not constitutionally prohibited were constitutionally protected. A State might well conclude that the most and perhaps, in its view, the only effective way of preventing unions or corporations from using funds contributed by differing members or shareholders to support political causes having no connection with the business of the organization is to absolutely ban such expenditures.

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conclusion, however, is without justification. No basis whatsoever is offered by the Court for rejecting the conclusion reached by the court below in dismissing appellants' equal protection challenge that the state legislature could permissibly find on the basis of experience, which this Court lacks, that other activities and forms of association do not present problems of the same type or the same dimension. 371 Mass. 773, 794, 359 N. E. 2d 1262, 1275 (1977). Indeed, the Court declines to consider appellants' equal protection challenge. *Ante,* at 774 n. 8.

The Court's further claim that "[t]he fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders [and] suggests instead that the legislature may have been concerned with silencing corporations on a particular subject," *ante,* at 793, ignores the fact that, as earlier acknowledged by the majority, *ante,* at 769–770, n. 3, the statutory provision stating that the personal income tax does not materially affect the business of corporations was enacted in response to prior judicial decisions construing the "materially affecting" requirement as not prohibiting corporate expenditures in connection with income tax referenda. To find evidence of hostility toward corporations on the basis of a decision of a legislature to clarify its intent following judicial rulings interpreting the scope of a statute is to elevate corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.

Secondly, unlike the remedies available to the Court in *Street* and *Abood* which required unions to refund the exacted funds in the proportion that union political expenditures with which a member disagreed bore to total union expenditures, no such alternative is readily available which would enable a corporate shareholder to maintain his investment in a corporation without supporting its electoral or political ventures other than prohibiting corporations from participating in such activities. There is no apparent way of segregating one shareholder's ownership interest in a corporation from another's. It is no answer to respond, as the Court does, that the dissenting "shareholder is free to withdraw his investment at any time and for any reason." *Ante,* at 794 n. 34. The employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened. Clearly the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities.

Finally, even if corporations developed an effective mechanism for rebating to shareholders that portion of their investment used to finance political activities with which they disagreed, a State may still choose to restrict corporate political activity irrelevant to business functions on the grounds that many investors would be deterred from investing in corporations because of a wish not to associate with corporations propagating certain views. The State has an interest not only in enabling individuals to exercise freedom of conscience without penalty but also in eliminating the danger that investment decisions will be significantly influenced by the ideological views of corporations. While the latter concern may not be of the same constitutional magnitude as the former, it is far from trivial. Corporations, as previously noted, are created by the State as a means of furthering the public welfare. One of

their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities. It has long been recognized that such pursuits are not the proper business of corporations. The common law was generally interpreted as prohibiting corporate political participation.[14] Indeed, the Securities and Exchange Commission's rules permit corporations to refuse to submit for shareholder vote any proposal which concerns a general economic, political, racial, religious, or social cause that is not significantly related to the business of the corporation or is not within its control.[15]

The necessity of prohibiting corporate political expenditures in order to prevent the use of corporate funds for purposes with which shareholders may disagree is not a unique perception of Massachusetts. This Court has repeatedly recognized that one of the purposes of the Corrupt Practices Act was to prevent the use of corporate or union funds for political purposes without the consent of the shareholders or union members and to protect minority interests from domination by corporate or union leadership.[16] Although the Court has never, as noted *supra,* adjudicated the constitutionality of the Act, it has consistently treated this objective with deference. Indeed, in *United States* v. *CIO,* 335 U. S. 106 (1948), the Court construed a previous version of the Corrupt Practices Act so as to

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[14] See Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 852–853 (1961), and cases therein cited.

[15] See Rule 14a–8 (c) of the Securities and Exchange Commission, 17 CFR § 240.14a–8 (c) (1977); *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403 (1972).

[16] See *Pipefitters* v. *United States,* 407 U. S. 385, 413–414 (1972); *United States* v. *Automobile Workers,* 352 U. S. 567, 572–573 (1957); *United States* v. *CIO,* 335 U. S., at 113, 115.

conform its prohibitions to those activities to which the Court believed union members or shareholders might object. After noting that if the statute "were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality," *id.*, at 121, the Court held that the statute did not prohibit such in-house publications. It was persuaded that the purposes of the Act would not be impeded by such an interpretation, because it "is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests." *Id.*, at 123.

The Court today purports not to foreclose the possibility that the Corrupt Practices Act and state statutes which prohibit corporate expenditures only in the context of elections to public office may survive constitutional scrutiny because of the interest in preventing the corruption of elected representatives through the creation of political debts. *Ante,* at 788 n. 26. It does not choose to explain or even suggest, however, why the state interests which it so cursorily dismisses are less worthy than the interest in preventing corruption or the appearance of it. More importantly, the analytical framework employed by the Court clearly raises great doubt about the Corrupt Practices Act. The question in the present case, as viewed by the Court, "is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection," *ante,* at 778, which it answers in the negative. But the Court has previously held in *Buckley* v. *Valeo* that the interest in preventing corruption is insufficient to justify restrictions upon individual expend-

itures relative to candidates for political office. If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day. As I understand the view that has now become part of First Amendment jurisprudence, the use of corporate funds, even for causes irrelevant to the corporation's business, may be no more limited than that of individual funds. Hence, corporate contributions to and expenditures on behalf of political candidates may be no more limited than those of individuals. Individual contributions under federal law are limited but not entirely forbidden, and under *Buckley* v. *Valeo* expenditures may not constitutionally be limited at all. Most state corrupt practices Acts, like the federal Act, forbid *any* contributions or expenditures by corporations to or for a political candidate.

In my view, the interests in protecting a system of freedom of expression, set forth *supra,* are sufficient to justify any incremental curtailment in the volume of expression which the Massachusetts statute might produce. I would hold that apart from corporate activities, such as those discussed in Part I, *supra,* and exempted from regulation in *CIO,* which are integrally related to corporate business operations, a State may prohibit corporate expenditures for political or ideological purposes. There can be no doubt that corporate expenditures in connection with referenda immaterial to corporate business affairs fall clearly into the category of corporate activities which may be barred. The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.[17]

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[17] The exemption provided by the Massachusetts statute for contributions and expenditures in connection with any referendum question "mate-

I would affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

MR. JUSTICE REHNQUIST, dissenting.

This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394, 396 (1886). Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same Amendment. See, *e. g., Smyth* v. *Ames,* 169 U. S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that Amendment "is the liberty of natural, not artificial persons." *Northwestern Nat. Life Ins. Co.* v. *Riggs,* 203 U. S. 243, 255 (1906). Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons, *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936), and that a nonprofit membership corporation organized for the purpose of "achieving . . . equality of treatment by all government, federal, state and local, for the members of the Negro community" enjoys certain liberties of political expression. *NAACP* v. *Button,* 371 U. S. 415, 429 (1963).

The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court.[1] However, the General Court

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rially affecting any of the property, business or assets of the corporation" affords any First Amendment protection to which corporate electoral communications may be entitled. See Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977).

[1] Our prior cases, mostly of recent vintage, have discussed the boundaries of protected speech without distinguishing between artificial and natural persons. See, *e. g., Linmark Associates, Inc.* v. *Willingboro,* 431

of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. I think it quite probable that their judgment may properly be reconciled with our controlling precedents, but I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 636 (1819).

The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by

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U. S. 85 (1977); *Buckley* v. *Valeo,* 424 U. S. 1 (1976). Nevertheless, the Court today affirms that the failure of those cases to draw distinctions between artificial and natural persons does not mean that no such distinctions may be drawn. The Court explicitly states that corporations may not enjoy all the political liberties of natural persons, although it fails to articulate the basis of its suggested distinction. *Ante,* at 777–778, n. 13.

state law.[2] Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, *United States* v. *White*, 322 U. S. 694, 698–701 (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence." *Dartmouth College, supra,* at 636.

There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.[3] *Grosjean* so held, and our subsequent cases have so assumed. *E. g., Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *New York Times Co.* v. *Sullivan,* 376

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[2] Appellants Wyman-Gordon Co. and Digital Equipment Corp. are incorporated in Massachusetts. The Gillette Co. is incorporated in Delaware, but does business in Massachusetts. It is absolutely clear that a State may impose the same restrictions upon foreign corporations doing business within its borders as it imposes upon its own corporations. *Northwestern Nat. Life Ins. Co.*, 203 U. S. 243, 254–255 (1906).

Appellants First National Bank of Boston and New England Merchants National Bank are organized under the laws of the United States. In providing for the chartering of national banks, Congress has not purported to empower them to take part in the political activities of the States in which they do business. Indeed, it has explicitly forbidden them to make any "contribution or expenditure in connection with any election to any political office." 2 U. S. C. § 441b (a) (1976 ed.). Thus, there is no occasion to consider whether Congress would have the power to require the States to permit national banks to participate in political affairs. Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819).

[3] The Court concedes, *ante,* at 781, that, for this reason, this statute poses no threat to the ordinary operations of corporations in the communications business.

U. S. 254 (1964).[4] Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 761–770 (1976). Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.[5] A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as

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[4] It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate's campaign. Such a right is no more "incidental to its very existence" than it is to any other business corporation.

[5] However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. *NAACP* v. *Button,* 371 U. S. 415, 428–429 (1963). The fact that the author of that opinion, my Brother BRENNAN, has joined my Brother WHITE's dissent in this case strengthens my conclusion that nothing in *Button* requires that similar protection be extended to ordinary business corporations.

It should not escape notice that the rule established in *Button* was only an alternative holding, since the Court also ruled that the National Association for the Advancement of Colored People had standing to assert the personal rights of its members. *Ibid.,* citing *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 458–460 (1958). The holding, which has never been repeated, was directly contrary to an earlier decision of this Court holding that another political corporation, the American Civil Liberties Union, did not enjoy freedom of speech and assembly. *Hague* v. *CIO,* 307 U. S. 496, 514 (1939) (opinion of Roberts, J.); *id.,* at 527 (opinion of Stone, J.).

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an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.[6] I would think that any particular form of organi-

[6] My Brother WHITE raises substantially these same arguments in his dissent, *ante,* at 809–810. However, his heavy emphasis on the need to protect minority shareholders at least suggests that "[t]he governmental interest in regulating corporate political communications," *ante,* at 809, might not prove sufficiently weighty in the absence of such concerns. Because of my conclusion that the Fourteenth Amendment does not require a State to endow a business corporation with the power of political speech, I do not find it necessary to join his assessment of the interests of the Commonwealth supporting this legislation.

The question of whether such restrictions are politically desirable is exclusively for decision by the political branches of the Federal Government and by the States, and may not be reviewed here. My Brother WHITE, in his dissenting opinion, puts the legislative determination in its most appealing light when he says, *ibid.*:

"[T]he interest of Massachusetts and the many other States which have restricted corporate political activity . . . is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . ."

As I indicate in the text, *supra,* I agree that this is a rational basis for sustaining the legislation here in question. But I cannot agree with my Brother WHITE's intimation that this is *in fact* the reason that the Massachusetts General Court enacted this legislation. If inquiry into legislative

zation upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.

One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of the Supreme Judicial Court in this case. That court reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expres-

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motives were to determine the outcome of cases such as this, I think a very persuasive argument could be made that the General Court, desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.

If one believes, as my Brother WHITE apparently does, see *ante*, at 806, that a function of the First Amendment is to protect the interchange of ideas, he cannot readily subscribe to the idea that, if the desire to muzzle corporations played a part in the enactment of this legislation, the General Court was simply engaged in deciding *which* First Amendment values to promote. Thomas Jefferson in his First Inaugural Address made the now familiar observation:

"If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." J. Richardson, A Compilation of the Messages and Papers of the Presidents 310 (1897).

One may entertain a healthy skepticism as to whether the General Court left reason free to combat error by their legislation; and it most assuredly did not leave undisturbed corporations which opposed its proposed personal income tax as "monuments of the safety with which error of opinion may be tolerated." But I think the Supreme Judicial Court was correct in concluding that, whatever may have been the motive of the General Court, the law thus challenged did not violate the United States Constitution.

sion by a corporation "when a general political issue materially affects a corporation's business, property or assets." 371 Mass. 773, 785, 359 N. E. 2d 1262, 1270 (1977).

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid.

It is true, as the Court points out, *ante,* at 781–783, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity. Cf. *Maher* v. *Roe,* 432 U. S. 464, 474 (1977).

I would affirm the judgment of the Supreme Judicial Court.

Syllabus

LANDMARK COMMUNICATIONS, INC. *v.* VIRGINIA

APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 76–1450. Argued January 11, 1978—Decided May 1, 1978

A Virginia statute makes it a crime to divulge information regarding proceedings before a state judicial review commission that is authorized to hear complaints about judges' disability or misconduct. For printing in its newspaper an article accurately reporting on a pending inquiry by the commission and identifying the judge whose conduct was being investigated, appellant publisher was convicted of violating the statute. Rejecting appellant's contention that the statute violated the First Amendment as made applicable to the States by the Fourteenth, the Virginia Supreme Court affirmed. *Held:* The First Amendment does not permit the criminal punishment of third persons who are strangers to proceedings before such a commission for divulging or publishing truthful information regarding confidential proceedings of the commission. Pp. 837–845.

(a) A major purpose of the First Amendment is to protect the free discussion of governmental affairs, which includes discussion of the operations of the courts and judicial conduct, and the article published by appellant's newspaper served the interests of public scrutiny of such matters. Pp. 838–839.

(b) The question is not whether the confidentiality of commission proceedings serves legitimate state interests, but whether those interests are sufficient to justify encroaching on First Amendment guarantees that the imposition of criminal sanctions entails. Injury to the reputation of judges or the institutional reputation of courts is not sufficient to justify "repressing speech that would otherwise be free." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 272–273. Pp. 839–842.

(c) The mere fact that the legislature found a clear and present danger to the orderly administration of justice justifying enactment of the challenged statute did not preclude the necessity of proof that such danger existed. This Court has consistently rejected the argument that out-of-court comments on pending cases or grand jury investigations constituted a clear and present danger to the administration of justice. See *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367; *Wood* v. *Georgia,* 370 U. S. 375. If the clear-and-present-danger test could not be satisfied in those cases, *a fortiori* it could not be satisfied here. Pp. 842–845.

(d) Much of the risk to the orderly administration of justice can be eliminated through careful internal procedures to protect the confidentiality of commission proceedings. P. 845.

217 Va. 699, 233 S. E. 2d 120, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 848. BRENNAN and POWELL, JJ., took no part in the consideration or decision of the case.

Floyd Abrams argued the cause for appellant. With him on the briefs were *Dean Ringel, Conrad M. Shumadine,* and *John O. Wynne.*

James E. Kulp, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief was *Anthony F. Troy,* Attorney General.*

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

The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.[1]

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*Briefs of *amici curiae* urging reversal were filed by *Stephen W. Bricker, Bruce J. Ennis, Joel M. Gora,* and *Philip J. Hirschkop* for the American Civil Liberties Union et al.; by *Arthur B. Hanson* and *Frank M. Northam* for the American Newspaper Publishers Assn.; by *Christopher B. Fager, William G. Mullen,* and *James R. Cregan* for the National Newspaper Assn. et al.; and by *Edward Bennett Williams* and *John B. Kuhns* for the Washington Post Co. et al.

[1] Article 6, § 10, of the Constitution of Virginia provides in relevant part:

"The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and

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On October 4, 1975, the Virginian Pilot, a Landmark newspaper, published an article which accurately reported on a pending inquiry by the Virginia Judicial Inquiry and Review Commission and identified the state judge whose conduct was being investigated. The article reported that "[n]o formal complaint has been filed by the commission against [the judge], indicating either that the five-man panel found insufficient cause for action or that the case is still under review." App. 47a. A month later, on November 5, a grand jury indicted Landmark for violating Va. Code § 2.1–37.13 (1973) by "unlawfully divulg[ing] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission.

The trial commenced on December 16, 1975, after the court

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vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential."

Virginia Code § 2.1–37.13 (1973) implements the constitutional mandate of confidentiality. It provides in relevant part:

"All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1–37.11, 2.1–37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character.

. . . . . .

"Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

Rule 10 of the Rules of the Commission is to the same effect:

"All papers filed with and all proceedings before the Commission are confidential pursuant to § 2.1–37.13, Code of Virginia (1950), that the same shall not be divulged, and a violation thereof is a misdemeanor and punishable as provided by law."

had denied Landmark's motion to quash or dismiss the indictment on the grounds that the statutory provision did not in terms apply to the article in question, and that it could not be so applied consistently with the First and Fourteenth Amendments. The essential facts were stipulated, and revealed that at the time the article was published the Commission had not filed a formal complaint with the Supreme Court of Virginia concerning the judge under investigation.[2] The only witness at the trial, Joseph W. Dunn, Jr., Managing Editor of the Virginian Pilot, testified that he decided to print the information about the Commission proceedings because he felt that the subject was a matter of public importance which should be brought to the attention of the Pilot's readers. Mr. Dunn acknowledged he was aware that it was a misdemeanor for anyone participating in Commission proceedings to divulge information about those proceedings, but testified that he did not understand the statute to apply to newspaper reports about the proceedings. He further testified that no reporter, employee, or representative of Landmark had been subpoenaed by or had appeared before the Commission in connection with the proceedings described in the October 4 article.

The case was tried without a jury, and Landmark was found guilty and fined $500 plus the costs of prosecution. The Supreme Court of Virginia affirmed the conviction, with one dissent. That court characterized the case as involving "a confrontation between the First Amendment guaranty of freedom of the press and a Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission." At the outset it rejected Landmark's claim that Va. Code § 2.1–37.13 (1973) applied only to the participants in a Commission proceeding or to the initial disclosure of confidential infor-

[2] Upon the filing of a complaint with the Supreme Court of Virginia, the records of the proceedings before the Commission lose their confidential character. Va. Code § 2.1–37.13 (1973).

mation. "Clearly, Landmark's actions violated [the statute] and rendered it liable to imposition of the sanctions prescribed . . . ." 217 Va. 699, 703, 233 S. E. 2d 120, 123.

Turning then to the constitutional question, the court noted that it was one of first impression and of broad significance because of the large number of other States in addition to Virginia which have comparable statutes requiring confidentiality with respect to judicial inquiry commissions. The court emphasized that the issue was not one of prior restraint but instead involved a sanction subsequent to publication. Accordingly, it concluded that the "clear and present danger test" was the appropriate constitutional benchmark. It identified three functions served by the requirement of confidentiality in Commission proceedings: (a) protection of a judge's reputation from the adverse publicity which might flow from frivolous complaints, (b) maintenance of confidence in the judicial system by preventing the premature disclosure of a complaint before the Commission has determined that the charge is well founded, and (c) protection of complainants and witnesses from possible recrimination by prohibiting disclosure until the validity of the complaint has been ascertained. The court concluded:

> "Considering these matters, we believe it can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice." *Id.*, at 712, 233 S. E. 2d, at 129.

In dissent, Justice Poff took the position that as applied to

Landmark the statute violated the First Amendment. We noted probable jurisdiction, 431 U. S. 964, and we now reverse.[3]

II

At the present time it appears that 47 States, the District of Columbia, and Puerto Rico have established, by constitution, statute, or court rule, some type of judicial inquiry and disciplinary procedures.[4] All of these jurisdictions, with the apparent exception of Puerto Rico, provide for the confidentiality of judicial disciplinary proceedings, although in most the guarantee of confidentiality extends only to the point when a formal complaint is filed with the State Supreme Court or equivalent body.[5] Cf. ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 9.1 (App. Draft 1972).

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[3] Eight days after the decision of the Supreme Court of Virginia, the United States District Court for the Eastern District of Virginia issued a temporary injunction restraining prosecution of Richmond television station WXEX for violation of the same Virginia law under which Landmark was prosecuted. *Nationwide Communications, Inc.* v. *Backus,* No. 77–0139–R (Mar. 15, 1977). Thereafter, Richmond Newspapers, Inc., the publisher of two Richmond, Va., newspapers, was also charged under § 2.1–37.13. On April 5, 1977, the District Court denied the publisher's motion to enjoin the pending prosecution and a conviction for two violations of the statute resulted. Upon conclusion of the case, the District Court enjoined further prosecution of the publisher under the statute. Appellant then secured a temporary restraining order against further prosecution under the statute for the limited purpose of allowing it to publish an Associated Press story about a current Commission investigation which the Richmond newspapers were free to publish because of the court order shielding them from prosecution. *Landmark Communications, Inc.* v. *Campbell,* No. 77–404–N (ED Va., June 17, 1977). The temporary restraining order expired on June 20, 1977.

[4] Several bills are also pending in Congress providing for somewhat similar inquiry into the conduct of federal judges. See, *e. g.,* H. R. 1850, 95th Cong., 1st Sess. (1977); H. R. 9042, 95th Cong., 1st Sess. (1977); S. 1423, 95th Cong., 1st Sess. (1977).

[5] The relevant state constitutional provisions, statutes, and court rules are listed as an appendix to this opinion. Confidentiality of proceedings

The substantial uniformity of the existing state plans suggests that confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions. First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination.[6] Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants. See generally W. Braithwaite, Who Judges the Judges? 161–162 (1971); Buckley, The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct, 3 U. San Fran. L. Rev. 244, 255–256 (1969).

In addition to advancing these general interests, the confidentiality requirement can be said to facilitate the work of the commissions in several practical respects. When removal or retirement is justified by the charges, judges are more likely

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is also an integral aspect of the proposals currently pending in Congress. See H. R. 1850, *supra,* § 382; H. R. 9042, *supra,* § 382; S. 1423, *supra,* § 381. None of these bills impose criminal sanctions for a breach of the confidentiality requirement.

[6] According to appellee, under the Virginia plan, the name of the complainant as such is never revealed to the judge under investigation even when a complaint is filed with the Supreme Court. All complaints other than the original are filed in the name of the Commission; the original complaint is not made a part of any public record. The identity of the witnesses heard by the Commission, however, would presumably be a part of the Commission's records which are made public if a complaint is filed with the Supreme Court.

to resign voluntarily or retire without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.[7] Of course, if the charges become public at an early stage of the investigation, little would be lost—at least from the judge's perspective—by the commencement of formal proceedings. In the more common situation, where the alleged misconduct is not of the magnitude to warrant removal or even censure, the confidentiality of the proceedings allows the judge to be made aware of minor complaints which may appropriately be called to his attention without public notice. See Braithwaite, *supra,* at 162–163.

Acceptance of the collective judgment that confidentiality promotes the effectiveness of this mode of scrutinizing judicial conduct and integrity, however, marks only the beginning of the inquiry. Indeed, Landmark does not challenge the requirement of confidentiality, but instead focuses its attack on the determination of the Virginia Legislature, as construed by the Supreme Court, that the "divulging" or "publishing" of information concerning the work of the Commission by third parties, not themselves involved in the proceedings, should be criminally punishable. Unlike the generalized mandate of confidentiality, the imposition of criminal sanctions for its breach is not a common characteristic of the state plans;

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[7] "The experience in California has been that not less than two or three judges a year have either retired or resigned voluntarily, rather than to confront the particular charges that are made. . . . The important thing is that [these cases] are closed without any public furor, or without any harm done to the judiciary, because the existence and the procedures of the commission has caused the judge himself to recognize the situation that exists and to avail himself of retirement." Hearings on S. 1110 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., 120 (1976) (testimony of Jack E. Frankel, Executive Officer of the California Commission on Judicial Qualifications).

indeed only Virginia and Hawaii appear to provide criminal sanctions for disclosure.[8]

III

The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission.[9] We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it. We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate.[10] Cf. *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 564 (1976); *id.,* at 601 n. 27 (BRENNAN, J., concurring in judgment); *Wood* v. *Georgia,* 370 U. S. 375, 393–394 (1962). Nor does Landmark argue for any constitutionally compelled right of access for the press to those proceedings. Cf. *Saxbe* v. *Washington Post Co.,* 417

[8] Hawaii Rev. Stat. § 610–3 (b) (1976) provides in relevant part:

"Any commission member or individual . . . who divulges information concerning the charge prior to the certification of the charge by the commission . . . shall be guilty of a felony which shall be punishable by a fine of not more than $5000 or imprisonment of not more than five years, or both."

[9] Landmark argued below that the statute was unclear with regard to whether the proscription against divulging information concerning a Commission proceeding applied to third parties as well as those who actually participated in the proceedings. The Supreme Court of Virginia, over the dissent of Justice Poff, construed the statutory language so as to encompass appellant. Although a contrary construction might well save the statute from constitutional invalidity, "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien* v. *Skinner,* 414 U. S. 524, 531 (1974).

[10] At least two categories of "participants" come to mind: Commission members and staff employees, and witnesses or putative witnesses not officers or employees of the Commonwealth. No issue as to either of these categories is presented by this case.

U. S. 843 (1974); *Pell* v. *Procunier,* 417 U. S. 817 (1974). Finally as the Supreme Court of Virginia held, and appellant does not dispute, the challenged statute does not constitute a prior restraint or attempt by the State to censor the news media.

Landmark urges as the dispositive answer to the question presented that truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment. It points to the solicitude accorded even untruthful speech when public officials are its subjects, see, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and the extension of First Amendment protection to the dissemination of truthful commercial information, see, *e. g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977), to support its contention. We find it unnecessary to adopt this categorical approach to resolve the issue before us. We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom. See, *e. g., Buckley* v. *Valeo,* 424 U. S. 1, 64–65 (1976).

A

In *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966), this Court observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." [11] Al-

[11] The interdependence of the press and the judiciary has frequently been acknowledged. "The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their

though it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives "[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions." *Bridges* v. *California,* 314 U. S. 252, 289 (1941) (Frankfurter, J., dissenting). The operations of the courts and the judicial conduct of judges are matters of utmost public concern.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966).

Cf. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 492 (1975).

The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media. The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry and Review Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect. See *New York Times Co.* v. *Sullivan, supra,* at 269–270.

B

The Commonwealth concedes that "[w]ithout question the First Amendment seeks to protect the freedom of the press

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independence is a free press." *Pennekamp* v. *Florida,* 328 U. S. 331, 355 (1946) (Frankfurter, J., concurring).

to report and to criticize judicial conduct," Brief for Appellee 17, but it argues that such protection does not extend to the publication of information "which by Constitutional mandate is to be confidential." *Ibid.* Our recent decision in *Cox Broadcasting Corp.* v. *Cohn, supra,* is relied upon to support this interpretation of the scope of the freedom of speech and press guarantees. As we read *Cox,* it does not provide the answer to the question now confronting us. Our holding there was that a civil action against a television station for breach of privacy could not be maintained consistently with the First Amendment when the station had broadcast only information which was already in the public domain. "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U. S., at 496. The broader question—whether the publication of truthful information withheld by law from the public domain is similarly privileged—was not reached and indeed was explicitly reserved in *Cox. Id.,* at 497 n. 27. We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment.

The Commonwealth also focuses on what it perceives to be the pernicious effects of public discussion of Commission proceedings to support its argument. It contends that the public interest is not served by discussion of unfounded allegations of misconduct which defames honest judges and serves only to demean the administration of justice. The functioning of the Commission itself is also claimed to be impeded by premature disclosure of the complainant, witnesses, and the judge under investigation. Criminal sanctions minimize these harmful consequences, according to the Commonwealth, by ensuring that the guarantee of confidentiality is more than an empty promise.

It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.[12]

Moreover, neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality. Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insuffi-

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[12] A number of States provide that a breach of the confidentiality requirement by commission members or staff is punishable as contempt. *E. g.*, Rule 4.130 (2) of the Kentucky Supreme Court; Rule 3 (g) of the Massachusetts Committee on Judicial Responsibility. Other States require witnesses as well as staff and commission members to take an oath of secrecy, violation of which is treated as contempt. *E. g.*, Rule 25 (c) of the Florida Judicial Qualifications Commission; Rule S (2) of the Minnesota Board on Judicial Standards (witnesses only); Rule 7 (c) of the Procedural Rules and Regulations of the New Mexico Judicial Standards Commission; Rule 1 (c) of the Rules of Procedure Governing the Pennsylvania Judicial Inquiry and Review Board (witnesses only). No similar provision relating to the conduct of participants in Commission proceedings is contained in the Rules of the Virginia Judicial Inquiry and Review Commission.

cient reason "for repressing speech that would otherwise be free." *New York Times Co.* v. *Sullivan,* 376 U. S., at 272–273. See also *Garrison* v. *Louisiana,* 379 U. S. 64, 67 (1964). The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales. See *New York Times Co.* v. *Sullivan, supra.* As Mr. Justice Black observed in *Bridges* v. *California,* 314 U. S., at 270–271:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

Mr. Justice Frankfurter, in his dissent in *Bridges,* agreed that speech cannot be punished when the purpose is simply "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed." *Id.,* at 291–292.

The Commonwealth has provided no sufficient reason for disregarding these well-established principles. We find them controlling and, on this record, dispositive.

IV

The Supreme Court of Virginia relied on the clear-and-present-danger test in rejecting Landmark's claim. We question the relevance of that standard here; moreover we cannot accept the mechanical application of the test which led that court to its conclusion. Mr. Justice Holmes' test was never intended "to express a technical legal doctrine or to convey a formula for adjudicating cases." *Pennekamp* v. *Florida,* 328 U. S. 331, 353 (1946) (Frankfurter, J., concurring). Properly

applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

Landmark argued in the Supreme Court of Virginia that "before a state may punish expression, it must prove by 'actual facts' the existence of a clear and present danger to the orderly administration of justice." 217 Va., at 706, 233 S. E. 2d, at 125. The court acknowledged that the record before it was devoid of such "actual facts," but went on to hold that such proof was not required when the legislature itself had made the requisite finding "that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission." *Id.*, at 708, 233 S. E. 2d, at 126. This legislative declaration coupled with the stipulated fact that Landmark published the disputed article was regarded by the court as sufficient to justify imposition of criminal sanctions.

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. In *Pennekamp* v. *Florida, supra,* at 335, Mr. Justice Reed observed that this Court is

> "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Mr. Justice Brandeis was even more pointed in his concurrence in *Whitney* v. *California,* 274 U. S. 357, 378–379 (1927):

> "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the cir-

> cumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

It was thus incumbent upon the Supreme Court of Virginia to go behind the legislative determination and examine for itself "the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment." *Bridges* v. *California,* 314 U. S., at 271. Our precedents leave little doubt as to the proper outcome of such an inquiry.

In a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. See *Bridges* v. *California, supra; Penne-*

kamp v. *Florida, supra; Craig* v. *Harney,* 331 U. S. 367 (1947); *Wood* v. *Georgia,* 370 U. S. 375 (1962). What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges* v. *California, supra,* at 263, and that a "solidity of evidence," *Pennekamp* v. *Florida, supra,* at 347, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney, supra,* at 376.

The efforts of the Supreme Court of Virginia to distinguish those cases from this case are unpersuasive. The threat to the administration of justice posed by the speech and publications in *Bridges, Pennekamp, Craig,* and *Wood* was, if anything, more direct and substantial than the threat posed by Landmark's article. If the clear-and-present-danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here. It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement. Moreover, much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.[13] Cf. *Nebraska Press Assn.* v. *Stuart,* 427 U. S., at 564; *id.,* at 601 n. 27 (BRENNAN, J., concurring in judgment). In any event, we must conclude as we did in *Wood* v. *Georgia,* that "[t]he type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." 370 U. S., at 388.

Accordingly, the judgment of the Supreme Court of Vir-

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

ginia is reversed, and the case remanded for further proceedings not inconsistent with this opinion.[14]

Reversed and remanded.

MR. JUSTICE BRENNAN and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

A total of 49 jurisdictions now have some mechanism for inquiring into judicial disability and conduct. With the one exception of Puerto Rico, all of the remaining jurisdictions impose some requirement of confidentiality through constitutional, statutory, or administrative provisions. The relevant provisions are listed below:

Alabama: Const. Amdt. No. 328, § 6.17 (1977), Rule 5 of Rules of Procedure of the Judicial Inquiry Commission; Alaska: Stat. Ann. § 22.30.060 (1977), Rule 2 of the Commission on Judicial Qualifications; Arizona: Const., Art. 6.1, § 5, Rule 10 of the Rules of Procedure for the Commission on Judicial Qualifications; Arkansas: Stat. Ann. §§ 22–145 (f) and 22–1004 (b) (Supp. 1977); California: Const., Art. 6, § 18 (f), Rule 902 of Title III (Miscellaneous Rules) Div. I (Rules for Censure, Removal, Retirement or Private Admonishment of Judges); Colorado: Const., Art. 6, § 23 (3)(d), Rule 3 of Rules of Procedure of the Commission on Judicial Qualifications; Connecticut: Gen. Stat. §§ 51c, 51d (1977), and § 6 of 1977 Pub. Act 77–494; Delaware: Const., Art. 4, § 37, Rule 10 (d) of Rules of Procedure of the Court on the Judiciary; District of Columbia: Code § 11–1528 (1973), Rule 1.4 (b) of the Rules and Regulations of the Commission on Judicial Disabilities and Tenure; Florida: Const., Art. 5, § 12 (d), Rule 25 of the Judicial Qualifications Commission; Georgia: Const., Art. 6,

[14] Appellant also attacks the Virginia statute generally on vagueness and overbreadth grounds. Our resolution of the question presented makes it unnecessary to address these issues.

§ 13, ¶ 3, Rule 18 of Rules of the Judicial Qualifications Commission; Hawaii: Rev. Stat. §§ 610–3 (a), 610–12 (b) (1976), Rule 15 of the Rules of Practice and Procedure of the Commission for Judicial Qualification; Idaho: Code § 1–2103 (Supp. 1977), Rule 24 of the Judicial Council; Illinois: Const., Art. 6, § 15 (c), Rule 5 of the Rules of Procedure of the Judicial Inquiry Board; Indiana: Const., Art. 7, § 11, Code § 33–2.1–5–3 (1976), Rule 5 of the Rules of the Judicial Qualifications Commission; Iowa: Code § 605.28 (1977); Kansas: Stat. Ann. § 20–175 (1974), Rule No. 607 of the Rules of the Supreme Court Relating to Judicial Conduct; Kentucky: Rule 4.130 of the Rules of Court; Louisiana: Const., Art. 5, § 25 (C), Rule 10 of the Judiciary Commission; Maryland: Const., Art. 4, § 4B (a), Rule 1227 §§ e, r, of the Rules of Procedure; Massachusetts: Rule 3 of the Committee on Judicial Responsibility; Michigan: Const., Art. 6, § 30 (2), Rule 932.22 of the Supreme Court Administrative Rules; Minnesota: Stat. § 490.16 (5) (1976); Rule S of the Commission on Judicial Standards; Missouri: Rule 12.23 of the Commission on Retirement, Removal and Discipline; Montana: Rev. Codes Ann. § 93–723 (Supp. 1977), Rule 7 of the Judicial Standards Commission; Nebraska: Const., Art. 5, § 30 (3), Rev. Stat. § 24.726 (1975), Rule 2 of the Commission on Judicial Qualifications; Nevada: Const., Art. 6, § 21 (3), Rule 4 of the Revised Interim Procedural Rules of the Commission on Judicial Discipline; New Hampshire: Rev. Stat. Ann. § 490:4 (Supp. 1975), Rule 28 of the Supreme Court Rules; New Jersey: Rule 2:15–11 (e) of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court; New Mexico: Const., Art. 6, § 32, Rule 7 of Procedural Rules and Regulations of the Judicial Standards Commission; New York: Jud. Law § 44 (McKinney Supp. 1977); North Carolina: Gen. Stat. § 7A–377 (a) (Supp. 1977), Rule 4 of the Judicial Standards Commission; North Dakota: Cent. Code § 27–23–03 (5) (Supp. 1977), Rule 4 of the Judicial Qualifications Com-

mission; Ohio: Rule 5 (21) of the Supreme Court Rules of Practice; Oklahoma: Stat., Tit. 20, § 1658 (Supp. 1976), Rule 5 (C) of the Council on Judicial Complaints; Oregon: Rev. Stat. §§ 1.420 (2), 1.440 (1977), Rule 7 of the Rules of Procedure of the Commission on Judicial Fitness; Pennsylvania: Const., Art. 5, § 18 (h), Rules 1, 20 of the Rules of Procedure of the Judicial Inquiry and Review Board; Rhode Island: Rule 21 of the Commission on Judicial Tenure and Discipline; South Carolina: Rule 34, Items 11 and 33, of the Rules of the Supreme Court; South Dakota: Const., Art. 5, § 9, Comp. Laws Ann. § 16–1A–4 (Supp. 1977), Rule 4 of the Judicial Qualifications Commission; Tennessee: Code Ann. §§ 17–811 (2), 17–813 (2) (Supp. 1977); Texas: Const., Art. 5, § 1-a (10), Rule 19 of Rules for the Removal or Retirement of Judges; Utah: Code Ann. § 78–7–30 (3) (1977); Vermont: Rule 3 of the Rules of the Supreme Court for Disciplinary Control; Virginia: Const., Art. 6, § 10, Code § 2.1–37.13 (1973), Rule 10 of the Judicial Inquiry and Review Commission; West Virginia: Rules 3 and 5 of the Rules of Procedure for the Handling of Complaints Against Justices, Judges, and Magistrates; Wisconsin: Item 21 of the Code of Judicial Ethics, Rules 2 and 3 (4) of the Rules of Procedure of the Judicial Commission; Wyoming: Rule 7 of the Judicial Supervisory Commission.

MR. JUSTICE STEWART, concurring in the judgment.

Virginia has enacted a law making it a criminal offense for "any person" to divulge confidential information about proceedings before its Judicial Inquiry and Review Commission. I cannot agree with the Court that this Virginia law violates the Constitution.

There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary. Virginia's derivative interest in maintaining the confidentiality of the proceedings of its Judicial Inquiry and Review Commission seems equally clear. Only such confidentiality, the State has

determined, will protect upright judges from unjustified harm and at the same time insure the full and fearless airing in Commission proceedings of every complaint of judicial misconduct. I find nothing in the Constitution to prevent Virginia from punishing those who violate this confidentiality. Cf. *In re Sawyer,* 360 U. S. 622, 646 (opinion concurring in result).

But in this case Virginia has extended its law to punish a newspaper, and that it cannot constitutionally do. If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.*

It is on this ground that I concur in the judgment of the Court.

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*National defense is the most obvious justification for government restrictions on publication. Even then, distinctions must be drawn between prior restraints and subsequent penalties. See, *e. g., New York Times Co.* v. *United States,* 403 U. S. 713, 733–737 (WHITE, J., concurring); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 716.

UNITED STATES *v.* MacDONALD

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

No. 75–1892. Argued January 9, 1978—Decided May 1, 1978

A defendant may not, *before* trial, appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. Pp. 853–863.

531 F. 2d 196, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all other Members joined except BRENNAN, J., who took no part in the consideration or decision of the case.

Kenneth S. Geller argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Civiletti,* and *Shirley Baccus-Lobel.*

Bernard L. Segal argued the cause for respondent. With him on the brief were *Michael J. Malley* and *Kenneth A. Letzler.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a defendant, *before* trial, may appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial.[1]

I

In February 1970, respondent Jeffrey R. MacDonald was a physician in military service stationed at Fort Bragg in

[1] The Sixth Amendment reads in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

North Carolina. He held the rank of captain in the Army Medical Corps.

Captain MacDonald's wife and their two daughters were murdered on February 17 at respondent's quarters. Respondent also sustained injury on that occasion. The military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation, and the Fayetteville, N. C., Police Department all immediately began investigations of the crime. On April 6 the CID informed respondent that he was under suspicion and, that same day, he was relieved of his duties and restricted to quarters. On May 1, pursuant to Art. 30 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 830, the Army charged respondent with the murders. As required by Art. 32 of the UCMJ, 10 U. S. C. § 832, an investigating officer was appointed to investigate the crimes and to recommend whether the charges (three specifications of murder, in violation of Art. 118 of the UCMJ, 10 U. S. C. § 918) should be referred by the general court-martial convening authority (the post commander) to a general court-martial for trial. App. 131.

At the conclusion of the Art. 32 proceeding, the investigating officer filed a report in which he recommended that the charges against respondent be dismissed, and that the civilian authorities investigate a named female suspect. App. 136. On October 23, after review of this report, the commanding general of respondent's unit accepted the recommendation and dismissed the charges. In December 1970, the Army granted respondent an honorable discharge for reasons of hardship.[2]

Following respondent's release from the military, and at the request of the Department of Justice, the CID continued its investigation. This was extensive and wide ranging. In June 1972, the CID submitted to the Department of Justice a 13-volume report recommending still further investigation.

[2] Respondent's discharge barred any further military proceeding against him. *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955).

Supplemental reports were transmitted in November 1972 and August 1973. It was not until August 1974, however, that the Government began the presentation of the case to a grand jury of the United States District Court for the Eastern District of North Carolina.[3] On January 24, 1975, the grand jury indicted respondent on three counts of first-degree murder, in violation of 18 U. S. C. § 1111. App. 22–23. He was promptly arrested and then released on bail a week later.

On July 29, the District Court denied a number of pretrial motions submitted by respondent. Among these were a motion to dismiss the indictment on double jeopardy grounds and another to dismiss because of the denial of his Sixth Amendment right to a speedy trial. App. to Pet. for Cert. 44a, 46a, 49a. Relying on *United States* v. *Marion,* 404 U. S. 307 (1971), the District Court concluded: "The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." App. to Pet. for Cert. 49a. Trial was scheduled to begin in August.

The United States Court of Appeals for the Fourth Circuit stayed the trial and allowed an interlocutory appeal on the authority of its decision in *United States* v. *Lansdown,* 460 F. 2d 164 (1972). App. to Pet. for Cert. 42a. The Court of Appeals, by a divided vote, reversed the District Court's denial of respondent's motion to dismiss on speedy trial grounds and remanded the case with instructions to dismiss the indictment. 531 F. 2d 196 (1976). The Government's petition for rehearing, with suggestion for rehearing en banc, was denied by an evenly divided vote. App. to Pet. for Cert. 2a.

The Court of Appeals panel majority recognized that the denial of a pretrial motion in a criminal case generally is not appealable. The court, however, offered two grounds for its assumption of jurisdiction in this particular case. It stated,

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[3] There was federal-court jurisdiction because the crimes were committed on a military reservation. 18 U. S. C. §§ 7 (3), 1111, and 3231.

first, that it considered respondent's speedy trial claim to be pendent to his double jeopardy claim, the denial of which *Lansdown* had held to be appealable before trial. Alternatively, although conceding that "[n]ot every speedy trial claim . . . merits an interlocutory appeal," and that "[g]enerally, this defense should be reviewed after final judgment," the court stated that it was "the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal." 531 F. 2d, at 199.

On the merits, the majority concluded that respondent had been deprived of his Sixth Amendment right to a speedy trial. The dissenting judge without addressing the jurisdictional issue, concluded that respondent's right to a speedy trial had not been violated. *Id.*, at 209.

Because of the importance of the jurisdictional question to the criminal law, we granted certiorari. 432 U. S. 905 (1977).

II

This Court frequently has considered the appealability of pretrial orders in criminal cases. See, *e. g., Abney* v. *United States,* 431 U. S. 651 (1977); *DiBella* v. *United States,* 369 U. S. 121 (1962); *Parr* v. *United States,* 351 U. S. 513 (1956); *Cobbledick* v. *United States,* 309 U. S. 323 (1940). Just last Term the Court reiterated that interlocutory or "piecemeal" appeals are disfavored. "Finality of judgment has been required as a predicate for federal appellate jurisdiction." *Abney* v. *United States,* 431 U. S., at 656. See also *DiBella* v. *United States,* 369 U. S., at 124.

This traditional and basic principle is currently embodied in 28 U. S. C. § 1291, which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts," both civil and criminal.[4] The rule of finality has particular

[4] Title 28 U. S. C. § 1291 reads:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States

force in criminal prosecutions because "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States,* 309 U. S., at 325. See also *DiBella* v. *United States,* 369 U. S., at 126.

This Court in criminal cases has twice departed from the general prohibition against piecemeal appellate review. *Abney* v. *United States, supra; Stack* v. *Boyle,* 342 U. S. 1 (1951). In each instance, the Court relied on the final-judgment rule's "collateral order" exception articulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 545–547 (1949).

Cohen was a stockholder's derivative action in which federal jurisdiction was based on diversity of citizenship. Before final judgment was entered, the question arose whether a newly enacted state statute requiring a derivative-suit plaintiff to post security applied in federal court. The District Court held that it did not, and the defendants immediately appealed. The Court of Appeals reversed and ordered the posting of security. This Court concluded that the Court of Appeals had properly assumed jurisdiction to review the trial judge's ruling, and affirmed.

The Court's opinion began by emphasizing the principle—well established even then—that there can be no appeal before final judgment "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Id.,* at 546. The Court's conclusion that the order appealed from qualified as a "final decision," within the language of 28 U. S. C. § 1291,

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District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

however, rested on several grounds. Those grounds were summarized in *Abney* v. *United States,* 431 U. S., at 658:

> "First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive' [337 U. S., at 546]. Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* Finally, the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*"

Two years after the decision in *Cohen,* the Court applied the "collateral order" doctrine in a criminal proceeding, holding that an order denying a motion to reduce bail could be reviewed before trial. *Stack* v. *Boyle, supra.* Writing separately in that case, Mr. Justice Jackson (the author of *Cohen*) explained that, like the question of posting security in *Cohen,* "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all." 342 U. S., at 12.

In *Abney,* the Court returned to this theme, holding that the collateral-order doctrine permits interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds. In so holding, the Court emphasized the special features of a motion to dismiss based on double jeopardy. It pointed out, first, that such an order constitutes "a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is

barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied." 431 U. S., at 659. Secondly, it noted that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged." *Ibid.* Finally, and perhaps most importantly, "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660.

III

The application to the instant case of the principles enunciated in the above precedents is straightforward.[5] Like the

[5] Respondent would rely on *United States* v. *Marion*, 404 U. S. 307 (1971), to demonstrate that a defendant has a right to appeal before trial the denial of a motion to dismiss an indictment on speedy trial grounds. That case, however, is clearly distinguishable. In *Marion*, the District Court *granted* the defendants' motion to dismiss the indictment on speedy trial grounds, and the Government appealed the dismissal to this Court. The appeal was predicated on the Criminal Appeals Act, 18 U. S. C. § 3731 (1964 ed., Supp. V), which, at the time, provided in relevant part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Currently, 18 U. S. C. § 3731 (1976 ed.) provides:

"In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Obviously, neither the former version of the statute nor the current one has anything whatsoever to do with a defendant's right to appeal the denial of a motion to dismiss an indictment on speedy trial grounds.

denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review," *Abney* v. *United States,* 431 U. S., at 659, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court. Thus, if such an order may be appealed before trial, it is because it satisfies the criteria identified in *Cohen* and *Abney* as sufficient to warrant suspension of the established rules against piecemeal review before final judgment.

We believe it clear that an order denying a motion to dismiss an indictment on speedy trial grounds does not satisfy those criteria. The considerations that militated in favor of appealability in *Stack* v. *Boyle, supra,* and in *Abney* v. *United States* are absent or markedly attenuated in the present case. In keeping with what appear to be the only two other federal cases in which a defendant has sought pretrial review of an order denying his motion to dismiss an indictment on speedy trial grounds, we hold that the Court of Appeals lacked jurisdiction to entertain respondent's speedy trial appeal. *United States* v. *Bailey,* 512 F. 2d 833 (CA5), cert. dism'd, 423 U. S. 1039 (1975); *Kyle* v. *United States,* 211 F. 2d 912 (CA9 1954).[6]

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[6] The justifications proffered by the Court of Appeals for its exercise of jurisdiction (see *supra,* at 852–853) are not persuasive for us. The argument that respondent's Sixth Amendment claim was "pendent" to his double jeopardy claim is vitiated by *Abney* v. *United States,* 431 U. S. 651, 662–663 (1977) (decided after the Court of Appeals filed its opinion), where this Court concluded that a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction. See also *United States* v. *Cerilli,* 558 F. 2d 697, 699–700 (CA3), cert. denied, 434 U. S. 966 (1977).

The Court of Appeals' alternative rationale—that it was the "extraordinary nature" of respondent's claim that merited interlocutory appeal,

In sharp distinction to a denial of a motion to dismiss on double jeopardy grounds, a denial of a motion to dismiss on speedy trial grounds does not represent "a complete, formal and, in the trial court, a final rejection" of the defendant's claim. *Abney* v. *United States,* 431 U. S., at 659. The resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case. As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered only after the relevant facts have been developed at trial.

In *Barker* v. *Wingo,* 407 U. S. 514 (1972), the Court listed four factors that are to be weighed in determining whether an accused has been deprived of his Sixth Amendment right to a speedy trial. They are the length of the delay, the reason for the delay, whether the defendant has asserted his right, and prejudice to the defendant from the delay. *Id.,* at 530. The Court noted that prejudice to the defendant must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.,* at 532 (footnote omitted).

Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pretrial motion to dismiss an indict-

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even though not all speedy trial claims would be so meritorious—is also unpersuasive. "Appeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States,* 354 U. S. 394, 405 (1957). The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute, 28 U. S. C. § 1291, the federal courts of appeals have power to review only "final decisions," a concept that Congress defined "in terms of categories." *Carroll* v. *United States,* 354 U. S., at 405.

ment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal, and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily "remains open, unfinished [and] inconclusive" until the trial court has pronounced judgment. *Cohen,* 337 U. S., at 546.

Closely related to the "threshold requirement of a fully consummated decision," *Abney* v. *United States,* 431 U. S., at 659, is the requirement that the order sought to be appealed be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.,* whether or not the accused is guilty of the offense charged." *Ibid.* In each of the two cases where this Court has upheld a pretrial appeal by a criminal defendant, the order sought to be reviewed clearly fit this description. *Abney* v. *United States* (double jeopardy); *Stack* v. *Boyle* (bail reduction). As already noted, however, there exists no such divorce between the question of prejudice to the conduct of the defense (which so often is central to an assessment of a speedy trial claim) and the events at trial. Quite the contrary, in the usual case, they are intertwined.

Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pretrial appellate review. The claim would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof. The double jeopardy motion in *Abney* was separable from the issues at trial because "[t]he elements of that claim are completely independent of [the accused's] guilt or innocence," 431 U. S., at 660, since an acquittal would not have eliminated the defendant's grievance at having been put twice in jeopardy. In contrast, a central

interest served by the Speedy Trial Clause is the protection of the factfinding process at trial. The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed.

Relatedly, the order sought to be appealed in this case may not accurately be described, in the sense that the description has been employed, as involving "an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Id.*, at 658, quoting *Cohen,* 337 U. S., at 546. The double jeopardy claim in *Abney,* the demand for reduced bail in *Stack* v. *Boyle,* and the posting of security at issue in *Cohen* each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.[7] There perhaps is some superficial attraction in the argument that the right to a speedy trial—by analogy to these other rights—must be vindicated before

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[7] Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial. Double jeopardy claims are paradigmatic.

Certainly, the fact that this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated, see *Strunk* v. *United States,* 412 U. S. 434 (1973), does not mean that a defendant enjoys a "right not to be tried" which must be safeguarded by interlocutory appellate review. Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution, when his indictment is defective, or, usually, when the only evidence against him was seized in violation of the Fourth Amendment. Obviously, however, this has not led the Court to conclude that such defendants can pursue interlocutory appeals. *Abney* v. *United States,* 431 U. S., at 663; *Cogen* v. *United States,* 278 U. S. 221, 227 (1929); *Heike* v. *United States,* 217 U. S. 423, 430 (1910).

trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker* v. *Wingo, supra,* combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered.

Furthermore, in most cases, as noted above, it is difficult to make the careful examination of the constituent elements of the speedy trial claim before trial.[8] Appellate courts would be in no better position than trial courts to vindicate a right that had not yet been shown to have been infringed.

IV

As the preceding discussion demonstrates, application of the principles articulated in *Cohen* and *Abney* to speedy trial claims compels the conclusion that such claims are not appealable before trial. This in itself is dispositive. Our conclusion, however, is reinforced by the important policy considerations that underlie both the Speedy Trial Clause and 28 U. S. C. § 1291.

Significantly, this Court has emphasized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *DiBella* v. *United States,* 369 U. S., at 126. Fulfillment of this guarantee would be impossible if every pretrial order were appealable.

[8] Of course, an accused who does successfully establish a speedy trial claim before trial will not be tried.

Many defendants, of course, would be willing to tolerate the delay in a trial that is attendant upon a pretrial appeal in the hope of winning that appeal. The right to a speedy trial, however, "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo,* 407 U. S., at 519. See also *United States* v. *Avalos,* 541 F. 2d 1100, 1110 (CA5 1976), cert. denied, 430 U. S. 970 (1977). Among other things, delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes. *Dickey* v. *Florida,* 398 U. S. 30, 42 (1970) (BRENNAN, J., concurring).

Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause. And some assertions of delay-caused prejudice would become self-fulfilling prophecies during the period necessary for appeal.

There is one final argument for disallowing pretrial appeals on speedy trial grounds. As the Court previously has observed, there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim. See *Barker* v. *Wingo,* 407 U. S., at 521–522, 530. Unlike a double jeopardy claim, which requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense, in every case there will be some period between arrest or indictment and trial during which time "every defendant will either be incarcerated . . . or on bail subject to substantial restrictions on his liberty." *Id.,* at 537 (WHITE, J., concurring). Thus, any defendant can make a pretrial motion

for dismissal on speedy trial grounds and, if § 1291 is not honored, could immediately appeal its denial.

V

In sum, we decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review.[9] The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

[9] In view of our resolution of the appealability issue, we do not reach the merits of respondent's motion to dismiss the indictment on speedy trial grounds. Similarly, we express no opinion on the District Court's denial of respondent's motion to have the indictment dismissed on double jeopardy grounds. The Court of Appeals stated that it had jurisdiction to review the latter claim, 531 F. 2d 196, 199 (1976), but declined to address its merits because of the court's disposition of respondent's speedy trial motion. *Id.*, at 209.

Reporter's Note

The next page is purposely numbered 901. The numbers between 863 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 FEBRUARY 27 THROUGH MAY 1, 1978

FEBRUARY 27, 1978

Affirmed on Appeal

No. 77–1033. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* ESCALANTE ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 446 F. Supp. 560.

Appeals Dismissed

No. 77–957. HUTTER *v.* KORZEN, TREASURER OF COOK COUNTY. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question.

No. 77–979. APPALACHIAN POWER CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

Miscellaneous Orders. (See also No. 77–6018, *infra.*)

No. A–666. O'LEARY *v.* PALMER ET AL. Sup. Ct. Ohio. Application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–105. IN RE DISBARMENT OF SALTZER. Disbarment entered. [For earlier order, see 431 U. S. 912.]

No. D–120. IN RE DISBARMENT OF BOZNOS. Disbarment entered. [For earlier order, see 434 U. S. 900.]

No. D–131. IN RE DISBARMENT OF GIBSON. It is ordered that Truman Kella Gibson, Jr., of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–1701. TENNESSEE VALLEY AUTHORITY *v.* HILL ET AL. C. A. 6th Cir. [Certiorari granted, 434 U. S. 954.] Motions of Southeastern Legal Foundation and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. Motion of respondents for additional time for oral argument or, in the alternative, for divided argument denied.

No. 77–178. ROBERTSON *v.* WEGMANN, EXECUTOR, ET AL. C. A. 5th Cir. [Certiorari granted, 434 U. S. 983.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 77–240. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* BARRY ET AL. C. A. 1st Cir. [Certiorari granted, 434 U. S. 919.] Motion of Lakeside Hospital, Inc., for leave to file a brief as *amicus curiae* granted.

No. 77–285. CALIFORNIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 434 U. S. 984.] Motion of Charles J. Meyers for leave to file a brief as *amicus curiae* granted.

No. 77–324. HICKLIN ET AL. *v.* ORBECK, COMMISSIONER, DEPARTMENT OF LABOR OF ALASKA, ET AL. Appeal from Sup. Ct. Alaska. [Probable jurisdiction noted, 434 U. S. 919.] Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted.

No. 77–369. FURNCO CONSTRUCTION CORP. *v.* WATERS ET AL. C. A. 7th Cir. [Certiorari granted, 434 U. S. 996.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted.

No. 77–6017. MONTEER *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus and/or prohibition denied.

No. 77–452. Mobil Alaska Pipeline Co. *v.* United States et al.;

No. 77–457. Exxon Pipeline Co. *v.* United States et al.;

No. 77–551. BP Pipelines, Inc. *v.* United States et al; and

No. 77–602. ARCO Pipe Line Co. *v.* United States et al. C. A. 5th Cir. [Certiorari granted, 434 U. S. 964.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted respondents for that purpose. Petitioners also allotted 15 additional minutes for oral argument. Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 77–5858. Nazario de Toro *v.* Puerto Rico et al. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 77–388. Washington et al. *v.* Confederated Bands and Tribes of the Yakima Indian Nation. Appeal from C. A. 9th Cir. Probable jurisdiction noted. The parties are directed to address the following issue: "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment." Reported below: 552 F. 2d 1332.

Certiorari Granted

No. 77–952. Group Life & Health Insurance Co., aka Blue Shield of Texas, et al. *v.* Royal Drug Co., Inc., dba Royal Pharmacy of Castle Hills et al., et al. C. A. 5th Cir. Motion of Blue Shield Assn. for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 556 F. 2d 1375.

No. 77–841. QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 563 F. 2d 873.

Certiorari Denied

No. 77–592. SEYMOUR *v.* UNITED STATES;

No. 77–5448. BROWN ET AL. *v.* UNITED STATES; and

No. 77–5456. NEWSOME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 F. 2d 407.

No. 77–668. ALABAMA ASSOCIATION OF INSURANCE AGENTS, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 729.

No. 77–669. DE MATEOS, ADMINISTRATRIX *v.* TEXACO INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 895.

No. 77–722. CARROLL, GOVERNOR OF KENTUCKY, ET AL. *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 561 F. 2d 1.

No. 77–786. MOORE *v.* RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 573.

No. 77–865. POWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 256.

No. 77–872. COMMITTEE OF INTERNS AND RESIDENTS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 810.

No. 77–963. TENNESSEE *v.* ARMSTRONG. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 555 S. W. 2d 870.

No. 77–964. IRANIAN SHIPPING LINES, S. A. *v.* ARYA SHIPPING LINES, S. A., ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–965. TAMARI ET AL., DBA WAHBE TAMARI & SONS CO. *v.* BACHE & CO. (LEBANON) S. A. L. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 565 F. 2d 1194.

No. 77–967. CROWNOVER *v.* GLEICHMAN ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 194 Colo. 48, 574 P. 2d 497.

No. 77–973. FAULKNER *v.* BALDWIN PIANO & ORGAN CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 561 F. 2d 677.

No. 77–985. GEISINGER *v.* BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 52 Ohio St. 2d 51, 369 N. E. 2d 477.

No. 77–1070. KOEHNEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 393.

No. 77–1079. LOMBARDI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5466. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 507.

No. 77–5672. BOORD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 564 F. 2d 87.

No. 77–5690. HUGHES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 77–5750. PHILLIPS *v.* WILLIAMS ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 77–5760. SMITH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 77–5776. MULLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 999.

No. 77–5822. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 660.

No. 77–5837. ILACQUA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5838. EAGLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 1069.

No. 77–5863. TALAMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5864. KEHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–5887. LAING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5893. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 162.

No. 77–5915. DOHERTY *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–5988. JOHNSON *v.* HATRAK, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 90.

No. 77–5997. GARDNER *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 156.

No. 77–6000. HALEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 344 So. 2d 349.

No. 77–6006. TYLER *v.* PEACH ET AL. C. A. 8th Cir. Certiorari denied.

No. 77–6013. WYCHE *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 160.

No. 77–6015. TOLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 372.

No. 77–6028. NEWELL ET AL. *v.* DAVIS, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 563 F. 2d 123.

No. 77–6047. SELBY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 77–6058. DOYLE *v.* CHESTER COUNTY WATER RESOURCES AUTHORITY. Pa. Commw. Ct. Certiorari denied.

No. 77–6064. BARRON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 95.

No. 77–6070. SMITH *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 249.

No. 77–6109. SCHNITZER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 567 F. 2d 536.

No. 77–672. NATIONAL LABOR RELATIONS BOARD *v.* GRAY-GRIMES TOOL CO., INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 557 F. 2d 1233.

No. 77–695. AMERICAN PUBLIC GAS ASSN. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 77–697. AMERADA HESS CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 186 U. S. App. D. C. 23, 567 F. 2d 1016.

No. 77–759. WHITMAN AREA IMPROVEMENT COUNCIL ET AL. *v.* RESIDENT ADVISORY BOARD ET AL.;

No. 77–761. PHILADELPHIA HOUSING AUTHORITY *v.* RESIDENT ADVISORY BOARD OF PHILADELPHIA ET AL.;

No. 77–762. REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA *v.* RESIDENT ADVISORY BOARD OF PHILADELPHIA ET AL.; and

No. 77–966. CITY OF PHILADELPHIA ET AL. *v.* RESIDENT ADVISORY BOARD OF PHILADELPHIA ET AL. C. A. 3d Cir. Motion of Nellie Reynolds for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 564 F. 2d 126.

No. 77–764. CRISP, WARDEN, ET AL. *v.* BROMLEY ET AL. C. A. 10th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 561 F. 2d 1351.

No. 77–866. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WHITE. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 559 F. 2d 852.

No. 77–5653. KNAPP *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BLACKMUN concurs in the denial of certiorari in this case on the usual understanding that it is without prejudice to petitioner's seeking relief by habeas corpus. Reported below: 114 Ariz. 531, 562 P. 2d 704.

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 grant certiorari and vacate the death sentence in this case.

No. 77–5728. JONES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari.

No. 77–5735. PICKENS, AKA COAKLEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 261 Ark. 756, 551 S. W. 2d 212.

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 grant certiorari and vacate the death sentence in this case.

No. 77–5869. CLIFT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 352 So. 2d 838.

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

Petitioner was indicted for murder in Alabama state court, convicted of second-degree murder after a jury trial, and sentenced to 25 years' imprisonment. Thereafter, he was brought to trial on a separate indictment charging the additional offense of robbery arising out of the same episode, over his objection that this indictment violated the Double Jeopardy Clause. He was convicted after a second trial, and sentenced to an additional term of 10 years' imprisonment. On appeal, the Alabama Court of Appeals affirmed the robbery conviction, but ordered that the robbery sentence run concurrently with the sentence imposed for the murder conviction. 352 So. 2d 836 (1976). The Supreme Court of Alabama reversed the Court of Appeals' determination as to sentencing, holding that because it found robbery and murder to be separate offenses for double jeopardy purposes, each offense could be the subject of a separate prosecution even if both crimes

were perpetrated during the same transaction. 352 So. 2d 838 (1977).

I would grant the petition for certiorari and reverse the judgment of the Supreme Court of Alabama. 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 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

No. 77–6018. ARUNGA *v.* ELLIS, CHIEF, UI DIVISION, DEPARTMENT OF EMPLOYMENT DEVELOPMENT. C. A. 9th Cir. Certiorari and/or motion for leave to file petition for writ of mandamus denied.

Rehearing Denied

No. 77–582. CHASE BRASS & COPPER CO., INC. *v.* FRANCHISE TAX BOARD OF CALIFORNIA, 434 U. S. 1029;

No. 77–607. CLARK *v.* FLORIDA, 434 U. S. 1013;

No. 77–766. ALBERT *v.* FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, EXECUTOR, 434 U. S. 1035;

No. 77–876. WRIGHT *v.* UNITED STATES, 434 U. S. 1036;

No. 77–5678. QURAISHI *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, 434 U. S. 1019;

No. 77–5696. TIMMINS *v.* GORE NEWSPAPERS CO., INC., 434 U. S. 1020; and

No. 77–5850. SMILEY *v.* CALIFORNIA ET AL., 434 U. S. 1050. Petitions for rehearing denied.

No. 76–749. PFIZER INC. ET AL. *v.* GOVERNMENT OF INDIA ET AL., 434 U. S. 308. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 76–1796. OTTOBONI ET AL. *v.* UNITED STATES, 434 U. S. 930. Motion for leave to file petition for rehearing denied.

MARCH 2, 1978

Dismissal Under Rule 60

No. 77–806. GULF OIL CORP. *v.* CONNECTICUT PUBLIC UTILITIES CONTROL AUTHORITY ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 563 F. 2d 588.

MARCH 6, 1978

Appeals Dismissed

No. 77–1072. YEE *v.* YEE ET AL. Appeal from Sup. Ct. Hawaii dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–1091. EPSTEIN *v.* CIVIL SERVICE COMMISSION ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 47 Ill. App. 3d 81, 361 N. E. 2d 782.

Certiorari Granted—Vacated and Remanded

No. 77–5742. FRAKES *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Western District of Kentucky with instructions to grant the Government's motion to dismiss the indictment. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 563 F. 2d 803.

No. 77–172. MORELOCK ET AL. *v.* NCR CORP. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lorillard* v. *Pons*, 434 U. S. 575 (1978). Reported below: 546 F. 2d 682.

No. 76–6258. WHITEHEAD *v.* UNITED STATES. C. A. 4th 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 *Simpson* v. *United States*, *ante*, p. 6. Reported below: 549 F. 2d 942.

Dismissed After Certiorari Granted

No. 77–567. NEW YORK STATE PAROLE BOARD ET AL. *v.* CORALLUZZO. C. A. 2d Cir. [Certiorari granted, 434 U. S. 996.] Motion of respondent to dismiss writ of certiorari granted and the writ is dismissed as improvidently granted. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent.

Miscellaneous Orders

No. —. NATIONAL CITIZENS COMMITTEE FOR BROADCASTING *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motion of petitioner to dispense with printing petition for writ of certiorari denied.

No. A–688. LONG ISLAND RAILROAD CO. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL. The application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit in case No. 77–1054, presented to MR. JUSTICE POWELL, and by him referred to the Court, is granted, only insofar as the judgment requires applicant Long Island Railroad Company to keep in a separate trust fund the proceeds of the interim 12.5 per cent terminal surcharge, pending the timely filing of a petition for writ of certiorari. Should a timely petition for writ of certiorari not be filed or be denied, this stay is to terminate automatically. If the petition for writ of certiorari is granted, this stay is to remain in effect pending the judgment of this Court. In all other respects, the application for stay is denied.

MR. JUSTICE POWELL took no part in the consideration or decision of this application.

No. 76–1200. CRIST, WARDEN, ET AL. *v.* CLINE ET AL. Appeal from C. A. 9th Cir. [Probable jurisdiction postponed, 430 U. S. 982.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose.

No. 77–240. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* BARRY ET AL. C. A. 1st Cir. [Certiorari granted, 434 U. S. 919.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 77–444. PENN CENTRAL TRANSPORTATION CO ET AL. *v.* NEW YORK CITY ET AL. Appeal from Ct. App. N. Y. [Probable jurisdiction noted, 434 U. S. 983.] Motions of Pacific Legal Foundation, National Trust for Historic Preservation et al., and Real Estate Board of New York, Inc., for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Appellants also allotted 15 additional minutes for oral argument.

No. 77–653. SWISHER, STATE'S ATTORNEY FOR BALTIMORE CITY, ET AL. *v.* BRADY ET AL. Appeal from D. C. Md. [Probable jurisdiction noted, 434 U. S. 963.] Motion of the State Public Defender of California for leave to file a brief as *amicus curiae* granted.

No. 77–6029. PILLON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 77–891. BEAL, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted.

No. 77–515. HOLT CIVIC CLUB ET AL. *v.* CITY OF TUSCALOOSA ET AL. Appeal from D. C. N. D. Ala. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 77–920. THOR POWER TOOL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari granted. Reported below: 563 F. 2d 861.

No. 77–922. CHRYSLER CORP. *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 565 F. 2d 1172.

Certiorari Denied. (See also Nos. 77–1072 and 1091, *supra*).

No. 76–5632. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 1096.

No. 77–637. REEVE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 522.

No. 77–661. MOSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 155.

No. 77–769. UNITED STEELWORKERS JUSTICE COMMITTEE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 553 F. 2d 451.

No. 77–773. LAMONT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 565 F. 2d 212.

No. 77–782. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 560 F. 2d 589.

No. 77–783. MORRISON *v.* REED, SECRETARY, DEPARTMENT OF CORRECTION OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 272.

No. 77–795. WEGNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 562 F. 2d 53.

No. 77–839. SPEIDEL, AKA ROJAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 1129.

No. 77–863. BUTHORN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–879. BAILEY CO., INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 563 F. 2d 439.

No. 77–906. SCHOTT ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1021.

No. 77–989. WOLF *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 48 Ill. App. 3d 736, 363 N. E. 2d 402.

No. 77–1011. PASSARELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 565 F. 2d 43.

No. 77–1012. FRIBESCO S. A. ET AL. *v.* MITSUI & CO. (U. S. A.), INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 58 App. Div. 2d 513, 394 N. Y. S. 2d 832.

No. 77–1069. KEIFFER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 105.

No. 77–1071. LINFIELD *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 77–1122. ANTHONY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–1125. PERKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5174. MURRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–5748. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1186.

No. 77–5769. APUZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 555 F. 2d 306.

No. 77–5775. JIMINEZ-VALENCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–5784. WOFFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 582.

No. 77–5831. LEWIS *v.* CHAVEZ, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77–5836. PAYTON *v.* CARLSON, DIRECTOR, U. S. BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–5852. RICARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 45.

No. 77–5857. MAWYER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 558 F. 2d 1029.

No. 77–5865. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 891.

No. 77–5890. SHANKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5923. MORRIS, AKA HUNDLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–5927. MASE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 671.

No. 77–5930. MEEKS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 142 Ga. App. 452, 236 S. E. 2d 119.

No. 77–5933. ALVAREZ-TOSTADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–5939. ILACQUA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 F. 2d 399.

No. 77–5948. YOUNG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–5962. HARMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 566 F. 2d 1045.

No. 77–6024. LEWIS ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 77–6030. JOHNSON *v.* NUNES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 1166.

No. 77–6032. HURD *v.* HURD. Sup. Ct. Cal. Certiorari denied.

No. 77–6036. PERSINGER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 116, 363 N. E. 2d 897.

No. 77–6044. MCCRARY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 77–6048. JONES *v.* MCCRACKEN. C. A. 10th Cir. Certiorari denied. Reported below: 562 F. 2d 22.

No. 77–6050. HOUSTON *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 77–6053. HURT *v.* LORTON COMPLEX ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6083. HULSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–6110. DEATON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 777.

No. 77–6116. MOYNAGH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 799.

No. 77–6120. MOORER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6132. PICCIRILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–6145. LYON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 777.

No. 77–6148. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 559.

No. 77–6150. WHITEFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–6152. PATTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 774.

No. 77–6159. KIRKLAND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–1028. INSURANCE COMPANY OF NORTH AMERICA *v.* MOSLEY ET AL. Sup. Ct. Fla. Motion of respondent Robert Mosley for leave to proceed *in forma pauperis* granted. Motion for attorney fees denied. Certiorari denied. Reported below: 352 So. 2d 172.

No. 77–1046. MARCO DENTAL PRODUCTS, INC. *v.* AUSTIN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 560 F. 2d 966.

Rehearing Denied

No. 76–1334. BORDENKIRCHER, PENITENTIARY SUPERINTENDENT *v.* HAYES, 434 U. S. 357;

No. 76–6372. QUILLOIN *v.* WALCOTT ET VIR, 434 U. S. 246;

No. 77–709. WEINBERGER *v.* EQUIFAX, INC. (FORMERLY RETAIL CREDIT CO.), 434 U. S. 1035;

No. 77–5809. TURNER *v.* LANDRY, 434 U. S. 1049;

No. 77–5841. HOLLIS *v.* NEW YORK, 434 U. S. 1049; and

No. 77–5896. CRANE *v.* UNITED STATES, 434 U. S. 1039. Petitions for rehearing denied.

No. 77–5516. BEACHEM *v.* UNITED STATES ET AL., 434 U. S. 1007. Motion for leave to file petition for rehearing denied.

MARCH 17, 1978

Rehearing Denied

No. 77–1033. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* ESCALANTE ET AL., *ante,* p. 901. Petition for rehearing denied. Motion of appellees for issuance of judgment forthwith, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted.

MARCH 20, 1978

Dismissal Under Rule 60

No. 77–1110. CHESAPEAKE & OHIO RAILWAY CO. *v.* ILLINOIS CENTRAL GULF RAILROAD CO. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 564 F. 2d 222.

Appeals Dismissed

No. 77–794. SILVERTON *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 77–987. FORGE ET AL. *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 262 N. W. 2d 341.

No. 77–1050. DEKAM ET AL. *v.* CITY OF SOUTHFIELD ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 75 Mich. App. 188, 254 N. W. 2d 839.

No. 77–1130. POTTS *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 561 S. W. 2d 682.

No. 77–6055. SMITH *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 349 So. 2d 1244.

No. 77–1056. SUNBEAM TELEVISION CORP. ET AL. *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 351 So. 2d 723.

Miscellaneous Orders

No. A–722. MARTIN *v.* KANSAS. Application for stay of mandate of the Supreme Court of Kansas, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–747 (Nos. 77–1236 and 77–1237). GENERAL ATOMIC CO. *v.* FELTER, JUDGE, ET AL. Application for stay of all further proceedings in *United Nuclear Corp.* v. *General Atomic Co.*, in the District Court of New Mexico, Santa Fe County, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. 76–1607. SECURITIES AND EXCHANGE COMMISSION *v.* SLOAN. C. A. 2d Cir. [Certiorari granted, 434 U. S. 901.] Motion of Canadian Javelin Ltd. for leave to participate in oral argument as *amicus curiae* denied.

No. 76–1701. TENNESSEE VALLEY AUTHORITY *v.* HILL ET AL. C. A. 6th Cir. [Certiorari granted, 434 U. S. 954.] Motions of Eastern Band of Cherokee Indians and East Tennessee Valley Landowners' Assn. for leave to file briefs as *amici curiae* granted.

No. 77–444. PENN CENTRAL TRANSPORTATION CO. ET AL. *v.* NEW YORK CITY ET AL. Appeal from Ct. App. N. Y. [Probable jurisdiction noted, 434 U. S. 983.] Motion of Committee to Save Grand Central Station et al. for leave to file a brief as *amici curiae* granted.

No. 77–560. GARDNER *v.* WESTINGHOUSE BROADCASTING CO. C. A. 3d Cir. [Certiorari granted, 434 U. S. 984.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted.

No. 77–6259. SEAGROVES *v.* TENNESSEE. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–1094. GALANTE *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 77–120. DOUGHERTY COUNTY, GEORGIA, BOARD OF EDUCATION, ET AL. *v.* WHITE. Appeal from D. C. M. D. Ga. Probable jurisdiction noted. Reported below: 431 F. Supp. 919.

No. 77–803. BARRY, CHAIRMAN, RACING AND WAGERING BOARD OF NEW YORK, ET AL. *v.* BARCHI. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 436 F. Supp. 775.

No. 77–1115. LALLI *v.* LALLI, ADMINISTRATRIX, ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 43 N. Y. 2d 65, 371 N. E. 2d 481.

No. 77–991. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* AZNAVORIAN; and

No. 77–5999. AZNAVORIAN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeals from D. C. S. D. Cal. Motions of Grace Aznavorian for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 440 F. Supp. 788.

Certiorari Granted

No. 77–1000. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD Co. *v.* REDIKER. Ct. App. Kan. Certiorari granted. Reported below: 1 Kan. App. 2d 581, 571 P. 2d 70.

No. 77–1016. UNITED CALIFORNIA BANK ET AL., Co-EXECUTORS *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 563 F. 2d 400.

No. 77–1105. HERBERT *v.* LANDO ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 568 F. 2d 974.

No. 77–654. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 557 F. 2d 971.

No. 77–5781. RAKAS ET AL. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 46 Ill. App. 3d 569, 360 N. E. 2d 1252.

Certiorari Denied

No. 77–603. MARTORANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 1 and 561 F. 2d 406.

No. 77–713. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 F. 2d 375.

No. 77–771. SCHURGIN *v.* UNITED STATES; and
No. 77–5755. RIMAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 1271.

No. 77–780. CORNFELD, DBA GRAYHALL, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 967.

No. 77–809. Joe *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 77–818. Commercial National Bank of Dallas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1215.

No. 77–846. Graves et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1319.

No. 77–859. G. M. Leasing Corp. et al. *v.* United States et al. C. A. 10th Cir. Certiorari denied. Reported below: 560 F. 2d 1011.

No. 77–868. REA Express, Inc. *v.* United States et al.; and

No. 77–869. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 940.

No. 77–886. Martorella et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–889. Smith *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 77–894. Pierce *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 561 F. 2d 735.

No. 77–928. United Steelworkers of America, AFL–CIO–CLC, et al. *v.* National Rejectors Industries. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 1069.

No. 77–938. Angelini et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 565 F. 2d 469.

No. 77–944. Frey *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 270.

No. 77–953. BUFFALO RIVER CONSERVATION & RECREATION COUNCIL ET AL. *v.* NATIONAL PARK SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 558 F. 2d 1342.

No. 77–990. DICARLO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 565 F. 2d 802.

No. 77–994. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 1065.

No. 77–995. GORDON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 193.

No. 77–1017. RHODES, GOVERNOR OF OHIO *v.* KRAUSE ET AL.;

No. 77–1018. DEL CORSO, ADJUTANT GENERAL OF OHIO, ET AL. *v.* KRAUSE ET AL.; and

No. 77–1022. KRAUSE ET AL. *v.* RHODES, GOVERNOR OF OHIO, et al. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 563.

No. 77–1024. FURNESS WITHY & CO., LTD., ET AL. *v.* BUNGE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 790.

No. 77–1025. HESS *v.* UPPER MISSISSIPPI TOWING CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1030.

No. 77–1030. OLINKRAFT, INC. *v.* LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 350 So. 2d 865.

No. 77–1031. BOUDREAUX *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 350 So. 2d 688.

No. 77–1040. HUGHES AIRCRAFT CO. *v.* BELL TELEPHONE LABORATORIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 654.

No. 77–1044. CARAVEL OFFICE BUILDING CO. ET AL. *v.* BOGLEY HARTING MAHONEY & LEIBLING, INC. Sup. Ct. Va. Certiorari denied.

No. 77–1045. BERGEN COUNTY ASSOCIATES ET AL. *v.* BOROUGH OF EAST RUTHERFORD ET AL. Super. Ct. N. J. Certiorari denied.

No. 77–1047. SHERARD *v.* GINSBERG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–1049. ST. LOUIS UNION TRUST CO. ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 1040.

No. 77–1052. BUTKER *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–1053. NUTTER *v.* TORREZ, DBA PERFECTO PLUMBING SEWER SERVICE, INC., ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 222 Kan. 749.

No. 77–1054. TRACHTMAN *v.* ANKER, CHANCELLOR, NEW YORK CITY PUBLIC SCHOOLS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 512.

No. 77–1055. LUNSFORD *v.* INVESTORS DIVERSIFIED SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 393.

No. 77–1090. FOUNDING CHURCH OF SCIENTOLOGY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 297, 572 F. 2d 321.

No. 77–1142. ROBLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1308.

No. 77–1151. JACKSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 393.

No. 77–1158. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1193.

No. 77–1159. HALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–1167. MAGEEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 77–1168. CONSTANTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 567 F. 2d 266.

No. 77–5511. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 569.

No. 77–5556. BAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–5733. MORGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 397.

No. 77–5777. NEYRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5780. WEST *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 757.

No. 77–5785. OAKES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 564 F. 2d 384.

No. 77–5786. BOBISINK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 562 F. 2d 106.

No. 77–5814. FISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5817. HARRINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–5820. BENEL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 1166.

No. 77–5839. LONGORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1185.

No. 77–5845. ZUBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–5848. DIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 1138.

No. 77–5854. SPEIR ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 564 F. 2d 934.

No. 77–5889. LIVINGSTON ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 77–5892. SHANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 90.

No. 77–5936. PALANACKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–5940. SMOLSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5949. JARDAN *v.* HUNTER, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 77–5955. MCDONNELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–5965. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 567 F. 2d 930.

No. 77–5975. HORNG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied.

No. 77–5976. EMLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 584.

No. 77–5994. MASEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 563 F. 2d 322.

No. 77–6002. SKIDMORE *v.* NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–6003. TYLER *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 1179.

No. 77–6009. COONE ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1214.

No. 77–6020. ELLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6022. HARRISON *v.* MORRIS, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 10th Cir. Certiorari denied.

No. 77–6033. CALDWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 77–6049. DORAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 1176.

No. 77–6063. OLDEN *v.* COMMUNITY RELEASE BOARD. C. A. 9th Cir. Certiorari denied.

No. 77–6065. RICKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–6069. LADD *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 568 P. 2d 960.

No. 77–6072. MYERS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 117 Ariz. 79, 570 P. 2d 1252.

No. 77–6074. TRANTINO *v.* HATRAK, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 86.

No. 77–6077. CLARK *v.* MALLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6080. BILLINGSLEY ET AL. *v.* SEIBELS, MAYOR OF BIRMINGHAM, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 276.

No. 77–6081. WILLIAMS *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 775.

No. 77–6082. TURNER *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 556 S. W. 2d 563.

No. 77–6085. MOORE ET AL. *v.* COWAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 560 F. 2d 1298.

No. 77–6089. TYLER *v.* GOINS, SHERIFF. C. A. 8th Cir. Certiorari denied.

No. 77–6091. STEVENSON *v.* YOUNG, ACTING PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1213.

No. 77–6093. RAITPORT *v.* GENERAL ELECTRIC CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–6096. WALLOE *v.* CUYLER, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–6099. CONOVER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6102. ROCCA *v.* GROOMES, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–6108. SAYLES *v.* HAYWOOD, JUDGE, ET AL. Ct. App. D. C. Certiorari denied.

No. 77–6112. ANDERSON ET UX. *v.* WATERTOWN SAVINGS BANK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 1166.

No. 77–6113. HEFLIN *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 77–6114. Reed *v.* Owen et al. Sup. Ct. Colo. Certiorari denied. Reported below: See —— Colo. ——, 570 P. 2d 26.

No. 77–6115. Lawary *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 77–6118. Smyzer *v.* Dotson, Superintendent, Career Development Center of Kentucky. C. A. 6th Cir. Certiorari denied.

No. 77–6121. O'Neill *v.* California. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 77–6122. Marsh *v.* Cupp, Warden. C. A. 9th Cir. Certiorari denied.

No. 77–6123. Lowe *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 218 Va. 670, 239 S. E. 2d 112.

No. 77–6124. Lawrence et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–6127. Noone *v.* Szoradi et al. Ct. App. D. C. Certiorari denied.

No. 77–6128. Richardson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 555 S. W. 2d 134.

No. 77–6129. Riley *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 352 So. 2d 180.

No. 77–6133. Carr *v.* Dick et al. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 27.

No. 77–6136. Christian *v.* Perini, Penitentiary Superintendent. C. A. 6th Cir. Certiorari denied.

No. 77–6139. Crawford *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 223 Kan. 127, 573 P. 2d 982.

No. 77–6143. JENKINS *v.* WASHINGTON POST CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–6146. RAUPP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6151. CAMPBELL *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 77–6164. MILLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 564 F. 2d 103.

No. 77–6172. LIEBERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–6174. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–6175. MARSHALL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 969, 566 F. 2d 1191.

No. 77–6176. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 391.

No. 77–6181. LIPSCOMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6186. MCELROY *v.* WILSON ET AL. Ct. App. Ga. Certiorari denied. Reported below: 143 Ga. App. 893, 240 S. E. 2d 155.

No. 77–6187. BASS, AKA JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770.

No. 77–6188. BERKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770.

No. 77–6196. SCRUGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 349.

No. 77–6200. VAN BUREN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 607.

No. 77–6205. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6206. LOWE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 569 F. 2d 1113.

No. 77–6246. SUMLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 567 F. 2d 684.

No. 76–6204. BONNER *v.* COUGHLIN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 545 F. 2d 565.

No. 77–1020. WINOKUR ET AL. *v.* BELL FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 560 F. 2d 271.

No. 77–121. WALKER, GOVERNOR OF ILLINOIS, ET AL. *v.* LITTLE. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 552 F. 2d 193.

No. 77–732. MICHIGAN *v.* HAMPTON. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 77–743. ROWE, CORRECTIONS DIRECTOR, ET AL. *v.* FERRIS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 551 F. 2d 185.

No. 77–986. BLACK, REFORMATORY SUPERINTENDENT *v.* NIEMEYER ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 77–992. RAINES, SECRETARY OF CORRECTIONS, ET AL. *v.* WRIGHT ET AL. Ct. App. Kan. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 1 Kan. App. 2d 494, 571 P. 2d 26.

No. 77–691. SUPREME COURT OF ILLINOIS ET AL. *v.* KTSANES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari. Reported below: 552 F. 2d 740 and 560 F. 2d 790.

No. 77–714. DALEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 564 F. 2d 645.

No. 77–733. MICHIGAN *v.* ALLENSWORTH. Sup. Ct. Mich. Certiorari denied, it appearing that the judgment below rests upon adequate state grounds. Reported below: 401 Mich. 67, 257 N. W. 2d 81.

No. 77–770. AKIN *v.* UNITED STATES. C. A. 7th Cir. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Certiorari denied. Reported below: 562 F. 2d 459.

No. 77–785. CONSUMERS UNION OF THE UNITED STATES, INC. *v.* COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 182 U. S. App. D. C. 423, 561 F. 2d 872.

No. 77–887. SURLES *v.* WIRTH. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 562 F. 2d 319.

No. 77–1048. CANON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 373 Mass. 494, 368 N. E. 2d 1181.

No. 77–1060. CONDIT ET AL. *v.* UNITED AIR LINES, INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 558 F. 2d 1176.

No. 77–1057. YUHAS ET AL. *v.* LIBBEY-OWENS-FORD CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 562 F. 2d 496.

No. 77–1059. BOSSARD, ADMINISTRATRIX, ET AL. *v.* EXXON CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 559 F. 2d 1040.

No. 77–1083. SIMPSON *v.* O'NEAL. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 350 So. 2d 998.

No. 77–5757. JARVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 494.

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

In denying certiorari in this case, the Court allows the Second Circuit's "but for" corollary to the exclusionary rule to pass unreviewed, at least for the present. As applied in this case, the Second Circuit rule allows into evidence the fruits of an arrest involving serious constitutional questions, because the court below could envision a set of circumstances in which the arrest might have been carried out constitutionally.

Petitioner was arrested on April 20, 1976, on the authority of a "John Doe" bench warrant. The arresting agents broke down the door of petitioner's home and arrested him in his bed. The trial court approved the arrest on the basis of extrinsic evidence which supplemented the nameless and descriptionless warrant. However, the Second Circuit found the "John Doe" warrant to be invalid, and went on to consider whether the

arrest might otherwise be defended under 18 U. S. C. § 3052, which grants FBI agents authority to make felony arrests based on reasonable suspicion. Observing that *United States* v. *Watson,* 423 U. S. 411 (1976), left unresolved the constitutionality of probable-cause arrests pursuant to statutory authority effected in a private home without a warrant, the Second Circuit concluded that the facts of this case raised "serious question whether the forcible entry into Jarvis' home without a valid warrant and in the absence of exigent circumstances meets the requirement of the statute or fourth amendment standards of reasonableness." 560 F. 2d 494, 498 (CA2 1977).

Nevertheless, the Second Circuit affirmed the admissibility of photographs, fingerprints, and identifications resulting therefrom, all of which followed petitioner's arrest. Its reasoning was that the agents *could have* legally arrested petitioner on probable cause as he emerged from his home, and, had they done so, all the evidence complained of would then have materialized anyway. "The illegal arrest thus was not a 'but for' cause for the introduction of the evidence appellant seeks to suppress." *Id.,* at 498–499.

This "but for" test presents a substantial question for the proper enforcement of the exclusionary rule. Its origin is dubious,[1] and its use has not been explicitly sanctioned outside of the Second Circuit.[2] Most importantly, it sanctions a *post*

[1] *United States* v. *Galante,* 547 F. 2d 733 (CA2 1976), which the Second Circuit cites as supporting the "but for" test, engaged in speculation in a fashion similar to the court's action in this case, but it also based the holding of admissibility on the interruption of the chain connecting illegal arrest and seizure of evidence by an independent act of the suspect. *Id.,* at 741. In *United States* v. *Edmons,* 432 F. 2d 577 (CA2 1970), also relied on by the Solicitor General in opposing this petition, the Second Circuit excluded the fruits of "flagrantly illegal arrests," while reserving the question of exclusion after "an arrest made in good faith" but lacking probable cause. *Id.,* at 584.

[2] The Solicitor General relies on only one Circuit case outside of the Second Circuit, *Sutton* v. *United States,* 267 F. 2d 271 (CA4 1959). The

hoc hypothesizing by a court as to what the conditions for an arrest or a search might have been. If a court is satisfied that the Constitution need not have been violated in the conduct of a particular arrest, then, under this rule, evidence derived from the arrest, which in fact violated the Constitution, may be admitted. In short, the exclusionary rule is suspended when constitutional infringements are gratuitous.

The "but for" rule is not a mere application or extension of our cases sustaining the admissibility of evidence arguably the product of a prior constitutional breach. In *Wong Sun* v. *United States,* 371 U. S. 471 (1963), this Court sanctioned the use of evidence possibly stemming from an illegal arrest, where the "connection between the arrest and the [evidence] had 'become so attenuated as to dissipate the taint,' " *id.,* at 491, citing *Nardone* v. *United States,* 308 U. S. 338, 341 (1939). In *Brown* v. *Illinois,* 422 U. S. 590 (1975), we recently reaffirmed that "[i]n order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires . . . that the statement . . . be 'sufficiently an act of free will to purge the primary taint.' " *Id.,* at 602. In both cases it was recognized that evidence which would not have arisen "but for" an illegal arrest might still be admitted if, under the facts *as they actually developed,* a break in the chain occurred. But in this case, the Government does not argue that an act of the petitioner's free will intervened to break the causality between arrest and identification. Rather, this case deals in suppositions of how the illegality of the arrest might have been avoided.

The primary rationale for the exclusionary rule is to deter official misconduct. *United States* v. *Calandra,* 414 U. S. 338,

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defendant there sought to suppress *all* evidence in order to punish the Government for an unreasonably long prearraignment delay. The absence of any causal link between the right infringement and the evidence sought to be suppressed clearly distinguishes *Sutton* from the present case and from the discussion of "but for" causation generally.

347–348 (1974). Evidence that comes to light after official misconduct but not because of it may be introduced. No deterrent purpose is served by excluding it. The Second Circuit rule poses the problem of evidence which comes to light because of official misconduct, but which might well have arisen anyway. It makes the exclusion decision turn not on what events transpired but on what might have transpired. It makes courts not factfinders but fact predictors. As a deterrent, it removes the exclusion sanction from that police misconduct which is gratuitous and avoidable, precisely the type of behavior most in need of deterrence. I believe this Court should give plenary consideration to the interpretation the Second Circuit has given to the exclusionary rule this Court originally fashioned.

I dissent from the denial of certiorari.

No. 77–5891. MANION *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 67 Ill. 2d 564, 367 N. E. 2d 1313.

No. 77–6057. BOWDEN *v.* GEORGIA; and

No. 77–6107. MITCHELL *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–6057, 239 Ga. 821, 238 S. E. 2d 905; No. 77–6107, 239 Ga. 781, 239 S. E. 2d 2.

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 grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 76–5815. ZANNIS *v.* UNITED STATES, 430 U. S. 934. Second motion for leave to file petition for rehearing denied.

No. 77–219. PLUMLEE *v.* UNITED STATES, 434 U. S. 1040;

No. 77–801. FOWLER *v.* MARYLAND STATE BOARD OF LAW EXAMINERS, 434 U. S. 1043; and

No. 77–5960. ROOTS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, 434 U. S. 1059. Petitions for rehearing denied.

No. 72–1679. HACKETT, DIRECTOR, DEPARTMENT OF EMPLOYMENT SECURITY OF RHODE ISLAND, ET AL. *v.* GRINNELL CORP., 414 U. S. 879;

No. 76–6983. KEEFER *v.* PENNSYLVANIA, 434 U. S. 1009; and

No. 77–5676. BEARD *v.* ESTELLE, CORRECTIONS DIRECTOR, 434 U. S. 1019. Motions for leave to file petitions for rehearing denied.

MARCH 24, 1978

Miscellaneous Order

No. A–807. BROWN ET AL. *v.* THOMSON, GOVERNOR OF NEW HAMPSHIRE. Application for stay of judgment of the United States Court of Appeals for the First Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pending timely filing and disposition of a petition for writ of certiorari in this Court.

Should the petition for a writ of certiorari not be timely filed or denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to remain in effect pending issuance of the judgment of this Court.

THE CHIEF JUSTICE dissenting.

I would not disturb the order of the United States Court of Appeals for the First Circuit. Moreover, the Attorney General of New Hampshire having this day personally represented to the Clerk of this Court that the proclamation of March 21,

1978, has been superseded by a new proclamation dated March 24, 1978, filed today, the application referred to the Court appears to be moot, and I therefore dissent from the action of the Court and would reinstate the order of the Court of Appeals.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, dissenting.

As we would not disturb the order of the Court of Appeals of the First Circuit, we dissent from the order of this Court.

MARCH 27, 1978

Appeals Dismissed

No. 77–1100. ILLINOIS STATE BOARD OF ELECTIONS *v.* SANGMEISTER ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 565 F. 2d 460.

No. 77–6162. ADAMS *v.* MULDER ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 567 F. 2d 388.

No. 77–5919. RICHARDSON ET AL., EXECUTORS *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. Appeal from C. A. 2d Cir. dismissed for failure to file notice of appeal within the time provided by 28 U. S. C. § 2101 (a) and this Court's Rule 11. Reported below: 560 F. 2d 500.

Miscellaneous Orders

No. A–739 (77–6178). GARRETT *v.* UNITED STATES. C. A. 9th Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–754 (77–1293). PETERSON *v.* UNITED STATES. C. A. 7th Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–791. FUND OF FUNDS, LTD., ET AL. *v.* ARTHUR ANDERSEN & CO. ET AL. C. A. 2d Cir. Application for extension of time to file petition for writ of certiorari, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. Special Master's Accounting of Expense Funds is accepted. It is ordered that the Special Master be discharged. [For earlier order herein, see *e. g.*, 430 U. S. 140.]

No. 76–1114. CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.;

No. 76–1133. EL PASO NATURAL GAS CO. *v.* SOUTHLAND ROYALTY CO. ET AL.; and

No. 76–1587. FEDERAL ENERGY REGULATORY COMMISSION *v.* SOUTHLAND ROYALTY CO. ET AL. C. A. 5th Cir. [Certiorari granted *sub nom. Federal Power Comm'n* v. *Southland Royalty Co.*, 433 U. S. 907.] These cases restored to calendar for reargument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 77–152. BETH ISRAEL HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. [Certiorari granted, 434 U. S. 1033.] Motion of Massachusetts Hospital Workers Union, Local 880, for leave to intervene granted.

No. 77–369. FURNCO CONSTRUCTION CORP. *v.* WATERS ET AL. C. A. 7th Cir. [Certiorari granted, 434 U. S. 996.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 77–510. UNITED STATES *v.* NEW MEXICO. Sup. Ct. N. M. [Certiorari granted, 434 U. S. 1008.] Motion of National Wildlife Federation et al. to file a brief as *amici curiae* denied.

No. 77–575. JOHN ET AL. *v.* MISSISSIPPI; and

No. 77–836. UNITED STATES *v.* JOHN ET AL. C. A. 5th Cir. [Probable jurisdiction postponed, 434 U. S. 1032.] Joint motion for additional time for oral argument granted and 30 additional minutes allotted for that purpose.

No. 77–1098. BELL, SECURITIES COMMISSIONER OF ARKANSAS *v.* INTERNATIONAL TRADING, LTD., ET AL. Sup. Ct. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–1289. LUTHERAN HOSPITAL OF MILWAUKEE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Motion of petitioner to consolidate with No. 77–152, *Beth Israel Hospital* v. *National Labor Relations Board* [certiorari granted, 434 U. S. 1033], denied.

No. 77–6321. PAYTON *v.* HARRIS, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 77–961. NEW YORK TELEPHONE CO. ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 566 F. 2d 388.

No. 77–968. DETROIT EDISON CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari granted. Reported below: 560 F. 2d 722.

Certiorari Denied. (See also Nos. 77–1100 and 77–6162, *supra.*)

No. 77–674. THE TAMANO ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 564 F. 2d 964.

No. 77–686. CHIAPPE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–736. NEW YORK STOCK EXCHANGE, INC., ET AL. *v.* HEIMANN, COMPTROLLER OF THE CURRENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 217, 562 F. 2d 736.

No. 77–787. TIDWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 262.

No. 77–898. POMPONIO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 563 F. 2d 659.

No. 77–900. VELSICOL CHEMICAL CORP. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 561 F. 2d 671.

No. 77–901. FRAKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 821.

No. 77–903. MYERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 67 Ill. 2d 308, 367 N. E. 2d 949.

No. 77–917. WHITESIDE & CO. ET AL. *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1118.

No. 77–936. COASTAL STATES PETROCHEMICAL CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 214 Ct. Cl. 520, 559 F. 2d 1.

No. 77–946. IANNONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–948. ZANNINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–956. PARKE, DAVIS & CO. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 1200.

No. 77–974. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 1160.

No. 77–962. Hawaiian Telephone Co. et al. *v.* Hawaii Department of Labor and Industrial Relations et al. C. A. 9th Cir. Certiorari before judgment denied.

No. 77–996. Poe *v.* Stetson, Secretary of the Air Force, et al. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 56.

No. 77–997. Hawaii *v.* Consumer Product Safety Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 133, 566 F. 2d 798.

No. 77–998. Logal *v.* Cruse et al. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 83, 368 N. E. 2d 235.

No. 77–1029. Clay *v.* Bomar. C. A. 6th Cir. Certiorari denied.

No. 77–1076. Massachusetts *v.* Dustin. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 373 Mass. 612, 368 N. E. 2d 1388.

No. 77–1082. Joyner *v.* Phelps, Warden. Sup. Ct. La. Certiorari denied. Reported below: 352 So. 2d 187.

No. 77–1084. Barbee *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 34 N. C. App. 66, 237 S. E. 2d 352.

No. 77–1088. Chestnutt Corp. *v.* Galfand et al. C. A. 2d Cir. Certiorari denied.

No. 77–1103. Bryan *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 276.

No. 77–1112. Duke *v.* United States Steel Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1022.

No. 77–1114. TERNES *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 259 N. W. 2d 296.

No. 77–1139. BURNETT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 262 Ark. 235, 556 S. W. 2d 653.

No. 77–1178. QUINN *v.* KANSAS POWER & LIGHT CO. C. A. 10th Cir. Certiorari denied.

No. 77–1187. BLACK ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 569 F. 2d 1111.

No. 77–1204. RODRIGUEZ *v.* UNITED STATES; and
No. 77–1212. RODRIGUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–1215. CADY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 771.

No. 77–5832. COLE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 50 Ill. App. 3d 133, 365 N. E. 2d 133.

No. 77–5875. DUKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–5884. WELCH *v.* EVANS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 94.

No. 77–5895. RUDOLPH *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 78 Wis. 2d 435, 254 N. W. 2d 471.

No. 77–5971. MYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 1329.

No. 77–6008. ASUMANSI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6037. WYLIE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 186 U. S. App. D. C. 231, 569 F. 2d 62.

No. 77–6038. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 785.

No. 77–6051. CHALK *v.* SECRETARY OF LABOR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 184 U. S. App. D. C. 189, 565 F. 2d 764.

No. 77–6056. CLARK *v.* BENSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–6061. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 244.

No. 77–6134. PETERSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 281 Md. 309, 379 A. 2d 164.

No. 77–6138. ARIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–6142. JENKINS *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 77–6153. RICKS *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 77–6154. BROOMFIELD *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 77–6163. FAHRIG ET AL. *v.* BERGER ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 77–6166. TENNART *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 352 So. 2d 629.

No. 77–6168. CLOUDY *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 77–6169. MURRAY *v.* CALIFANO, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 157.

No. 77–6171. EXUM *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–6173. GREEN *v.* WARDEN, MARYLAND STATE PENITENTIARY. C. A. 4th Cir. Certiorari before judgment denied.

No. 77–6179. NAYLOR *v.* SUPERIOR COURT OF ARIZONA, COUNTY OF MARICOPA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1363.

No. 77–6182. TIPPETT *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 558 S. W. 2d 288.

No. 77–6183. WILLIAMS ET AL. *v.* HOYT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1336.

No. 77–6185. ROGERS *v.* THIRTY-SEVENTH JUDICIAL COURT ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6207. CARDILLO *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 43.

No. 77–6214. SIMPSON *v.* KREIGER, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 565 F. 2d 390.

No. 77–6220. PICO-ZAZUETA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 1367.

No. 77–6243. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6249. HOWZE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–6257. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 889.

No. 77–6262. BULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 869.

No. 77–6264. KULAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6269. MONTES-ZARATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 F. 2d 1330.

No. 77–6284. ILACQUA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 F. 2d 399.

No. 77–6311. ECKERT *v.* HEWITT ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–318. SHANG, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* HOLLEY ET AL. C. A. 2d Cir. Motion of respondents Holley et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 553 F. 2d 845.

No. 77–958. PENNSYLVANIA *v.* JONES, AKA FRIDAY. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 474 Pa. 364, 378 A. 2d 835.

No. 77–1075. AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL. *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE POWELL would grant certiorari. Reported below: 184 U. S. App. D. C. 253, 566 F. 2d 145.

Rehearing Denied

No. 77–584. NEUSTEIN *v.* UNITED STATES, 434 U. S. 1062;

No. 77–5515. HAMPTON *v.* UNITED STATES, 434 U. S. 1071; and

No. 77–5804. SIMMONS ET AL. *v.* UNITED STATES, 434 U. S. 1074. Petitions for rehearing denied.

No. 77–5328. HILLIARD *v.* ESTELLE, CORRECTIONS DIRECTOR, 434 U. S. 1016. Motion for leave to file petition for rehearing denied.

APRIL 3, 1978

Affirmed on Appeal

No. 77–980. LEWIS *v.* COWEN ET AL. Affirmed on appeal from D. C. E. D. Pa. MR. JUSTICE BRENNAN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 443 F. Supp. 544.

Appeal Dismissed

No. 77–1026. RILEY, A MINOR, BY GIBBS *v.* OHIO ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 77–85. SMALLING, SUPERINTENDENT OF UNIFIED SCHOOL DISTRICT NO. 480, SEWARD COUNTY, KANSAS, ET AL. *v.* EPPERSON ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carey* v. *Piphus, ante,* p. 247. Reported below: 551 F. 2d 254.

Miscellaneous Orders

No. A–636 (77–6111). BROWN *v.* UNITED STATES. C. A. 2d Cir. Application for stay, presented to MR. JUSTICE STEVENS, and by him referred to the Court, denied.

No. A–776. KEOGH *v.* MAIN XX XVI, INC. County Ct. of Law No. 3, Harris County, Tex. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–122. IN RE DISBARMENT OF STILLO. Disbarment entered. [For earlier order, see 434 U. S. 979.]

No. D–125. IN RE DISBARMENT OF DUDEN. Disbarment entered. [For earlier order, see 434 U. S. 980.]

No. D–126. IN RE DISBARMENT OF SPAR. Disbarment entered. [For earlier order, see 434 U. S. 980.]

No. D–127. In re Disbarment of Gonzalez. Disbarment entered. [For earlier order, see 434 U. S. 980.]

No. D–128. In re Disbarment of Kellogg. Disbarment entered. [For earlier order see 434 U. S. 980.]

No. D–132. In re Disbarment of Esser. It is ordered that Gene Ira Esser of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–133. In re Disbarment of Chu. It is ordered that Gene Loy Chu of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 77–529. Wise, Mayor of Dallas, et al. *v.* Lipscomb et al. C. A. 5th Cir. [Certiorari granted, 434 U. S. 1008.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose, provided that the brief of the United States is filed on or before April 10, 1978. If the brief is timely filed, appellants also allotted an additional 15 minutes for oral argument.

No. 77–888. Vitek, Correctional Director, et al. *v.* Jones et al. D. C. Neb. [Probable jurisdiction noted, 434 U. S. 1060.] Motion of appellee Jones for leave to proceed herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Thomas A. Wurtz, Esquire, of Lincoln, Neb., be appointed to serve as counsel for appellee Jones in this case.

No. 77–1207. Blum, Acting Commissioner, Department of Social Services of New York, et al. *v.* Toomey et ux. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–6354. NORTHERN *v.* DEPARTMENT OF HUMAN SERVICES OF TENNESSEE. Appeal from Sup. Ct. Tenn. Motion to expedite denied.

No. 77–1037. RENWICK *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or other relief denied.

Certiorari Granted

No. 77–1051. GIVHAN *v.* WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 555 F. 2d 1309.

Certiorari Denied

No. 77–570. AVERY *v.* NEW ENGLAND TELEPHONE & TELEGRAPH CO. C. A. 2d Cir. Certiorari denied. Reported below: 559 F. 2d 1202.

No. 77–805. FRANKLIN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 143 Ga. App. 3, 237 S. E. 2d 425.

No. 77–851. FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1246.

No. 77–855. WARNER-LAMBERT CO. *v.* FEDERAL TRADE COMMISSION; and

No. 77–1118. FEDERAL TRADE COMMISSION *v.* WARNER-LAMBERT CO. C. A. D. C. Cir. Certiorari denied. Reported below: 183 U. S. App. D. C. 230, 562 F. 2d 749.

No. 77–870. MISSOURI PACIFIC RAILROAD CO. *v.* CITY OF PALESTINE, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 408.

No. 77–885. COMMISSIONER OF EDUCATION OF NEW JERSEY ET AL. *v.* BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL, TOWNSHIP OF FRANKLIN, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 74 N. J. 345, 378 A. 2d 218.

No. 77–939. BLIZZARD *v.* MAHAN, PRISON SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied.

No. 77–959. HULVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 562 F. 2d 1132.

No. 77–960. CLINTON MUNICIPAL SEPARATE SCHOOL DISTRICT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1188.

No. 77–976. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 688.

No. 77–999. HELFER *v.* UNITED STATES;
No. 77–5991. GENTRY *v.* UNITED STATES; and
No. 77–6052. HORNSTEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 563 F. 2d 836.

No. 77–1001. MARKLEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 567 F. 2d 523.

No. 77–1005. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–1034. NOGUERAS ET AL. *v.* PUERTO RICO INTERNATIONAL AIRLINES, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 77–1035. VICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1004.

No. 77–1043. STIFEL, NICOLAUS & CO., INC., ET AL. *v.* GARNATZ. C. A. 8th Cir. Certiorari denied. Reported below: 559 F. 2d 1357.

No. 77–1073. LEE PHARMACEUTICALS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (DEN-MAT, INC., ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 77–1085. AMERICAN BILTRITE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1221.

No. 77–1113. LOZADA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 907, 394 N. Y. S. 2d 460.

No. 77–1116. TORO CO. ET AL. *v.* ALSOP, U. S. DISTRICT JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 998.

No. 77–1121. STATE COMPENSATION INSURANCE FUND *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 77–1127. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–1141. WALTER E. HELLER & CO. *v.* FIRST VIRGINIA BANKSHARES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1307.

No. 77–1183. CITY OF EVANSTON, ILLINOIS *v.* ANDRUSS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 68 Ill. 2d 215, 369 N. E. 2d 1258.

No. 77–1206. GAMBINO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 414.

No. 77–1216. DUHON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 345.

No. 77–1224. FOSTER ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–1230. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 569 F. 2d 448.

No. 77–1233. ODNEAL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 598.

No. 77–1238. LEVATINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–5539. WALKING CROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 386.

No. 77–5855. RAPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 101.

No. 77–5916. MANSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 71 Cal. App. 3d 1, 139 Cal. Rptr. 275.

No. 77–5954. CAREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 545.

No. 77–5987. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6014. ALBERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 568 F. 2d 489.

No. 77–6027. SILBERBERG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–6046. WHITNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6071. ABASCAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 821.

No. 77–6079. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–6090. LEWIS *v.* CHAVEZ, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77–6106. TYLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 160.

No. 77–6135. DESHAZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 893.

No. 77–6144. ADCOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 582.

No. 77–6189. COHEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 1066, 399 N. Y. S. 2d 552.

No. 77–6190. PEVLOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 77–6193. HARRIS, AKA DAVIS *v.* UNITED STATES; and No. 77–6195. FELDER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 77–6193, 568 F. 2d 771; No. 77–6195, 568 F. 2d 770.

No. 77–6197. RATLIFF *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 77–6198. LYLE *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 529.

No. 77–6199. THUNDERSHIELD *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 1018.

No. 77–6203. ZINK *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6210. STAFFORD *v.* WEBER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–6213. HERNANDEZ ET AL. *v.* COLORADO. C. A. 10th Cir. Certiorari denied.

No. 77–6223. GRISMORE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 564 F. 2d 929.

No. 77–6224. SCHOULTZ *v.* SHERIFF, CARSON CITY, NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 778.

No. 77–6227. PUNCH ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 377 A. 2d 1353.

No. 77–6232. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 1119.

No. 77–6240. BARNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 134.

No. 77–6266. MORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6270. GODIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6272. DANIELS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 77–6275. MONTOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1368.

No. 77–6281. SPEADLING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 348.

No. 77–6292. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 881.

No. 77–6294. SUMMERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 161.

No. 77–6295. FRANKLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 1156.

No. 77–6298. CARBAJAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6302. CERKL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6306. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 569 F. 2d 771.

No. 77–6312. PEDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 77–6314. ENRIQUEZ-PALAFOX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6316. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1304.

No. 77–6319. MULLHOLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6327. MOORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 154.

No. 77–6334. SIMPKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 774.

No. 77–1108. ANTAL *v.* BOYLE ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE POWELL would grant certiorari. Reported below: 185 U. S. App. D. C. 245, 567 F. 2d 112.

No. 77–1111. COLORADO *v.* BRAMLETT. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 194 Colo. 205, 573 P. 2d 94.

No. 77–1132. NEW MEXICO EX REL. ENVIRONMENTAL IMPROVEMENT AGENCY *v.* ALBUQUERQUE PUBLISHING CO. Sup. Ct. N. M. Certiorari denied, it appearing that the judgment below rests upon adequate state grounds. Reported below: 91 N. M. 125, 571 P. 2d 117.

No. 77–1175. ILLINOIS *v.* PENDLETON. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests upon adequate state grounds. Reported below: 52 Ill. App. 3d 241, 367 N. E. 2d 196.

No. 77–5874. LITTLE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 261 Ark. 859, 554 S. W. 2d 312.

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

I would grant certiorari to resolve the question whether, before a juvenile waives her constitutional rights to remain silent and consult with an attorney, she is entitled to competent advice from an adult who does not have significant conflicts of interest.

Petitioner, a girl of "low dull normal" intelligence,[1] has been sentenced to spend the rest of her life in prison for a crime that occurred when she was 13 years old.[2] Her conviction for the murder of her father was based in large part on incriminating statements that she made on three occasions. The most important of these statements was a lengthy confession given at the county juvenile home on the day of the murder, in the presence of her mother, a probation officer, a prosecuting attorney, and two sheriff's deputies.

Prior to making this confession, petitioner spent 10–15 minutes alone with her mother, who had earlier been questioned by the police concerning the murder and who believed that she was herself a suspect. 261 Ark. 859, 866–867, 554 S. W. 2d 312, 314–315 (1977). The mother emerged from this meeting, "look[ing] as if she had been crying," and stated

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[1] 261 Ark. 859, 870, 554 S. W. 2d 312, 317 (1977). The psychiatrist who made this observation had been called by the State at a pretrial hearing on petitioner's suppression motion. He also stated that petitioner had "basic insecurity and inadequacy" and that she was "fearful of doing the wrong thing." *Ibid.*

[2] The opinion of the Arkansas Supreme Court suggests at one point that petitioner might have been 14 years old, *id.*, at 863, 554 S. W. 2d, at 313, but assumes at another point that petitioner was 13, *id.*, at 876, 554 S. W. 2d, at 320–321. The State here concedes that petitioner was 13. Brief in Opposition 5.

that petitioner wanted to confess. *Id.*, at 867, 554 S. W. 2d at 315. Petitioner then was advised of her rights under the Fifth and Sixth Amendments, pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966).[3] She said that she understood her rights and wished to talk. Her confession was tape-recorded and, along with testimony concerning petitioner's other self-incriminating statements,[4] was introduced at trial over timely objection. Petitioner's subsequent conviction was affirmed by the Arkansas Supreme Court.

The issue presented here is an important one. In *In re Gault*, 387 U. S. 1 (1967), this Court recognized that "special problems may arise with respect to waiver of the [Fifth Amendment] privilege by or on behalf of children" and that "the greatest care must be taken to assure that . . . [a child's confession] was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.*, at 55. Several years earlier, in *Gallegos* v. *Colorado*, 370 U. S. 49 (1962), the Court observed that "a 14-year-old boy, no matter how sophisticated, . . . is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." *Id.*, at 54. In both of these cases, convictions of

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[3] Petitioner had been given *Miranda* warnings at least once prior to this time, see n. 4, *infra*, and her rights had been separately explained to her mother, 261 Ark., at 866–867, 554 S. W. 2d, at 315.

[4] Petitioner had earlier stated, while being taken to the juvenile home by deputy sheriffs, that she had " 'done it.' " *Id.*, at 866, 554 S. W. 2d, at 315. It is not clear whether this brief statement was made spontaneously or in response to questioning by the sheriffs. Compare *ibid.*, with *id.*, at 872, 554 S. W. 2d, at 318. *Miranda* warnings had been given before petitioner spoke.

The final set of statements made by petitioner and used against her were made at a juvenile home where petitioner was held for several months. She developed a close relationship with a "house mother," who later testified that petitioner had admitted to her that petitioner had committed the crime partly out of fear of her father's sexual advances. *Id.*, at 872–873, 554 S. W. 2d, at 318. There is no indication that the house mother ever advised petitioner of her rights.

juveniles were reversed, in part because they had not had an opportunity to consult with a relative or lawyer prior to confessing. See 387 U. S., at 56; 370 U. S., at 54.[5]

Requiring that a child receive adult advice before making a confession ensures that the child is protected from "his own immaturity," thereby "put[ting] him on a less unequal footing with his interrogators. *Ibid.*[6] Petitioner here did consult with her mother before she made her statement. The mother, however, was plainly not in a position to provide rational advice with only the child's interests in mind, especially on the day of the murder. The mother had been through the traumatic experience of having her husband shot while he slept next to her, and then had suffered the additional trauma of believing herself to be a suspect, see *supra,* at 957. Like her daughter, the mother had been given tranquilizers not long before the confession was made. 261 Ark., at 869–872, 554 S. W. 2d, at 316–318. The mother's testimony indicates understandable confusion and incomprehension at the time her daughter's rights were explained to her:

> "I didn't know what to do. I didn't have nobody there with me, and being under this shock, and then them

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[5] See also *Haley* v. *Ohio,* 332 U. S. 596, 599–600 (1948):

"[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."

[6] Many state courts have required that a child receive competent parental or other adult advice before waiving constitutional rights. See, *e. g., Lewis* v. *State,* 259 Ind. 431, 436–440, 288 N. E. 2d 138, 141–143 (1972); *In re K. W. B.,* 500 S. W. 2d 275, 279–283 (Mo. App. 1973); *Commonwealth* v. *Webster,* 466 Pa. 314, 320–328, 353 A. 2d 372, 375–379 (1975). See also *Weatherspoon* v. *State,* 328 So. 2d 875, 876 (Fla. App. 1976).

> coming and picking her up, and I was sedated, she was sedated. . . . I was trying to make funeral arrangements. . . . I didn't know. I'd never been through a shock like this." Tr. 172, 173, 175–176.

Under the circumstances, it is hardly surprising that the mother cried when she was supposed to be giving dispassionate advice, see *supra,* at 957–958, and then urged her daughter to confess, 261 Ark., at 869, 554 S. W. 2d, at 316.

We recognized in *Gault* that the "competence of parents" is a relevant factor in determining the validity of a waiver of rights by a child. 387 U. S., at 55. When the parent is emotionally distraught, crying, and under the influence of drugs, not only is her advice likely to be less than "competent," but the parent's demeanor may well have an adverse effect on the child's ability to make a knowing waiver of her own rights. And to uphold a child's waiver on the ground that she received parental advice is surely questionable when the parent has two obvious conflicts of interest, one arising from the possibility that the parent herself is a suspect, and the other from the fact that she is "advising" the person accused of killing her spouse.

The difficulties inherent in a situation like that presented here have been recognized by lower courts and commentators. See, *e. g., McBride* v. *Jacobs,* 101 U. S. App. D. C. 189, 190, 247 F. 2d 595, 596 (1957) (parent may waive child's rights if waiver is "intelligent [and] knowing" and "there is no conflict of interest between them"); *Daniels* v. *State,* 226 Ga. 269, 273, 174 S. E. 2d 422, 424 (1970) (mother intoxicated; *Gault* requires "competent, sober mother"); *Ezell* v. *State,* 489 P. 2d 781, 783–784 (Okla. Crim. App. 1971) (confession inadmissible despite presence of mother and legal guardian; no showing that either was "capable of protecting defendant's constitutional rights"); *In re L. B.,* 33 Colo. App. 1, 4, 513 P. 2d 1069, 1070 (1973) (father, incarcerated on drunkenness and other charges, taken from cell to advise son; parent's "mere physical

presence" is not sufficient); Institute of Judicial Administration & American Bar Assn., Joint Commission on Juvenile Justice Standards, Standards Relating to Police Handling of Juvenile Problems 69–73 (tent. draft 1977); Note, 57 B. U. L. Rev. 778, 783, 787–788 (1977).

Under all of the circumstances, petitioner's contention that there was no valid waiver of her rights deserves this Court's plenary consideration. At the time that she made the decision to confess, this girl of "low dull normal" intelligence was not old enough, according to state law, to make decisions for herself on such other matters as marriage, voting, drinking alcoholic beverages, entering into an enforceable contract, initiating a lawsuit, and remaining in school.[7] Her mother was hardly in a position to act on petitioner's behalf on the day of the confession, as discussed above. In view of our reaffirmation only last Term that courts must "indulge in every reasonable presumption against waiver," *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977), I would grant the petition for certiorari.

Rehearing Denied

No. 77–646. BRAND *v.* UNITED STATES, 434 U. S. 1063;

No. 77–856. PHILLIPS PETROLEUM CO. *v.* SHUTTS, EXECUTOR, ET AL., 434 U. S. 1068;

No. 77–883. DAPPOLONIA *v.* BOARD OF CHIROPRACTIC EXAMINERS OF FLORIDA, 434 U. S. 1056; and

No. 77–5174. MURRY *v.* UNITED STATES, *ante*, p. 915. Petitions for rehearing denied.

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[7] Ark. Stat. Ann. § 55–102 (Supp. 1977); Ark. Const. Art. 3, § 1, Ark. Stat. Ann. § 3–212 (1976) and §§ 48–902.1 to 48–903.2 (1977); *Robertson* v. *King*, 225 Ark. 276, 278–279, 280 S. W. 2d 402, 403–404 (1955); Ark. Stat. Ann. § 27–823 (1962) and § 80–1502 (1960). In addition, a child of petitioner's age in Arkansas may not, *inter alia*, give blood or obtain a tattoo without parental consent, §§ 82–1606 (Supp. 1977), 41–2468 (1977); play cards in a "saloon," § 41–2459; "frequent" any "pool-hall," § 41–2461; or operate a motor vehicle, §§ 75–310, 75–324 (Supp. 1977).

No. 77–5419. TWYMAN *v.* OKLAHOMA ET AL., 434 U. S. 1071;

No. 77–5695. MOORE *v.* BRIERTON, WARDEN, 434 U. S. 1088;

No. 77–5721. THORNTON *v.* GEORGIA, 434 U. S. 1073;

No. 77–5748. SMITH *v.* UNITED STATES, *ante,* p. 915;

No. 77–5811. GILBERT *v.* YALANZON, 434 U. S. 1049;

No. 77–5870. BARNETT ET UX. *v.* CISNEROS ET AL., 434 U. S. 1075;

No. 77–5963. RAITPORT *v.* BANK & TRUST COMPANY OF OLD YORK ROAD ET AL., 434 U. S. 1077;

No. 77–6000. HALEY *v.* FLORIDA, *ante,* p. 906; and

No. 77–6006. TYLER *v.* PEACH ET AL., *ante,* p. 906. Petitions for rehearing denied.

No. 77–5048. DUDAR *v.* UNITED STATES, 434 U. S. 864. Motion for leave to file petition for rehearing denied.

APRIL 17, 1978

Affirmed on Appeal

No. 77–971. NORTH CAROLINA EX REL. MORROW ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. E. D. N. C. Motions of Pacific Legal Foundation and Association of American Physicians & Surgeons, Inc., for leave to file briefs as *amici curiae* granted. Judgment affirmed. Reported below: 445 F. Supp. 532.

Appeals Dismissed

No. 77–981. M. R. T. S., INC., DBA CLASSIC CAT THEATER *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 77–982. TASELLI ET AL. *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 77–1179. STOCKLER *v.* MICHIGAN ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 75 Mich. App. 640, 255 N. W. 2d 718.

No. 77–1211. REGENOLD *v.* BABY FOLD, INC., ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 68 Ill. 2d 419, 369 N. E. 2d 858.

No. 77–1188. BREZA *v.* CITY OF TRIMONT. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–6228. DEMERS *v.* RHODE ISLAND ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–6231. MUKA *v.* HEFFRON ET AL. 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: 42 N. Y. 2d 823, 364 N. E. 2d 1344.

No. 77–6244. MARSCHALL ET UX. *v.* KRISTENSEN ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–6313. JENKINS *v.* DISTRICT OF COLUMBIA. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–6149. HARPER *v.* DUFFEY. Appeal from D. C. Mass. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 77–16. UNITED STATES *v.* DEPARTMENT OF TRANSPORTATION OF GEORGIA. Appeal from D. C. N. D. Ga. Judgment vacated and case remanded for further consideration in light of *Massachusetts* v. *United States, ante,* p. 444.

Certiorari Granted—Vacated and Remanded. (See also No. 77–5898, *ante,* p. 559.)

No. 76–548. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc., ante,* p. 519. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 178 U. S. App. D. C. 336, 547 F. 2d 633.

No. 76–745. LONG ISLAND LIGHTING CO. *v.* LLOYD HARBOR STUDY GROUP, INC. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc., ante,* p. 519. MR. JUSTICE POWELL took no part in the consideration or decision of this case.

No. 77–947. BORDENKIRCHER, PENITENTIARY SUPERINTENDENT *v.* GASTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bordenkircher* v. *Hayes,* 434 U. S. 357 (1978). MR. JUSTICE MARSHALL dissents. Reported below: 564 F. 2d 99.

Certiorari Dismissed

No. 77–6141. BUSIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed, it appearing that the judgment of the Court of Appeals for the Third Circuit has been vacated.

Miscellaneous Orders

No. A–798 (77–1360). BRACY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Application for reconsideration of denial of stay, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–817. WEINSTEIN *v.* FLORIDA. Sup. Ct. Fla. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–821 (77–1377). HULL *v.* FLORIDA. Sup. Ct. Fla. Renewed application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–863 (77–1471). EDWARDS ET AL., MEMBERS, HOUSE OF REPRESENTATIVES *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–130. IN RE DISBARMENT OF SPURLARK. It having been reported to the Court that Royal E. Spurlark, Jr., has been reinstated on the roll of attorneys admitted to practice in the State of Illinois, it is ordered that the order of this Court entered January 9, 1978 [434 U. S. 1004], suspending Royal E. Spurlark, Jr., from further practice of law in this Court be vacated and that the rule to show cause issued January 9, 1978, be discharged.

No. 76–1701. TENNESSEE VALLEY AUTHORITY *v.* HILL ET AL. C. A. 6th Cir. [Certiorari granted, 434 U. S. 954.] Motion of Pacific Legal Foundation for leave to participate in oral argument as *amicus curiae* denied.

No. 77–380. ANDRUS, SECRETARY OF THE INTERIOR *v.* CHARLESTONE STONE PRODUCTS CO., INC. C. A. 9th Cir. [Certiorari granted, 434 U. S. 964.] Motion of J. Alan Steele for leave to file a brief as *amicus curiae* granted.

No. 77–510. UNITED STATES *v.* NEW MEXICO. Sup. Ct. N. M. [Certiorari granted, 434 U. S. 1008.] Motion of respondent for divided argument granted.

No. 77–528. FEDERAL COMMUNICATIONS COMMISSION *v.* PACIFICA FOUNDATION ET AL. C. A. D. C. Cir. [Certiorari granted, 434 U. S. 1008.] Motion of American Broadcasting Co. et al. for leave to participate in oral argument as *amici curiae* denied.

No. 77–529. WISE, MAYOR OF DALLAS, ET AL. *v.* LIPSCOMB ET AL. C. A. 5th Cir. [Certiorari granted, 434 U. S. 1008.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General to permit Peter Buscemi, Esquire, to present oral argument *pro hac vice* granted.

No. 77–539. ZENITH RADIO CORP. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 434 U. S. 1060.] Motions of Ford Motor Co., Craig Corp. et al., Union des Industries de la Communauté Europeenne, and American Importers Assn., Inc., for leave to file briefs as *amici curiae* granted.

No. 77–693. WILL, U. S. DISTRICT JUDGE *v.* CALVERT FIRE INSURANCE CO. ET AL. C. A. 7th Cir. [Certiorari granted, 434 U. S. 1008.] Motion of American Mutual Reinsurance Co. for additional time for oral argument denied without prejudice. Should petitioner cede a total of 10 minutes, divided argument is granted.

No. 77–1036. LARSEN, ACTING COMMISSIONER OF LABOR OF THE VIRGIN ISLANDS *v.* ROGERS. Appeal from C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–6394. LEFEBRE *v.* WISCONSIN ET AL.; and

No. 77–6450. DAVIDSON *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 77–1358. GAETANO ET AL. *v.* OBERDORFER, U. S. DISTRICT JUDGE;

No. 77–6245. KLEIN *v.* DECKER, U. S. DISTRICT JUDGE; and

No. 77–6279. TYLER *v.* GRADY, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 77–69. PANORA, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS *v.* MONTRYM. Appeal from D. C. Mass. [Restored to calendar, 434 U. S. 1058.] Probable jurisdiction noted. Reported below: 429 F. Supp. 393.

No. 77–1163. FRIEDMAN ET AL. *v.* ROGERS ET AL.;

No. 77–1164. ROGERS ET AL. *v.* FRIEDMAN ET AL.; and

No. 77–1186. TEXAS OPTOMETRIC ASSN., INC. *v.* ROGERS ET AL. Appeals from D. C. E. D. Tex. Probable jurisdiction noted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 438 F. Supp. 428.

No. 77–5992. ADDINGTON *v.* TEXAS. Appeal from Sup. Ct. Tex. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 557 S. W. 2d 511.

Certiorari Granted

No. 77–1202. MICHIGAN *v.* DORAN. Sup. Ct. Mich. Certiorari granted. Reported below: 401 Mich. 235, 258 N. W. 2d 406.

No. 77–6248. HUNTER *v.* DEAN, SHERIFF. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 240 Ga. 214, 239 S. E. 2d 791.

Certiorari Denied. (See also Nos. 77–1188, 77–6228, 77–6231, 77–6244, and 77–6313, *supra.*)

No. 77–487. FRAZIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 884.

No. 77–763. BRACKETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 394, 567 F. 2d 501.

No. 77–925. WINDHAM ET AL. *v.* AMERICAN BRANDS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 59.

No. 77–977. HUBBARD BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 184 U. S. App. D. C. 115, 564 F. 2d 600.

No. 77–978. WESTERN CHAIN CO. *v.* BROWNLEE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 247, 364 N. E. 2d 926.

No. 77–984. MASCARENHAS *v.* MERIDIAN HOSPITAL AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 683.

No. 77–988. RICHARDSON ET AL. *v.* MCFADDEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 563 F. 2d 1130.

No. 77–1010. MIAMI HERALD PUBLISHING CO. ET AL. *v.* KRENTZMAN, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 1202.

No. 77–1013. PUGLISI ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 86, 564 F. 2d 403.

No. 77–1019. LIVESTOCK MARKETERS, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 748.

No. 77–1027. Doe et al. *v.* McMillan, Chairman, House Committee on the District of Columbia, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 48, 566 F. 2d 713.

No. 77–1038. Stewart *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–1041. Ex parte Moody. Sup. Ct. Ala. Certiorari denied. Reported below: 351 So. 2d 538.

No. 77–1064. McLennan et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 943.

No. 77–1065. Lawriw *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 98.

No. 77–1087. Ewanco *v.* Commissioner of Patents and Trademarks. C. A. D. C. Cir. Certiorari denied. Reported below: 186 U. S. App. D. C. 328, 569 F. 2d 159.

No. 77–1093. Malizia *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 77–1096. Feeney et al. *v.* Securities and Exchange Commission. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 260.

No. 77–1102. Vaughn *v.* United States; and
No. 77–6130. Little *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 346.

No. 77–1109. Moody *v.* Alabama ex rel. Payne, Commissioner of Insurance of Alabama, et al. Sup. Ct. Ala. Certiorari denied. Reported below: 351 So. 2d 552.

No. 77–1135. Brown *v.* Tanenbaum, Judge, et al. C. A. 2d Cir. Certiorari denied.

No. 77–1136. O'Haver et ux. *v.* Black et al. C. A. 10th Cir. Certiorari denied. Reported below: 567 F. 2d 361.

No. 77–1138. PATTERSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 556 S. W. 2d 909.

No. 77–1140. DOYLE *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBURG. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 48 Ill. App. 3d 449, 363 N. E. 2d 79.

No. 77–1143. JONES *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 558 S. W. 2d 233.

No. 77–1147. FIRESTONE TIRE & RUBBER CO. *v.* TAYLOR, DIRECTOR, EMPLOYMENT SECURITY COMMISSION OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 580.

No. 77–1148. NORRIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 262 Ark. 188, 555 S. W. 2d 560.

No. 77–1149. HOFFMAN ET AL. *v.* PUBLIC EMPLOYEES' RETIREMENT FUND. Ct. App. Ore. Certiorari denied. Reported below: 31 Ore. App. 85, 569 P. 2d 701.

No. 77–1152. BEE JAY'S TRUCK STOP, INC. *v.* DEPARTMENT OF REVENUE OF ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 52 Ill. App. 3d 90, 367 N. E. 2d 173.

No. 77–1156. ALNOA G. CORP. *v.* CITY OF HOUSTON, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 769.

No. 77–1157. TOPPS CHEWING GUM, INC. *v.* FLEER CORP. C. A. 3d Cir. Certiorari denied.

No. 77–1165. THOMPSON ET AL. *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 77–1166. PHILADELPHIA GAS WORKS *v.* GULF OIL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 570 F. 2d 1138.

No. 77–1180. LaFatch *v.* MM Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 565 F. 2d 81.

No. 77–1192. Lyons *v.* Salve Regina College et al. C. A. 1st Cir. Certiorari denied. Reported below: 565 F. 2d 200.

No. 77–1194. Lozano *v.* Texas Mexican Railway Co. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 720.

No. 77–1198. Namirowski *v.* Nabisco, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 392.

No. 77–1199. Times-Picayune Publishing Co. *v.* Forrest. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 347 So. 2d 1255.

No. 77–1208. Estabrook *v.* Wise et al. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 348 So. 2d 355.

No. 77–1210. Alitalia-Linee Aeree Italiane, S. p. A. *v.* Manufacturers Hanover Trust Co. C. A. 2d Cir. Certiorari denied.

No. 77–1214. Davidson *v.* Columbia University et al. App Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 77–1223 Super Athletics Corp. et al. *v.* Universal Athletic Sales Co. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–1281. Dillon *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 566 F. 2d 702.

No. 77–1291. Trevino *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1317.

No. 77–1292. Ivey et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

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No. 77–1295. BURKE *v.* NARRAGANSETT ELECTRIC CO. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 381 A. 2d 1358.

No. 77–1296. UNITED STATES NAVIGATION, INC., ET AL. *v.* ESPOSITO. C. A. 2d Cir. Certiorari denied.

No. 77–1302. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 568 F. 2d 509.

No. 77–1334. LIEBERT *v.* UNITED STATES; and
No. 77–1343. HARKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 77–1334, 571 F. 2d 573; No. 77–1343, 571 F. 2d 572.

No. 77–1349. UNION *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 816.

No. 77–1350. MORENO ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 1049.

No. 77–5157. HURST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 559 F. 2d 1222.

No. 77–5479. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 562 F. 2d 47.

No. 77–5902. BURGESS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–5931. DURAN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 91 N. M. 35, 570 P. 2d 36 and 39.

No. 77–5956. STILLMAN *v.* UNITED STATES;
No. 77–5967. BRYANT *v.* UNITED STATES;
No. 77–5978. PERRY *v.* UNITED STATES;
No. 77–6103. CAMPBELL *v.* UNITED STATES; and
No. 77–6160. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1227.

No. 77–5958. ELLIOTT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 46 Ill. App. 3d 887, 361 N. E. 2d 852.

No. 77–5984. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–5995. REDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 510.

No. 77–6005. HIMES *v.* HEWITT, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 77–6019. HOCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6023. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6031. DAVIS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 259 N. W. 2d 843.

No. 77–6039. CARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6078. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 565 F. 2d 1248.

No. 77–6088. ROBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 778.

No. 77–6104. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 801.

No. 77–6111. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–6119. FELTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6125. BARKLEY *v.* LUMPKIN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1180.

No. 77–6126. CROCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6131. MUNCASTER *v.* GRIFFIN. C. A. 5th Cir. Certiorari denied.

No. 77–6137. GILLEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 393.

No. 77–6140. COOKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–6157. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 32.

No. 77–6161. MIZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6167. MORGAN *v.* UNITED STATES; and
No. 77–6178. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 1065.

No. 77–6184. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 486.

No. 77–6201. POPE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–6209. VON DER LINDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 561 F. 2d 1340.

No. 77–6212. HOPPE *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 347.

No. 77–6229. ANDERSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 352 So. 2d 1019.

No. 77–6230. RIDDELL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 77–6237. BLITZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 68 Ill. 2d 287, 369 N. E. 2d 1238.

No. 77–6238. SHERIDAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 51 Ill. App. 3d 963, 367 N. E. 2d 422.

No. 77–6239. ROBINSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 351 So. 2d 1100.

No. 77–6241. GABLE *v.* MASSEY, CORRECTIONAL SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 459.

No. 77–6242. MARTIN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 583.

No. 77–6253. HARRIS *v.* CHASE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 576.

No. 77–6254. MARCUS *v.* MCGINNIS, CORRECTIONS COMMISSIONER. C. A. 2d Cir. Certiorari denied.

No. 77–6256. BACKUS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 353 So. 2d 213.

No. 77–6258. JACKSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 62, 366 N. E. 2d 1186.

No. 77–6260. MCKINLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 69 Ill. 2d 145, 370 N. E. 2d 1040.

No. 77–6263. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 209.

No. 77–6271. MCGOWAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 69 Ill. 2d 73, 370 N. E. 2d 537.

No. 77–6276. PHILLIPS *v.* OLIAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1213.

No. 77–6277. HOWARD *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 77–6282. COLEDANCHISE *v.* MURDAUGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1172.

No. 77–6287. BUNKIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 2d 346.

No. 77–6315. ENNIS *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 1072.

No. 77–6326. RALLS *v.* MANSON, CORRECTIONS COMMISSIONER. C. A. 2d Cir. Certiorari denied.

No. 77–6328. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 502.

No. 77–6331. PITTMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 584.

No. 77–6335. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 584.

No. 77–6342. GUNSTON *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 77–6344. WATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 564 F. 2d 201 and 570 F. 2d 151.

No. 77–6349. KIZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 504.

No. 77–6367. MCNAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 573.

No. 77–6376. BOWERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 1309.

No. 77–6414. CHAVEZ-CHAPULA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6415. BOETTJER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 1078.

No. 77–6437. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–643. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 586.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The Court's action today lets stand the ruling by a panel of the Court of Appeals for the Third Circuit that attorney's fees are awardable to intervenors in union election challenges processed under Title IV of the Labor Management Reporting and Disclosure Act (LMRDA), 73 Stat. 532, 29 U. S. C. § 481 *et seq.* The issues presented in this case are of serious importance to the proper enforcement of the LMRDA, and also to the prosecution generally of private claims that benefit a broad class of persons.

The decision below rested on two necessary foundations: that the scheme of Title IV of the LMRDA did not foreclose the awarding of attorney's fees to intervenors, and that the "common benefit" exception to the American rule against awarding attorney's fees could fairly be applied to a case of intervention under Title IV such as occurred here.

In *Trbovich* v. *Mine Workers,* 404 U. S. 528 (1972), this Court held that intervention by an individual union member whose initial complaint commenced the challenge to the election was not inimical to the LMRDA. Title IV anticipates that objections to the conduct of union elections be initiated by union members filing a complaint with the Secretary of Labor after exhausting union remedies. Thereupon, however, it is the exclusive province of the Secretary to commence a civil action in federal district court. 29 U. S. C. § 482 (b). *Trbovich* held that the union member who initiated the challenge might still intervene in the federal suit, "so long as that intervention is limited to the claims of illegality presented

by the Secretary's complaint." *Trbovich, supra,* at 537. This conclusion represented a very careful balance between Title IV's commitment of enforcement authority to the Secretary's sole discretion, and a recognition that the union member who originally raised the complaint might wish to see his claims pressed in some manner different from that of the Secretary.

The opinion below threatens to upset that delicate compromise. Intervention by union members in support of the Secretary's grounds of complaint was upheld in *Trbovich* only because it would make the union liable "to relatively little additional burden," and would "not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit." *Trbovich, supra,* at 536. Once attorney's fees are assessable against a union on behalf of intervenors, however, the union has indeed become liable to an "additional burden" that could be quite costly. And the adjudication of whether an intervenor has contributed significantly to the common benefit of all union members could well involve the "burdensome multiple litigation" that the restrictions on intervention imposed by *Trbovich* were intended to avoid.

Although not controlling, the Secretary of Labor's views should also be considered in any matter concerning the proper enforcement of the Act he is to administer. It is significant, therefore, that the Secretary has in this case broken his silence on the attorney's fees question for the first time. It is the position of the Secretary that the awarding of attorney's fees to intervenors "significantly impedes the effective enforcement of Title IV."*

The other holding below, that intervention in such a case as

*Memorandum on Behalf of Secretary of Labor 2. The Secretary believes that the availability of attorney's fees will encourage excessive intervention since, no matter how great or small the assistance an individual might have provided the Secretary, it is only by intervening that he can hope to receive compensation.

this contributes to the "common benefit" of the group to be assessed the attorney's fees, raises problems of its own. A judge-made exception to the traditional American rule against awarding attorney's fees, the "common benefit" theory is premised on a court's equity power to allocate a portion of a fund won for a class of persons through the efforts of a single person to compensate that single person. See *Hall* v. *Cole,* 412 U. S. 1, 5 n. 7 (1973). Subsequent elaboration extended the early theory to cases where no single class of persons was suing, *Sprague* v. *Ticonic Nat. Bank,* 307 U. S. 161 (1939), and to cases involving a common benefit other than a tangible pool of assets. *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970); *Hall* v. *Cole, supra.*

The contribution made by an individual union member, however, who intervenes in an action brought by the Secretary of Labor, can only with great difficulty be viewed as the creation of a common benefit. The Secretary has already investigated the case, and is already conducting the suit. And the rationale permitting intervention was not to duplicate the efforts of the Secretary. Intervention was held permissible in *Trbovich* in order to protect a union member's interest, or his choice of how to represent that interest, precisely to the extent that the individual's interest *diverged* from the Secretary's. The Secretary is the champion of the " 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.' " *Trbovich, supra,* at 539, citing *Wirtz* v. *Glass Bottle Blowers,* 389 U. S. 463, 475 (1968). Hence, the rationale that provides for the right to intervene in the first place substantially undercuts the intervenor's claim to be creating a significant *common* benefit not already provided by the Secretary.

The Third Circuit panel, in adopting a common-benefit theory, correctly observed that our opinion in *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U. S. 240 (1975), recognized the continuing vitality of that theory. More questionable, however, is whether the court below took proper account of

Alyeska's explanation of the antedating opinions that applied a common-benefit theory:

> "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." *Id.*, at 265 n. 39.

The intervenor's contribution admittedly need not be the provision of a monetary sum. However, the lower court's reasoning that a new election in a single district benefited the entire membership of the United Steelworkers of America in such an identifiable and proportionate way as to justify burdening the entire membership with the intervenor's attorney's fees represents logic squarely at issue with *Alyeska*'s construction of the common-benefit theory.

Both holdings of the lower court appear to conflict with this Court's decisions. The awarding of attorney's fees to intervenors in Title IV proceedings threatens seriously to obstruct the administration of the LMRDA. The common-benefit exception has in this case been stretched beyond the bounds of its creative rationale, both as to whether a benefit has been shown to exist at all, given the Secretary's dominant enforcement role, and as to whether it is fair to tax the entire union with the costs of providing what benefit there might be. I would grant certiorari to resolve these important issues affecting the administration of the LMRDA and the conduct of all common-benefit litigation.

No. 77–910. GOVERNMENT OF THE VIRGIN ISLANDS ET AL. *v.* VITCO, INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 560 F. 2d 180.

No. 77–765. WADSWORTH, ADMINISTRATOR, NEW HAMPSHIRE EMPLOYERS' BENEFIT TRUST ET AL. *v.* WHALAND, COM-

MISSIONER, DEPARTMENT OF INSURANCE OF NEW HAMPSHIRE; and

No. 77–772. DAWSON, ADMINISTRATOR, NORTHERN NEW ENGLAND CARPENTERS HEALTH AND WELFARE FUND ET AL. *v.* WHALAND, COMMISSIONER, DEPARTMENT OF INSURANCE OF NEW HAMPSHIRE. C. A. 1st Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 562 F. 2d 70.

No. 77–949. ILLINOIS *v.* WASHINGTON. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 68 Ill. 2d 186, 369 N. E. 2d 57.

Rehearing Denied

No. 77–447. RATCHFORD, PRESIDENT, UNIVERSITY OF MISSOURI, ET AL. *v.* GAY LIB ET AL., 434 U. S. 1080;

No. 77–596. GULF OIL CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL., 434 U. S. 1062;

No. 77–777. MILLER *v.* HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., 434 U. S. 1065;

No. 77–853. WALTON ET UX. *v.* PAPAGIANOPOULOS ET AL., 434 U. S. 1067;

No. 77–941. ENDER *v.* CHRYSLER CORP. ET AL., 434 U. S. 1070;

No. 77–957. HUTTER *v.* KORZEN, TREASURER OF COOK COUNTY, *ante*, p. 901;

No. 77–975. SUMMERS *v.* ALABAMA, 434 U. S. 1070;

No. 77–1072. YEE *v.* YEE ET AL., *ante*, p. 911;

No. 77–5801. FRIVALDO *v.* CLELAND, ADMINISTRATOR, VETERANS' AFFAIRS, ET AL., 434 U. S. 1074;

No. 77–5882. KAPLAN *v.* WHIPPLE ET AL., JUDGES, 434 U. S. 1059;

No. 77–5908. HAMPTON *v.* ALASKA, 434 U. S. 1056;

No. 77–5921. GADDIS *v.* GEORGIA, 434 U. S. 1088; and

No. 77–5923. MORRIS, AKA HUNDLEY *v.* UNITED STATES, *ante*, p. 916. Petitions for rehearing denied.

No. 77–6013. WYCHE *v.* WARDEN, MARYLAND PENITENTIARY, *ante*, p. 907. Petition for rehearing denied.

No. 77–908. MADRY *v.* SOREL ET AL., 434 U. S. 1086. Motion of petitioner to defer consideration of petition for rehearing and petition for rehearing denied.

No. 77–5877. CARROLL *v.* MANSON, CORRECTIONS COMMISSIONER, ET AL., 434 U. S. 1075. Motion for leave to file petition for rehearing denied.

APRIL 19, 1978

Dismissals Under Rule 60

No. 76–1610. AYALA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 434 U. S. 814.] Writ of certiorari dismissed under this Court's Rule 60. Reported below: 550 F. 2d 1196.

No. 77–1000. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* REDIKER. Ct. App. Kan. [Certiorari granted, *ante*, p. 922.] Writ of certiorari dismissed under this Court's Rule 60. Reported below: 1 Kan. App. 2d 581, 571 P. 2d 70.

No. 77–1344. K. S. B. TECHNICAL SALES CORP. ET AL. *v.* NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION OF NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed under this Court's Rule 60. Reported below: 75 N. J. 272, 381 A. 2d 774.

APRIL 24, 1978

Appeals Dismissed

No. 76–1738. SEWELL *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 238 Ga. 495, 233 S. E. 2d 187.

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

Appellant, William M. Sewell, appeals from a judgment of the Supreme Court of Georgia which affirmed his conviction

on a one-count accusation framed under the Georgia obscenity statute, Ga. Code § 26–2101 (1975). In July 1975, a police officer bought a magazine, Hot and Sultry, and a device said to be an "artificial vagina," from appellant, an employee of the Stewart Avenue Adult Book Store. Shortly after this sale, the officer, joined by two others, entered the store, arrested appellant, and seized various vibrators, rubber devices shaped like penises, and other items alleged to be devices for sexual stimulation. After attempting unsuccessfully to have the seized material suppressed, appellant was convicted by a jury of selling the magazine and artificial vagina and of possessing the other material and was sentenced to 12 months in jail and a fine of $4,000.

Georgia Code § 26–2101 (a) (1975) provides:

> "A person commits the offense of distributing obscene materials when he sells . . . or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."

Sections 26–2101 (b) through 26–2101 (d) define the term "obscene materials" used in § 26–2101 (a). Section 26–2101 (b) covers published material alleged to be obscene and generally tracks the guidelines set out in *Miller* v. *California*, 413 U. S. 15 (1973). Section 26–2101 (c) states that, in addition to material covered in subsection (b), "any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The jury was instructed that it should determine the obscen-

ity of Hot and Sultry under the standards set out in §§ 26–2101 (a) and 26–2101 (b) and that the sale of the artificial vagina and the possession of the other material should be considered under §§ 26–2101 (a) and 26–2101 (c). The trial judge further charged the jury on the meaning of "knowing" in the words set out in § 26–2101 (a). A general verdict of guilty was returned.

In this Court, appellant raises constitutional objections to a number of features of § 26–2101. First, he argues that an obscenity statute which defines scienter in a manner which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of materials protected under the First and Fourteenth Amendments. Jurisdictional Statement 3. Second, he argues that there is no rational basis for § 26–2101 (c) and, in addition, that it is unconstitutionally vague. Jurisdictional Statement 3, 9–10. Third, appellant contends that Hot and Sultry is not obscene as a matter of law. *Id.*, at 3. And, finally, appellant challenges the warrantless mass seizure of the sexual devices on First, Fourth, and Fourteenth Amendment grounds. *Id.*, at 3, 17.

This is an appeal and I cannot agree with the Court that the first and second questions presented can be dismissed as not presenting substantial federal questions.[1]

I

In *Ballew* v. *Georgia*, *ante*, p. 223, we granted certiorari to consider, but did not reach, the precise scienter issue now raised by appellant. See Pet. for Cert. in *Ballew* v. *Georgia*, O. T. 1977, No. 76–761, p. 2. I see no basis for concluding that a federal constitutional question sufficiently substantial

[1] Although I agree with my Brother STEWART, *post*, at 988–989, that § 26–2101 is unconstitutional as applied to the magazine involved in this case, I recognize that a majority of this Court does not agree with this view and, accordingly, I would hear argument on the scienter issue.

to be granted review on certiorari is now so insubstantial as not to require exercise of our mandatory appellate jurisdiction in this case. Moreover, even if others do not agree that the void-for-vagueness issue is substantial, the fact that appellant might have been convicted for sale or possession of the seized devices is irrelevant to consideration of the obscenity issue. As we said in *Stromberg* v. *California,* 283 U. S. 359, 367–368 (1931):

> "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

See also *Bachellar* v. *Maryland,* 397 U. S. 564 (1970).

II

Appellant's second argument, that § 26–2101 (c) is void for vagueness, also raises a substantial federal question—one of first impression in this Court—even though appellant fundamentally misapprehends the reach of the First Amendment in his argument that the protections of that Amendment extend to the sexual *devices* involved in this case.[2] As we said in *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972):

> "It is a basic principle of due process that an enactment

[2] Even if devices might in some circumstances be protected by the First and Fourteenth Amendments, this is not the case here since no claim is made that the devices are in any way expressive or that their possession and sale is in any way related to appellant's right to speak.

> is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Footnotes omitted.)

See also *Papachristou* v. *Jacksonville,* 405 U. S. 156 (1972); *Cline* v. *Frink Dairy Co.,* 274 U. S. 445 (1927); *Connally* v. *General Construction Co.,* 269 U. S. 385 (1926).

Section 26–2101 (c) at least arguably offends both principles enunciated in *Grayned.* Even conceding that a jury could properly infer from the shapes of the seized devices that some could be used for sexual stimulation, the fact that some people might use the devices for that purpose scarcely suffices to show that they are designed or marketed *primarily* for sexual stimulation. As one commentator has noted, statutes couched in such terms of "judgment and degree" contain seeds of "inherent discontrol" over the law enforcement process and have been "virtually [the] exclusive target of void-for-vagueness nullification." Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 92–93 (1960). Moreover, "it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation, . . . that there exists the risk of continuing irregu-

larity with which the vagueness cases have been concerned." *Id.*, at 93.[3]

In addition, although vague statutes may be saved from constitutional infirmity if they require specific intent as an element of an offense, see *Papachristou* v. *Jacksonville, supra,* at 163, the constructive scienter requirement of § 26–2101 (a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate § 26–2101 (c).

The record here is very clear: Appellant was convicted solely on the basis of the *guesses* and *assumptions* of the single witness at trial—a policeman who had never used the devices, Tr. 24; never seen them used, *id.*, at 25; and who knew of no one who used them for sexual stimulation, *id.*, at 26—that the seized devices were used primarily for the stimulation of human genitals. See *id.*, at 22, 24. In explaining how he had reached his guesses and assumptions notwithstanding a total lack of personal familiarity with the seized devices, that witness stated that he had seen, in the course of his investigations, "newspapers that are printed and catalogs that are sent out to different people pertaining to these things." *Id.*, at 32. No catalogs were introduced into evidence and no evidence was given to show that the unidentified

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[3] Moreover, the facial vagueness of § 26–2101 (c) is enhanced by its interpretation by law enforcement personnel. Although § 26–2101 (c) by its terms applies only to devices that are "designed or marketed as useful primarily for the stimulation of human genital organs," the accusation against appellant nonetheless charged appellant with possession of "3 anal stimulators." Clerk's Tr. 3. So far as I know, no dictionary includes the human anus among the *genital* organs. See also *Balthazar* v. *Superior Court,* 573 F. 2d 698 (CA1 1978). The packaging of another item states quite clearly on the back that the item is a "doggy dong." Whether this item, in the shape of a rubber candlestick, is to be used with dogs or humans—or simply as a "novelty," for whatever ribald humor it may give rise to—it is impossible to discover how appellant or a jury could conclude that this item is *primarily* used for stimulation of *human* genitals.

catalogs would likely have been sent to appellant. Thus, how the proverbial "reasonable man," or even a "reasonable clerk in an adult book store," would have been put on notice of the *primary* use to which the seized devices would be put is simply not apparent.

It is therefore hard to imagine a more stark prima facie case of a "vague law [which] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford, supra,* at 108–109. In a society where the rule of law is paramount, it simply will not do to allow persons, however ignoble their trade—or perhaps because their trade is ignoble, cf. *Papachristou* v. *City of Jacksonville, supra*—to be convicted of crimes solely because policemen and juries, encouraged by the State, can conjure up scenes of sexual stimulation in which devices play a major role.

For the reasons set out above, I would set this case for argument.

MR. JUSTICE STEWART, dissenting.

The appellant stands convicted of the single crime of distributing obscene material in violation of Ga. Code § 26–2101 (1975). Cf. *Robinson* v. *State,* 143 Ga. App. 37, 38–39, 237 S. E. 2d 436, 438 (1977), vacated and remanded on other grounds, *post,* p. 991. The one-count indictment charged that he had sold both sexual devices, alleged to be obscene material as defined in § 26–2101 (c), and a magazine, alleged to be obscene under the definition in § 26–2101 (b).

While the appellant does not claim that the definition of obscenity in subsection (b) is unconstitutional, he does ask this Court to examine the magazine in question and to determine that it is constitutionally protected as a matter of law. I continue to believe that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and

Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (BRENNAN, J., dissenting). I therefore believe that the appellant's conviction cannot constitutionally rest on the sale of an allegedly obscene magazine.

Because it cannot be determined that the jury in this case did not convict the appellant on the basis of the magazine sale alone, I would reverse the judgment of the Supreme Court of Georgia.* See *Stromberg* v. *California,* 283 U. S. 359, 368.

No. 77–790. TEAL *v.* GEORGIA. Appeal from Ct. App. Ga. dismissed for want of substantial federal question. Reported below: 143 Ga. App. 47, 238 S. E. 2d 128.

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

Appellant, Warren Teal, appeals from a judgment of the Georgia Court of Appeals which affirmed his conviction on a one-count accusation framed under the Georgia obscenity statute, Ga. Code § 26–2101 (1975). On August 29, 1975, two Atlanta area law enforcement officers bought a magazine, Piece Meal, from appellant, an employee of the Ponce de Leon Adult Book Store, and immediately arrested appellant and seized various items alleged to be devices "designed or marketed as useful primarily for the stimulation of human genital organs." § 26–2101 (c). After attempting unsuccessfully to have the seized material suppressed, appellant was convicted by a jury of selling the magazine and possessing the devices and was sentenced to 12 months in jail and a $5,000 fine.

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*Like my Brother BRENNAN, *ante,* at 984 n. 1, I recognize that a majority of the Court does not share this view, and since I also agree with Part I of his dissenting opinion, I would alternatively note probable jurisdiction and hear argument in this case on the scienter issue, if three other Members of the Court were like-minded.

In this Court, appellant presents constitutional questions identical to those in *Sewell* v. *Georgia, ante,* p. 982, which are set out in my dissent there. For the reasons stated in that dissent, I would set this case for argument on the scienter and void-for-vagueness issues.*

MR. JUSTICE STEWART, dissenting.

This case is in all relevant respects identical to *Sewell* v. *Georgia, ante,* p. 982. For the reasons stated in my dissenting opinion in that case, I would reverse the judgment of the Georgia Court of Appeals, or alternatively, note probable jurisdiction and hear argument on the scienter issue.

No. 77–1220. SCHROEDER *v.* MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 73 Cal. App. 3d 841, 141 Cal. Rptr. 85.

No. 77–6365. GILL *v.* GILL ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 568 F. 2d 768.

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*A review of the record in this case shows that, as in *Sewell* v. *Georgia, ante,* p. 982 (BRENNAN, J., dissenting), the scienter requirement does not save Ga. Code § 26–2101 (c) (1975) from vagueness. Although a police officer testified here that, in the course of viewing adult movies, he had seen some of the devices used to stimulate human genitals and, in addition, that he had seen a catalog which marketed the devices for such a use, there was no showing that appellant had seen or should have seen the indicated movies or that appellant was familiar with any such catalog. Indeed, the trial judge refused to admit the catalog into evidence because it had no relation to the constructive scienter issue. Thus the conclusion that the seized devices were "useful primarily for the stimulation of human genital organs," here as in *Sewell,* was reached solely from an inference to be drawn from the shape of the devices and the arresting officers' guesses and assumptions.

No. 77–1229. HUFFMAN, ADMINISTRATOR *v.* KENTUCKY ET AL. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 561 S. W. 2d 683.

Vacated and Remanded on Appeal

No. 77–915. ROBINSON *v.* GEORGIA. Appeal from Ct. App. Ga. Judgment vacated and case remanded for further consideration in light of *Ballew* v. *Georgia, ante,* p. 223. Reported below: 143 Ga. App. 37, 237 S. E. 2d 436.

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

Appellant, Ernest H. Robinson, appeals from a judgment of the Georgia Court of Appeals which affirmed his conviction on a one-count accusation framed under the Georgia obscenity statute, Ga. Code § 26–2101 (1975). As in *Sewell* v. *Georgia, ante,* p. 982, and *Teal* v. *Georgia, ante,* p. 989, appellant was an employee in an adult book store and was arrested for selling an allegedly obscene magazine to an Atlanta police officer. Immediately after the arrest, the police seized various devices thought to be "designed or marketed as useful primarily for the stimulation of human genital organs." § 26–2101 (c). After attempting unsuccessfully to have the seized material suppressed, appellant was convicted by a five-person jury of selling the magazine and possessing the devices and was sentenced to 12 months in jail and a $1,000 fine.

In this Court, appellant presents constitutional questions identical to those in *Sewell* v. *Georgia, supra,* and, in addition, alleges that a jury composed of only five persons is constitutionally deficient. Although I agree that appellant's conviction by a five-person jury cannot stand, see *Ballew* v. *Georgia, ante,* p. 223, I would nonetheless set the case for argument on the scienter and void-for-vagueness issues, see *Sewell* v. *Georgia, ante,* p. 982 (BRENNAN, J., dissenting), since a reversal on either of those grounds might bar a retrial, whereas Georgia is free under the Court's remand order to put appel-

lant to another trial under a statute that may well be unconstitutional.

MR. JUSTICE STEWART, dissenting.

This case is in all relevant respects identical to *Sewell* v. *Georgia, ante,* p. 982. For the reasons stated in my dissenting opinion in that case, I would reverse the judgment of the Georgia Court of Appeals, or, alternatively, note probable jurisdiction and hear argument on the scienter issue.

Certiorari Granted—Vacated and Remanded

No. 77–440. PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, ET AL. *v.* KUREK ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *City of Lafayette* v. *Louisiana Power & Light Co., ante,* p. 389. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 557 F. 2d 580.

No. 77–734. CITY OF IMPACT ET AL. *v.* WHITWORTH, DBA DINKIE'S FOOD MART. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *City of Lafayette* v. *Louisiana Power & Light Co., ante,* p. 389. Reported below: 559 F. 2d 378.

No. 77–826. FAIRFAX HOSPITAL ASSN. ET AL. *v.* CITY OF FAIRFAX ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *City of Lafayette* v. *Louisiana Power & Light Co., ante,* p. 389. Reported below: 562 F. 2d 280.

No. 77–835. UNIVERSITY OF TEXAS SYSTEM ET AL. *v.* ASSAF. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the Southern District of Texas with directions to dismiss the case as moot. *Board of Regents of the University of Texas System* v. *New Left Education Project,* 414 U. S. 807 (1973). Reported below: 557 F. 2d 822.

Miscellaneous Orders

No. A–807. Brown et al. *v.* Thomson, Governor of New Hampshire. C. A. 1st Cir. Motion to amend or clarify order which this Court entered March 24, 1978 [*ante,* p. 938], denied.

No. A–856. Kissinger *v.* Reporters Committee for Freedom of the Press et al. Application for stay of order of the United States District Court for the District of Columbia, entered January 25, 1978, presented to The Chief Justice and by him referred to the Court, granted pending final disposition of the appeals in the United States Court of Appeals for the District of Columbia Circuit.

No. D–134. In re Disbarment of Beitling. It is ordered that S. Richard Beitling of Independence, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–679. Internal Revenue Service *v.* Fruehauf Corp. et al., 429 U. S. 1085. Motion of respondents to retax costs denied.

No. 77–529. Wise, Mayor of Dallas, et al. *v.* Lipscomb et al. C. A. 5th Cir. [Certiorari granted, 434 U. S. 1008.] Motion of Adelfa B. Callejo et al. for leave to participate in oral argument denied. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens would grant the motion.

No. 77–1200. American Association of Councils of Medical Staffs of Private Hospitals, Inc. *v.* Judges of the United States Court of Appeals for the Fifth Circuit. Motion for leave to file petition for writ of mandamus denied.

No. 77–6462. BEGLEY *v.* CARTER ET AL.; and

No. 77–6479. RICKS *v.* COLLINS, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 77–1131. IN RE VENDO CO. On February 10, 1978, petitioner filed for leave to file a petition for writ of mandamus and further prayed that a writ of mandamus issue to the United States District Court for the Northern District of Illinois directing the District Court to dissolve the preliminary injunction in *Lektro-Vend Corp.* v. *Vendo Co.* In *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623 (1977), this Court had held that the preliminary injunction violated the Anti-Injunction Act, 28 U. S. C. § 2283. The Court has now been advised of an order entered on April 6, 1978, dissolving the injunction in accordance with the judgment of this Court. Petitioner's motion is therefore dismissed as moot.

Probable Jurisdiction Noted

No. 77–1248. ILLINOIS STATE BOARD OF ELECTIONS *v.* SOCIALIST WORKERS PARTY ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 566 F. 2d 586.

Certiorari Granted

No. 77–533. HISQUIERDO *v.* HISQUIERDO. Sup. Ct. Cal. Certiorari granted. Reported below: 19 Cal. 3d 613, 566 P. 2d 224.

Certiorari Denied. (See also No. 77–6365, *supra.*)

No. 77–880. LOWTHER ET AL. *v.* MARYLAND EMPLOYEES RETIREMENT SYSTEM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 561 F. 2d 1120.

No. 77–993. UNION OIL COMPANY OF CALIFORNIA *v.* ASHLAND OIL COMPANY OF CALIFORNIA ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 567 F. 2d 984.

No. 77–1039. FRANKLIN *v.* ATKINS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 562 F. 2d 1188.

No. 77–1063. EISENBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 391.

No. 77–1068. PFISTER *v.* WADDY, U. S. DISTRICT JUDGE; and PFISTER *v.* DELTA AIR LINES, INC., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–1080. REDMOND *v.* UNITED STATES; and
No. 77–6073. LUND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 2d 1386.

No. 77–1081. KNEHANS *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied. Reported below: 184 U. S. App. D. C. 420, 566 F. 2d 312.

No. 77–1092. THIES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–1097. REYNOLDS METALS CO. *v.* BROWN, SECRETARY, DEPARTMENT OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 663.

No. 77–1099. BUTTRAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770.

No. 77–1101. PAPPAS TELEVISION, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 133, 566 F. 2d 798.

No. 77–1117. MCFAYDEN-SNIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–1120. TSANAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 340.

No. 77–1124. SOUTHWESTERN LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 627.

No. 77–1133. MARINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 941.

No. 77–1160. LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED HEALTH SERVICES UNION, SEIU, AFL–CIO *v.* LONG ISLAND COLLEGE HOSPITAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 833.

No. 77–1191. GISH ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 559 F. 2d 572.

No. 77–1209. LONG MFG., N. C., INC. *v.* DOLLAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 2d 613.

No. 77–1218. WHITTEN ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–1222. RUUD ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 259 N. W. 2d 567.

No. 77–1231. CITY OF CLEVELAND *v.* CLEVELAND ELECTRIC ILLUMINATING CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–1232. CARR *v.* UNITED STATES;
No. 77–6283. ANDERSON *v.* UNITED STATES; and
No. 77–6291. BULLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 77–1241. WAGNER ET AL. *v.* BURLINGTON NORTHERN, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 566 F. 2d 1176.

No. 77–1243. DETRICH, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF SAN DIEGO COUNTY *v.* SHELTON G. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 74 Cal. App. 3d 125, 141 Cal. Rptr. 554.

No. 77–1244. WADDELL *v.* PEPSI COLA CO. Ct. App. D. C. Certiorari denied.

No. 77–1245. PARADISE PALMS COMMUNITY ASSN. *v.* PARADISE HOMES ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 93 Nev. 488, 568 P. 2d 577.

No. 77–1246. MARYLAND *v.* WHEELER. Ct. App. Md. Certiorari denied. Reported below: 281 Md. 593, 380 A. 2d 1052.

No. 77–1304. MCADAMS *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–1357. COLEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–1367. WELSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–1375. MOROYOQUI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 862.

No. 77–1393. CARDARELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 264.

No. 77–5942. HANNA *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 48 Ill. App. 3d 6, 362 N. E. 2d 424.

No. 77–5972. ARMSTEAD ET AL. *v.* PHELPS, CORRECTIONS SECRETARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–6054. PHILLIPS *v.* BENTON ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6094. ROSENMUND *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–6101. SHAVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–6117. JACKSON *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–6191. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–6211. MCNAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–6226. LUNA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6234. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 584.

No. 77–6255. YOUNG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–6265. THOMPSON *v.* FLORIDA; and SURACE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 351 So. 2d 701 (first case); 351 So. 2d 702 (second case).

No. 77–6280. DAVIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 43 N. Y. 2d 17, 371 N. E. 2d 456.

No. 77–6296. CHAPMAN *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 77–6297. BURR *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 75, 367 N. E. 2d 1085.

No. 77–6299. PLEMONS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6301. WILLIAMS *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 40.

No. 77–6305. TRICE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 561 S. W. 2d 684.

No. 77–6310. KEELING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 556 S. W. 2d 832.

No. 77–6317. AGUIRRE *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 77–6320. MABERY *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 77–6322. MORGAN *v.* SETLIFF, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 77–6324. BURRELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6329. SHERLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 558 S. W. 2d 615.

No. 77–6417. WATKINS, DBA BELTONE HEARING AID CENTER *v.* LOU BACHRODT CHEVROLET, INC. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 48 Ill. App. 3d 954, 363 N. E. 2d 609.

No. 77–6436. GAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 2d 916.

No. 77–6446. ROACH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 77–6449. CLYBURN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 381 A. 2d 260.

No. 77–6452. BLACK HORSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 555.

No. 77–6453. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 77–6461. SACCO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 791.

No. 77–6491. JACKSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–1089. HEARST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari limited to Questions VII and VIII presented by the petition. Reported below: 563 F. 2d 1331.

No. 77–1308. NATIONAL BROADCASTING CO., INC., ET AL. *v.* NIEMI. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 74 Cal. App. 3d 383, 141 Cal. Rptr. 511.

No. 77–1329. OHIO *v.* TETER. Ct. App. Ohio, Summit County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 77–1385. MAY *v.* INDIANA. Ct. App. Ind. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: —— Ind. App. ——, 364 N. E. 2d 172.

No. 77–5953. RILEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 304, 364 N. E. 2d 306.

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

I dissent from the denial of certiorari. Petitioner was 16 years old at the time of his arrest in connection with three homicides.[1] After being held for an hour and a half in a police car at the cemetery where the bodies were found, petitioner was taken to the police station, where his shoes, trousers, and shirt were removed [2] and he was given a blanket and placed in a cell. An hour or two later, after being advised

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[1] All facts are taken from the opinion of the Illinois Appellate Court. 49 Ill. App. 3d 304, 364 N. E. 2d 306 (1977). It appears that petitioner first told the police that he was 17 years old, but it is here undisputed that petitioner was 16 at the time of the events in question. See *id.*, at 306, 310, 364 N. E. 2d, at 307–308, 310; Brief in Opposition 2.

[2] This clothing was apparently removed for evidentiary purposes. See 49 Ill. App. 3d, at 306, 364 N. E. 2d, at 307.

of his constitutional rights to remain silent and consult with an attorney, petitioner asked to speak to his father, who had come to the police station when he learned of his son's arrest; [3] this request was ignored by the police. Petitioner then confessed to the crimes, and later that evening repeated the confession to a prosecuting attorney, without having consulted with the parent whom he had asked to see or with any other friendly adult. The confession was introduced over objection at petitioner's trial, which led to his conviction for murder and to sentences of 75 to 225 years.[4]

The Illinois courts considered and rejected petitioner's argument, made initially in support of his motion to suppress the confession, that "the request of a juvenile defendant to see a parent is tantamount to an adult's request for an attorney" and should terminate police interrogation. 49 Ill. App. 3d 304, 308, 364 N. E. 2d 306, 309 (1977).[5] It is this argument that petitioner presses here.

I have recently expressed my view that this Court should decide whether a juvenile's waiver of rights is valid in the absence of "competent advice from an adult who does not have significant conflicts of interest." *Little* v. *Arkansas, ante,* p. 957 (dissenting from denial of certiorari). The instant case presents a related but less difficult issue, for we need not consider here whether the Constitution requires that

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[3] Police testimony conflicted with both petitioner's claim that he had asked to see his father and the father's claim that he had asked repeatedly to see his son. There is no dispute, however, about the father's presence at the police station that evening, and the trial court assumed, in ruling on petitioner's suppression motion, that petitioner had made the request to see his father. *Id.*, at 306–307, 310, 364 N. E. 2d, at 308, 310.

[4] Petitioner was convicted of two counts of murder, for which he received concurrent sentences of 75 to 225 years. He was also convicted of one count of involuntary manslaughter, for which he received a sentence of 3 to 10 years.

[5] The Illinois Supreme Court denied leave to appeal. App. B to Pet. for Cert.

a juvenile always receive adult advice before making a confession. Compare *ante,* at 958–959, and nn. 5–6. Nor need we decide whether adult advice tainted by conflict of interest is nevertheless sufficient for constitutional purposes. See *ante,* at 959–960. The narrow question presented here is simply whether an accused child's request to see a parent must be honored by the police before they continue interrogation, at least when the parent is available at the police station and interested in speaking to his child.

There is a conflict of authority on this question that indicates a need for this Court to exercise its certiorari jurisdiction. See Sup. Ct. Rule 19. The Supreme Court of California has held:

> "[W]hen . . . a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents . . . must . . . be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege." *People* v. *Burton,* 6 Cal. 3d 375, 383–384, 491 P. 2d 793, 798 (1971).

Other state courts have gone further, requiring that a juvenile always receive adult advice before the police may accept his confession, regardless of whether he asks to speak to an adult. See, *e. g., Lewis* v. *State,* 259 Ind. 431, 436–440, 288 N. E. 2d 138, 141–143 (1972); *In re K. W. B.,* 500 S. W. 2d 275, 279–283 (Mo. App. 1973); *Commonwealth* v. *Webster,* 466 Pa. 314, 320–328, 353 A. 2d 372, 375–379 (1975); *Commonwealth* v. *McCutchen,* 463 Pa. 90, 343 A. 2d 669 (1975). On the other hand, at least two courts in addition to the court below have upheld the admission of confessions obtained after juveniles' requests to see parents had been ignored by the police. *Chaney* v. *Wainwright,* 561 F. 2d 1129 (CA5 1977) (2–1 decision); *State* v. *Young,* 220 Kan. 541, 555, 552 P. 2d 905, 916 (1976) (noting that honoring juvenile's request to see

parent would be the "better police practice," although not constitutionally required).[6]

In *In re Gault,* 387 U. S. 1 (1967), this Court emphasized that "the greatest care must be taken to assure that [a juvenile's] admission was voluntary . . . [and] that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.,* at 55. In light of this admonition, there is an obvious incongruity in requiring the police to honor an adult's request for an attorney while allowing them to ignore a juvenile's request to speak to a parent:

> "[T]he state readily concedes that the police would have been required to accede to a request for an attorney. The accused who requests his mother rather than his ever-available attorney is the less knowledgeable, more easily coerced person most in need of protection from police overreaching. It makes no sense to protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the one person he trusts, his mother." *Chaney* v. *Wainwright, supra,* at 1134 (Goldberg, J., dissenting) (footnote omitted).

These considerations, at the very least, indicate that the issue presented here is a substantial one. For this reason, and because of the conflict among state and federal courts on the question, I would grant the petition for certiorari.

No. 77–6016. FRANKLIN ET AL. *v.* SHIELDS ET AL. C. A. 4th Cir. Motion of Public Defender of Wisconsin for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE

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[6] The Illinois court in the instant case similarly indicated that " 'it would be preferable to make sure, whenever possible, that a parent or guardian is present when a juvenile waives his rights.' " 49 Ill. App. 3d, at 311, 364 N. E. 2d, at 311, quoting *In re Stiff,* 32 Ill. App. 3d 971, 978, 336 N. E. 2d 619, 625 (1975).

MARSHALL would grant certiorari. Reported below: 569 F. 2d 784.

No. 77–6288. GIBSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 351 So. 2d 948.

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 grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 77–863. BUTHORN *v.* UNITED STATES, *ante,* p. 915; and

No. 77–1028. INSURANCE COMPANY OF NORTH AMERICA *v.* MOSLEY ET AL., *ante,* p. 918. Petitions for rehearing denied.

MAY 1, 1978

Appeals Dismissed

No. 77–1061. DARKS *v.* TRANSOK PIPE LINE CO. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question.

No. 77–1250. INTERNATIONAL TRACERS OF AMERICA *v.* ESTATE OF HARD ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 89 Wash. 2d 140, 570 P. 2d 131.

No. 77–1285. TOWNSHIP OF MIDLAND ET AL. *v.* MICHIGAN STATE BOUNDARY COMMISSION ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 401 Mich. 641, 259 N. W. 2d 326.

No. 77–6361. RAITPORT *v.* ACRO-MATIC, INC. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 248 Pa. Super. 588, 374 A. 2d 695.

No. 77–1176. NABISCO, INC., ET AL. *v.* KORZEN, TREASURER OF COOK COUNTY, ET AL. Appeal from Sup. Ct. Ill. Motion of Northwestern University for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 68 Ill. 2d 451, 369 N. E. 2d 829.

No. 77–1287. FISHER *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–6289. WARD *v.* UTAH. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 571 P. 2d 1343.

Miscellaneous Orders

No. 76–1560. UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL. C. A. 3d Cir. [Certiorari granted, 434 U. S. 815.] Motion of respondents Colon Brown et al. for leave to file supplemental brief after argument granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 77–1234. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* COMPAGNIE NATIONALE AIR FRANCE. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–1471. EDWARDS ET AL., MEMBERS, HOUSE OF REPRESENTATIVES *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 77–6278. KNIGHT *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS;

No. 77–6352. TOWNSLEY *v.* LINDSAY, JUDGE, ET AL.; and

No. 77–6358. SIDDLE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 77–1301. GANNETT CO., INC. *v.* DEPASQUALE, JUDGE, ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 43 N. Y. 2d 370, 372 N. E. 2d 544.

No. 77–1305. PARKLANE HOSIERY CO., INC., ET AL. *v.* SHORE. C. A. 2d Cir. Certiorari granted. Reported below: 565 F. 2d 815.

No. 77–6067. DUREN *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 556 S. W. 2d 11.

Certiorari Denied. (See also Nos. 77–1287 and 77–6289, *supra.*)

No. 77–755. ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 559 F. 2d 1251.

No. 77–1008. SIOUX CITY & NEW ORLEANS BARGE LINES, INC. *v.* HELENA MARINE SERVICE, INC. C. A. 8th Cir. Certiorari denied. Reported below: 564 F. 2d 15.

No. 77–1062. DARKS ET AL. *v.* TRANSOK PIPE LINE CO. C. A. 10th Cir. Certiorari denied. Reported below: 565 F. 2d 1150.

No. 77–1095. CLEMENTE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 567 F. 2d 1140.

No. 77–1104. MONROE COUNTY CONSERVATION COUNCIL, INC., ET AL. *v.* ADAMS, SECRETARY OF TRANSPORTATION. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 419.

No. 77–1128. GRIFFIN ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 583.

No. 77–1145. VERNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 963.

No. 77–1155. SANTANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770.

No. 77–1170. BIBBS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 1165.

No. 77–1174. BELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–1182. UNITED AIR LINES, INC. *v.* INDA. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 554.

No. 77–1190. ALL ISLAND DELIVERY SERVICE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 290.

No. 77–1235. LAKE LIVINGSTON WASHATERIA, INC., ET AL. *v.* HASTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 104.

No. 77–1242. TALLY *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 161.

No. 77–1249. BISPING *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 240 S. E. 2d 656.

No. 77–1252. DONOVAN CONSTRUCTION COMPANY OF MINNESOTA *v.* FLORIDA TELEPHONE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 1191.

No. 77–1256. BARONE *v.* BARNES, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–1259. BEN R. HENDRIX TRADING CO., INC. *v.* J. HENRY SCHROEDER BANKING CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 560 F. 2d 1192.

No. 77–1274. ALUMINUM COMPANY OF AMERICA ET AL. *v.* CUYAHOGA COUNTY BOARD OF REVISION ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–1280. E. F. I., INC. *v.* M. I. I., DBA MARKETERS INTERNATIONAL, INC., ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 550 S. W. 2d 401.

No. 77–1286. CITY OF EAST DETROIT *v.* LLEWELLYN ET AL.; CITY OF EAST DETROIT *v.* VICKERY ET AL.; and CAPRI THEATRE CO., INC. *v.* CITY OF EAST DETROIT ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 401 Mich. 314, 257 N. W. 2d 902 (first case); 401 Mich. 843 (second and third cases).

No. 77–1309. MARYLAND PUBLIC INTEREST RESEARCH GROUP *v.* ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 864.

No. 77–1406. GAETANO ET AL. *v.* SILBERT, U. S. ATTORNEY. C. A. D. C. Cir. Certiorari denied.

No. 77–5941. BHONGSUPATANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 39.

No. 77–5951. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 50 Ill. App. 3d 320, 365 N. E. 2d 558.

No. 77–5957. CEDILLO *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6084. EMINHIZER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 77–6100. WASHINGTON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 257 N. W. 2d 890.

No. 77–6192. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 472.

No. 77–6222. BRANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6225. ROCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–6273. MOORE *v.* FORD MOTOR CO., WAYNE ASSEMBLY PLANT. Sup. Ct. Mich. Certiorari denied.

No. 77–6290. MCDANIEL *v.* HOPPER, ASSISTANT DISTRICT ATTORNEY OF TULSA COUNTY, OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 77–6330. ANDERSON *v.* DABDO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 161.

No. 77–6336. CHRISTIANSEN *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 77–6337. ALTIZER *v.* YOUNG, ACTING WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 812.

No. 77–6338. THORNTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 383 A. 2d 283.

No. 77–6340. SOLOMON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–6341. TURNER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 352 So. 2d 1007.

No. 77–6343. SKINNER *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 1381.

No. 77–6345. APEL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 77–6350. HINES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6351. ROYSE *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied.

No. 77–6360. HOLSEY *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 77–6364. MARTIN *v.* NEW ENGLAND TELEPHONE & TELEGRAPH CO. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 360.

No. 77–6369. RAY *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–6370. ELLIS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6401. REEB *v.* ECONOMIC OPPORTUNITY ATLANTA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1213.

No. 77–6430. FERMIN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 388.

No. 77–6456. MONTOYA-GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6464. PUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 626.

No. 77–6469. BURNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 205.

No. 77–6490. OLIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 77–6495. WARME, AKA WARNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 57.

No. 77–784. MARYLAND *v.* MARZULLO. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 561 F. 2d 540.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

This petition presents a question of fundamental importance to the administration of criminal justice in both the state and federal courts: What minimum standard of competence must be displayed by an attorney for a criminal defendant in order to satisfy the requirement of the Sixth Amendment that the defendant receive the effective assistance of counsel?

Despite the clear significance of this question, the Federal Courts of Appeals are in disarray. Three Circuits subscribe to the view that the representation of a defendant will be deemed adequate as a matter of constitutional law unless it was "such as to make a mockery, a sham or a farce of the trial." *United States* v. *Madrid Ramirez,* 535 F. 2d 125, 129 (CA1 1976); *Rickenbacker* v. *Warden,* 550 F. 2d 62, 65 (CA2 1976); *Gillihan* v. *Rodriguez,* 551 F. 2d 1182, 1187 (CA10 1977). Four Circuits require, however, that defense counsel render "reasonably competent" assistance. *United States* v. *De Coster,* 159 U. S. App. D. C. 326, 331, 487 F. 2d 1197, 1202 (1973); *Beasley* v. *United States,* 491 F. 2d 687, 696 (CA6 1974) ("reasonably effective assistance"); *United States* v. *Fessel,* 531 F. 2d 1275, 1278 (CA5 1976) ("reasonably effective assistance"); *United States* v. *Easter,* 539 F. 2d 663, 665–666 (CA8 1976) ("customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"). The Third and Seventh Circuits have developed their own, apparently different, standards for determining whether effective assistance of counsel has been rendered to a defendant. *Moore* v. *United States,* 432 F. 2d

730, 736 (CA3 1970) ("the exercise of the customary skill and knowledge which normally prevails at the time and place"); *United States ex rel. Williams* v. *Twomey,* 510 F. 2d 634, 641 (CA7 1975) ("assistance which meets a minimum standard of professional representation"). The Court of Appeals for the Ninth Circuit is internally divided. Compare *Saunders* v. *Eyman,* No. 75–3485 (Apr. 18, 1977) ("farce or a mockery of justice") with *Cooper* v. *Fitzharris,* 551 F. 2d 1162, 1166 (1977) ("reasonably effective assistance"), rehearing en banc granted.

This case presents an appropriate occasion for addressing this issue. The District Court, following an earlier decision of the Fourth Circuit which held that "one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial," *Root* v. *Cunningham,* 344 F. 2d 1, 3 (1965), found that the representation which had been provided to defendant was adequate for constitutional purposes. The Court of Appeals for the Fourth Circuit expressly disavowed the test used in *Root,* adopted a new test requiring "representation within the range of competence demanded of attorneys in criminal cases," and applied this new standard to reverse the District Court. Thus, the choice of standard was determinative of the outcome of this case. Moreover, the Court of Appeals focused on a relatively discrete problem in the conduct of the trial, so that analysis of the adequacy of representation will not require inquiry into all aspects of the preparation and handling of the case.

The decisions of this Court recognize that the right to counsel is fundamental to a fair trial. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Powell* v. *Alabama,* 287 U. S. 45, 68–69 (1932); and, in the last analysis, it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representa-

tion required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Courts of Appeals, the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours.

I respectfully dissent.

No. 77–943. ILLINOIS *v.* GRAY. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests on an adequate state ground. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would deny petition without explanation. Reported below: 69 Ill. 2d 44, 370 N. E. 2d 797.

MR. JUSTICE STEVENS.

The Court's occasional practice of explaining its denials of certiorari, see, *e. g., Michigan* v. *Allensworth, ante,* p. 933; *Illinois* v. *Pendleton, ante,* p. 956; *Illinois* v. *Garlick,* 434 U. S. 988 (1977), is, I believe, inconsistent with the rule that such denials have no precedential value. Since I regard that rule as an important aspect of our practice, I do not join the Court's explanation in this case.

No. 77–1262. BECK *v.* MORRISON PUMP CO., INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 566 F. 2d 8.

No. 77–1266. MORIAL ET AL. *v.* JUDICIARY COMMISSION OF THE STATE OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 565 F. 2d 295.

No. 77–1277. MISSOURI STATE HIGHWAY COMMISSION *v.* MEYER. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 567 F. 2d 804.

No. 77–6025. HUFFMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 350 So. 2d 5.

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

Petitioner, a Negro male, was convicted by an all-white jury of raping a white woman, and was sentenced to life imprisonment.[1] In a post-conviction proceeding, he moved for a new trial on the ground that racial bias in the jury selection process deprived him of his Sixth Amendment right to an impartial jury and his Fourteenth Amendment rights to equal protection and due process. The trial court denied the motion, and the Florida District Court of Appeal affirmed without opinion, 336 So. 2d 612 (1976). With three justices dissenting, a four-man majority of the Florida Supreme Court dismissed petitioner's certiorari petition for lack of jurisdiction, without explanation. 350 So. 2d 5 (1977).

There can be no dispute that Negroes were systematically excluded from petitioner's jury in violation of the Fourteenth Amendment. The all-white jury was selected from an all-white venire, drawn from the same master jury list which the Florida District Court of Appeal held, in *Jordan* v. *State,* 293 So. 2d 131 (1974), to have been composed in a racially discriminatory fashion. As the District Court of Appeal noted in *Jordan,* the jury list was derived by a method rife with opportunity for racial discrimination, and reflected a substantial statistical disparity between the proportion of Negroes included and those who were eligible.[2] The State was unable

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[1] Petitioner was also convicted of burglary, for which he was given a concurrent life sentence. On appeal, the convictions were affirmed, but the concurrent sentence for burglary was reduced to 15 years. 301 So. 2d 815 (Fla. App. 1974).

[2] Petitioner was convicted in November 1972 in Sarasota County, Fla. The *Jordan* court found that the master jury list in use in Sarasota County at that time was compiled from voter registration cards, which indicated the race of the voter, and were taken from only 4 or 5 out of the 45

in *Jordan* to rebut the prima facie case of discrimination thus demonstrated, see, *e. g., Castaneda* v. *Partida,* 430 U. S. 482, 494–495 (1977); *Alexander* v. *Louisiana,* 405 U. S. 625, 630–631 (1972), and the State does not here contest that the jury which convicted petitioner was selected in an unconstitutional manner.

The State argues, instead, that we are foreclosed from reaching the merits of petitioner's claim by virtue of his failure to raise the issue by written motion prior to selection of the individual jurors, as required by Fla. Rule Crim. Proc. 3.290.[3] But petitioner did present a timely oral motion, and, under the circumstances of this case, adherence to the requirement of a written motion would serve only "to force resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley,* 355 U. S. 313, 320 (1958). As soon as he saw the all-white venire, petitioner's counsel moved to strike the panel, and requested

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voting precincts in the county. The jury commissioners did not use objective criteria for choosing precincts, and the precincts that were selected here "had virtually no registered black voters," whereas approximately 50% of the registered voters in two precincts, and 2.65% of the voters in the county as a whole, were Negroes. 293 So. 2d, at 132–133, and n. 7. The *Jordan* court found that, out of a total of 1,344 persons on the jury list, at most 4 were Negroes (0.297%), and that the chance of drawing such a small percentage of Negroes in a random sample of 1,344 of the registered voters in the county as a whole would be less than 1 in 10 million. *Id.,* at 133 n. 4.

[3] Rule 3.290 provides:

"The state or defendant may challenge the panel. A challenge to the panel may be made only on the ground that the prospective jurors were not selected or drawn according to law. Challenges to the panel shall be made and decided before any individual juror is examined, unless otherwise ordered by the court. A challenge to the panel shall be in writing and shall specify the facts constituting the ground of the challenge. Challenges to the panel shall be tried by the court. Upon the trial of a challenge to the panel the witnesses may be examined on oath by the court and may be so examined by either party. If the challenge to the panel is sustained, the court shall discharge the panel. If the challenge is not sustained, the individual jurors shall be called."

an opportunity to question the jury commissioners to determine whether Negroes had been systematically excluded.[4] The trial judge expressed willingness to allow questioning of the supervisor of elections but not the jury commissioners, and—because the supervisor of elections would not have been able to offer any relevant testimony—counsel agreed to proceed with trial, with the "understand[ing] . . . that I have placed on the record that the jury panel is white." App. to Pet. for Cert. E–6.

The jury commissioners' testimony clearly was essential to development of petitioner's discrimination claim. See n. 2, *supra*. Thus, rejection of counsel's request to interrogate the commissioners was tantamount to denial of petitioner's claim, and the filing of a written motion would have served no immediate purpose and would have unnecessarily delayed the proceedings.[5] The dissenting opinions in the Florida Supreme Court concluded that in this situation petitioner was not foreclosed as a matter of state law from raising his claim on collateral attack, notwithstanding his failure to comply with the letter of Rule 3.290. See 350 So. 2d, at 7–8 (Boyd, J., dissenting); *id.*, at 8–9 (Sundberg, J., dissenting). But, even assuming that the Florida Supreme Court's dismissal for lack of jurisdiction was based on petitioner's failure to make a written motion,[6] such a purely formalistic application of a

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[4] Counsel explained his failure to file a written motion, with the following:

"I might say that I did not file such a motion in writing for the Court because I didn't see the panel until today." App. to Pet. for Cert. E–3.

[5] Under these circumstances, it is simply untenable to suggest, as the State does, Response to Pet. for Cert. 1, that petitioner "abandoned" his oral motion by not accepting the trial judge's offer to allow questioning of the supervisor of elections.

[6] It is not clear whether the court's dismissal was based on petitioner's failure to comply with Rule 3.290, or solely on a conclusion that there was no direct conflict between the decision of the District Court of Appeal in this case, and the decision of that court in *Jordan* v. *State*. See Fla.

state procedural rule does not constitute an independent and adequate state ground barring review in this Court. Cf. *Wright* v. *Georgia,* 373 U. S. 284, 289–291 (1963); *NAACP* v. *Alabama ex rel. Flowers,* 377 U. S. 288, 293–297 (1964). As Mr. Justice Holmes so eloquently stated: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U. S. 22, 24 (1923).

I would grant certiorari and set the case for oral argument.

MR. JUSTICE STEVENS.

As MR. JUSTICE MARSHALL points out, the dissenting members of the Florida Supreme Court expressed the opinion that, as a matter of state law, the petitioner could assert his federal claim in a state collateral proceeding. *Ante,* at 1016. The majority of that court, however, concluded that the claim could not be raised in such a proceeding. They therefore did not decide the federal constitutional question. Since petitioner has now exhausted his state remedies, the federal question remains open for decision in a federal habeas corpus proceeding.

As the petition comes to us, we may assume that a summary reversal might have been appropriate on direct review of petitioner's conviction, and also that a collateral attack in the federal court should succeed. It does not follow, however, that this Court has the power to compel a State to employ a collateral post-conviction remedy in which specific federal claims may be raised. See *Case* v. *Nebraska,* 381 U. S. 336. Accordingly, totally apart from the considerations discussed by MR. JUSTICE MARSHALL, there are serious procedural questions

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Const., Art. 5, § 3 (b)(3) (limiting certiorari jurisdiction of Florida Supreme Court to cases in which there is a "direct conflict" between decisions of district courts of appeal, and to several other categories of cases not relevant here.)

that must be answered before addressing the merits of petitioner's federal claim. In making this observation I do not presume to explain the reasons for the Court's action; I write only to identify this as one of the many cases in which a persuasive dissent may create the unwarranted impression that the Court has acted arbitrarily in denying a petition for certiorari.

No. 77–6359. Ross *v.* Hopper, Warden. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 369, 240 S. E. 2d 850.

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 grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 76–1719. Washington Medical Center, Inc., et al. *v.* United States, 434 U. S. 902;

No. 77–953. Buffalo River Conservation and Recreation Council et al. *v.* National Park Service et al., *ante,* p. 924;

No. 77–1056. Sunbeam Television Corp. et al. *v.* Shevin, Attorney General of Florida, et al., *ante,* p. 920;

No. 77–5733. Morgan *v.* United States, *ante,* p. 926; and

No. 77–5965. Cox *v.* United States, *ante,* p. 927. Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1018 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

BRACY ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–798 (77–1360). Decided March 29, 1978

Application for stay of Court of Appeals' judgment affirming applicants' narcotics convictions and denying rehearing, pending a petition for certiorari wherein it is claimed that the indictment should be dismissed because a witness committed perjury before the grand jury, is denied where it does not appear that four Justices would vote to grant certiorari. An indictment is not invalidated by the introduction of inadmissible evidence before the grand jury, which sits not to determine the truth of the charges but only to determine whether there is probable cause to believe them true so as to require the defendant to stand trial.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants were convicted of several related narcotics offenses in the United States District Court for the Southern District of California. The Court of Appeals for the Ninth Circuit affirmed their convictions, and denied their petition for rehearing on February 28, 1978. That court granted their request for a stay of its mandate only pending consideration of their petition for rehearing, and not pending their petition for certiorari. The Court of Appeals denied rehearing and issued its mandate, and applicants now request that I stay the enforcement of the judgment of the Court of Appeals pending disposition of that petition for certiorari here.

The chief contention raised by applicants in their petition for certiorari is that a witness committed perjury before the grand jury which indicted them. The witness admitted his perjury at trial, and applicants moved to dismiss the indictment, contending that the prosecutor should have immediately

informed the defense and the court when he became aware of the perjury. The District Court denied the motion, and the Court of Appeals affirmed, relying on its opinion in *United States* v. *Basurto,* 497 F. 2d 781, 785–786 (1974), which held that perjury by a witness would invalidate an indictment only when his testimony was material.

Applicants rely upon such cases as *Mooney* v. *Holohan,* 294 U. S. 103 (1935), in support of their contention that the disclosure of the perjury required the court to declare a mistrial on its own motion. Pet. for Cert. 10. In that case, this Court first held that the knowing introduction of perjured testimony at a criminal trial rendered the resulting conviction constitutionally invalid. Later cases have held that the prosecutor has a duty to correct testimony he knows to be false, even if its introduction was not knowing and intentional. *Giglio* v. *United States,* 405 U. S. 150 (1972); *Napue* v. *Illinois,* 360 U. S. 264 (1959). Applicants suggest that the prosecutor has a similar duty with regard to testimony introduced in grand jury proceedings which is later shown to have been false.

Because it seems to me that applicants misconceive the function of the grand jury in our system of criminal justice, I cannot conclude that four Justices of this Court are likely to vote to grant their petition. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay, *Costello* v. *United States,* 350 U. S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment, *United States* v. *Calandra,* 414 U. S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that factfinding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court

will not continue to abide by the language of Mr. Justice Black in *Costello, supra,* at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The application is denied.

VETTERLI ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A–830 (77–1395). Decided April 10, 1978

Public school officials sought a stay, pending disposition of a motion for leave to file a petition for writ of mandamus and of a petition for writ of mandamus, of the District Court's order allegedly issued in violation of this Court's judgment in *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424, in that it had the effect of reimposing a desegregation plan requirement, held unauthorized by this Court, that there be no school in the system "with a majority of any minority students." There being no clear indication in the record that the order had such effect, it does not appear that five Members of this Court would vote to grant a writ of mandamus and the application for a stay is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, members of the Pasadena City Board of Education, seek a stay of an order issued by the United States District Court for the Central District of California, pending disposition of a motion for leave to file a petition for a writ of mandamus and of a petition for writ of mandamus.[1] They claim that portions of the District Court's order violate the decision and judgment of this Court in *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976), and that the order, unless stayed, will subject them to the irreparable harm of having to engage in burdensome and disruptive activities necessary to comply with the District Court's order. Since my reading of the record indicates that the order does not conflict with our decision in *Spangler, supra,* I decline to issue the stay.

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[1] Three separate orders are actually involved, but all are substantially identical.

Spangler arose out of a suit commenced in 1968 by high school students and their parents, alleging that various school officials had unconstitutionally segregated the public schools in Pasadena. In 1970, after trial, the District Court, holding that the defendants had violated the Fourteenth Amendment, ordered them to submit a plan for desegregation which would provide that beginning with the 1970–1971 school year there would be no school "with a majority of any minority students." The defendants complied. In 1974, however, applicants, successors in office to the previous defendants, filed a motion with the District Court seeking to modify the 1970 order by eliminating the "no majority" requirement. The District Court denied the motion, ruling that the "no majority" requirement was an inflexible one to be applied anew each school year even though subsequent changes in the racial mix in the schools were caused by factors for which the defendants might not be considered responsible. The Court of Appeals affirmed that ruling, but we reversed, concluding that the District Court had exceeded its authority in enforcing the "no majority" provision so as to require annual readjustment of attendance zones.

Upon remand to the District Court, a hearing was scheduled on applicants' motion for dissolution of the 1970 injunction.[2] Applicants represented that there was no plan at that time to make any changes in the method of making student assignments. Shortly thereafter, on July 1, 1977, the District Court deleted the "no majority" provision from the injunction.[3] The hearing was completed and the matter submitted

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[2] The cause was initially remanded to the Court of Appeals which in turn merely remanded it to the District Court, noting that "all determinations as to modifications required under [*Spangler*] . . . should initially be made by the district court." *Spangler* v. *Pasadena City Board of Education*, 549 F. 2d 733 (CA9 1977).

[3] The District Court entered the following order:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED: The no majority of any minority provision contained in this Court's judgment of

to the District Court for resolution. By late January 1978, when no further action had been taken by the District Court, however, applicants withdrew their representation that no changes would be made in the method of student assignments and on February 28, 1978, the District Court entered the following oral order:

> "[P]ending decision of this Court on the submitted matters before the Court or until further order of the Court, . . . each of you are enjoined from making any changes in the method of student assignments in the Pasadena Unified School District that was in effect on October 21, 1977." [4]

The applicants, concerned that the District Court did not include in the order anything expressly relating to the "no majority" provision, sought a clarification of the order later that same day. Applicants' counsel stated:

> "We have concluded from that omission, your Honor, that the purport of the order which was issued or the injunction which was issued this morning to those defendants was that they are indeed enjoined to take measures for the purpose of insuring that no school in the district has a majority of any minority students."

The judge replied:

> "That is right, Mr. McDonough. There is to be no

January 23, 1970 is hereby stricken from the Pasadena Plan as required by the Supreme Court's opinion of June 28, 1976."

[4] Prior to issuance of the order the District Court had entertained proposed orders to be entered against the applicants pending disposition of the case. The United States and the student plaintiffs-intervenors submitted proposed written orders which expressly reaffirmed the District Court's order striking the "no majority" requirement. Applicants argued that no further order was justified, but that if an order were made it should specifically include the provision that "[n]othing in this order requires defendants to take any measures for the purpose of insuring that no school in the Pasadena Unified School District has a majority of any minority students."

change in the student assignment system that was in force on October 21st, 1977."

Applicants, relying totally on the judge's comment that "[t]hat is right," now contend that the District Court has reimposed the "no majority" requirement contrary to the dictates of our decision in *Spangler, supra.* If that were true, a writ of mandamus might properly issue to execute the Court's judgment. See *Vendo Co.* v. *Lektro-Vend Corp.,* 434 U. S. 425 (1978). But I do not think the judge's statements during the colloquy can be read as having that effect, and I accordingly deny the application for a stay.

The District Court took steps which unequivocally lifted the offending part of the 1970 order. See n. 3, *supra.* That was done on July 1, 1977. And there is nothing in the record before me to indicate that after that date the "no majority" requirement was part of the method of student assignments. On February 28 the District Court ordered applicants to refrain from making any changes in the method of student assignments in effect as of October 21, 1977, a date well after the July 1 date on which the "no majority" requirement was eliminated from the 1970 injunction. On its face this order certainly cannot be read as reimposing the "no majority" requirement.

Even as a matter of language, one would have to strain to read the colloquy occurring later that same day as indicating that the judge thought his order had reimposed the "no majority" provision. Busy judges and busy lawyers do not invariably speak with mathematical precision in such colloquies. The obligations imposed by an injunction must be clear and well defined. A judge should not be thought, by a cryptic and offhanded remark in a later proceeding, to have reimposed an obligation which he specifically and unequivocally eliminated just a few months before pursuant to the direction of this Court and to which he made absolutely no reference in the original order. I will not indulge the presumption that

the District Court acted contrary to these well-settled principles in the absence of a clear indication that it in fact did.

Since the District Court's order of February 28 does not conflict with our decision in *Spangler* by placing applicants under any obligation to annually reassign students so that there is no school "with a majority of any minority students," I do not think five Members of this Court will vote to grant a writ of mandamus. Thus, I see no reason to issue the requested stay.

Of course, if at some future time the District Court actually reimposes the "no majority" requirement in contravention of our decision in *Spangler* or otherwise requires applicants to comply with such a provision, applicants may again petition this Court or the Court of Appeals for relief. At this time such relief appears unwarranted, however, because applicants do not appear to be under any such obligation.

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U. S. GOVERNMENT PRINTING OFFICE : 1980 O - 257-734


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